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State Bar Court of California Hearing Department Los Angeles			kwiktag® 078 540 200 
Counsel For The State Bar Larry DeSha Deputy Trial Counsel 1149 S. Hill Street Los Angeles, CA 90015 (213) 765-1336 Bar # 117910	Case Number (s) 06-O-14198-DFM	(for Court's use) <div style="text-align: center;"> FILED MAR 16 2009 STATE BAR COURT CLERK'S OFFICE LOS ANGELES </div> <div style="text-align: center; margin-top: 20px;"> PUBLIC MATTER </div>	
Counsel For Respondent Albert W. Arena Arena & Schnitzer, APLC 110 West C Street; Ste. 1709 San diego, CA 92101 Bar # 113723	Submitted to: Settlement Judge		
In the Matter Of: BRIAN DINSMORE GARD Bar # 118457 A Member of the State Bar of California (Respondent)	STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING PUBLIC REPROVAL <input type="checkbox"/> PREVIOUS STIPULATION REJECTED		

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

- (1) Respondent is a member of the State Bar of California, admitted **June 14, 1985**.
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.
- (3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **9** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".
- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):

- costs added to membership fee for calendar year following effective date of discipline (public reproof)
- case ineligible for costs (private reproof)
- costs to be paid in equal amounts for the following membership years:
(hardship, special circumstances or other good cause per rule 284, Rules of Procedure)
- costs waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs"
- costs entirely waived

- (9) The parties understand that:

- (a) A private reproof imposed on a respondent as a result of a stipulation approved by the Court prior to initiation of a State Bar Court proceeding is part of the respondent's official State Bar membership records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page. The record of the proceeding in which such a private reproof was imposed is not available to the public except as part of the record of any subsequent proceeding in which it is introduced as evidence of a prior record of discipline under the Rules of Procedure of the State Bar.
- (b) A private reproof imposed on a respondent after initiation of a State Bar Court proceeding is part of the respondent's official State Bar membership records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page.
- (c) A public reproof imposed on a respondent is publicly available as part of the respondent's official State Bar membership records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page.

B. Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.

- (1) **Prior record of discipline** [see standard 1.2(f)]
- (a) State Bar Court case # of prior case
- (b) Date prior discipline effective
- (c) Rules of Professional Conduct/ State Bar Act violations:
- (d) Degree of prior discipline
- (e) If Respondent has two or more incidents of prior discipline, use space provided below or a separate attachment entitled "Prior Discipline."
- (2) **Dishonesty:** Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

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- (3) **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (4) **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.
- (5) **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (6) **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.
- (7) **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.
- (8) **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see standard 1.2(e)]. Facts supporting mitigating circumstances are required.

- (1) **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.
- (2) **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.
- (3) **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.
- (4) **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.
- (5) **Restitution:** Respondent paid \$ _____ on _____ in restitution to _____ without the threat or force of disciplinary, civil or criminal proceedings.
- (6) **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7) **Good Faith:** Respondent acted in good faith.
- (8) **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.
- (9) **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

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- (10) **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11) **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.
- (12) **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.
- (13) **No mitigating circumstances** are involved.

Additional mitigating circumstances:

D. Discipline:

- (1) **Private reproof (check applicable conditions, if any, below)**
- (a) Approved by the Court prior to initiation of the State Bar Court proceedings (no public disclosure).
- (b) Approved by the Court after initiation of the State Bar Court proceedings (public disclosure).

or

- (2) **Public reproof (Check applicable conditions, if any, below)**

E. Conditions Attached to Reproof:

- (1) Respondent must comply with the conditions attached to the reproof for a period of **two (2) years**.
- (2) During the condition period attached to the reproof, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (3) Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
- (4) Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.
- (5) Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the condition period attached to the reproof. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of the reproof during the preceding calendar quarter. Respondent must also state in each report whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 (thirty) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the condition period and no later than the last day of the condition period.

- (6) Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the monitor.
- (7) Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the conditions attached to the reprobation.
- (8) Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.
- No Ethics School recommended. Reason:
- (9) Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (10) Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation within one year of the effective date of the reprobation.
- No MPRE recommended. Reason:
- (11) The following conditions are attached hereto and incorporated:
- | | |
|---|---|
| <input type="checkbox"/> Substance Abuse Conditions | <input type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions | <input type="checkbox"/> Financial Conditions |

F. Other Conditions Negotiated by the Parties:

None.

Attachment language (if any):

ATTACHMENT TO
STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF: BRIAN DINSMORE GARD
CASE NO.: 06-O-14198-DFM

FACTS:

1. On May 11, 2004, Sheila Agahan-Price ("Client") hired Respondent to ascertain the amount of spousal support arrearage she was owed by her ex-husband, and to record a judgment lien against a house then owned by her ex-husband. Respondent agreed to do so for a fixed fee of \$1,000.00, which Client promptly paid.
2. Respondent had previously worked for Client in the case between September 24, 2001 and June 23, 2003 to resolve post-judgment issues of modification of child support and spousal support. Client had been charged and had paid \$1,805.30 for those services.
3. Respondent mistakenly failed to recognize that he could file the lien without ascertaining the amount of the arrearage, and Respondent thus set out to first have the court ascertain the amount of the arrearage. Respondent did not get a proper Order to Show Cause filed until September 7, 2004, and the hearing was set for October 12, 2004.
4. Respondent was unable to effect service of the notice on Client's ex-husband, and had the hearing continued to November 22, 2004. Respondent then hired a professional process server to locate the ex-husband, but the location efforts were unsuccessful.
5. Client's ex-husband's house sold prior to October 17, 2004 and closed escrow prior to the hearing on November 22, 2004.
6. Respondent failed to notify Client that the hearing on November 22, 2004, was continued until December 28, 2004, nor did he tell Client that the continuance was necessary because her ex-husband still had not been served notice. Client appeared at the court on November 22, 2004, only to learn from the clerk that the hearing had been continued.
7. Thereafter, Respondent had the hearing continued several times, all on grounds of inability to locate the ex-husband. Respondent gave Client late notice of two of the continuances and did not explain that the two continuances were necessary because her ex-husband had not been served notice.
8. On March 29, 2005, Respondent notified Client that the hearing was then set for April 27, 2005, but that her ex-husband still had not been located.

9. On April 12, 2005, Client demanded that Respondent either get the lien filed or refund all \$2,805.30 which she had paid him since September 24, 2001. Respondent replied that he was dropping the case, and did in fact thereafter allow the hearing to go off calendar as of June 5, 2005.
10. On April 30, 2005, Respondent sent client a bill for \$871.90 as the unpaid balance for his services in 2005.
11. On March 30, 2006, Client sued Respondent in Small Claims Court for a refund of the \$2,805.30. On May 5, 2006, judgment was entered for Client in the amount of \$1,585.30 plus costs of \$80.00. Respondent did not file for trial de novo.
12. Respondent did not pay the judgment until November 7, 2006, after inquiry by the State Bar.

DISMISSALS:

1. Count One, alleging failure to perform with competence, is to be dismissed on the grounds that the failure to perform was a single error not arising to an ethical offense.
2. Count Two, alleging moral turpitude, is to be dismissed on the grounds of insufficient evidence.

CONCLUSIONS OF LAW:

1. By delaying until November 7, 2006 to pay the refund ordered by a court more than six months earlier, Respondent failed to promptly refund unearned fees in willful violation of rule 3-700(D)(2) of the California Rules of Professional Conduct.
2. By failing to inform Client of the continuance of the hearing scheduled for November 22, 2004, by late notice of two other continuances, and by failing to inform Client that the continuances were necessary due to Respondent's failure to serve notice on her ex-husband, Respondent failed to keep his client reasonably informed of significant developments in her case in willful violation of Business and Professions Code section 6068(m).

SUPPORTING AUTHORITY:

Standard 2.4(b) of the Standards for Attorney Sanctions for Professional Misconduct requires "reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client" in cases of willful failure to communicate with a client.

Standard 2.10 similarly requires "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim" for a violation of any Rule of Professional Conduct which is not covered by another Standard. This Standard applies to Rule 3-700(D)(2).

PENDING PROCEEDINGS:

The disclosure date referred to on page 2, paragraph A.(7), was February 23, 2009.

COSTS:

Respondent acknowledges that the Office of the Chief Trial Counsel has informed Respondent that as of February 20, 2009, the estimated prosecution costs in this matter are approximately \$3,654.00. Respondent acknowledges that this figure is an estimate only, and that costs will increase to the next level of \$4,920.00 if this matter is not resolved by stipulation or otherwise before Pretrial Statements are filed.

If Respondent fails to pay any installment within the time provided in paragraph A.(8) above or as modified by the State Bar Court pursuant to section 6068.10 (c), the remaining balance of costs will be due and payable immediately and enforceable as a money judgment unless relief is granted under rule 286 of the Rules of Procedure of the State Bar of California.

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In the Matter of BRIAN DINSMORE GARD	Case number(s): 06-O-14198-DFM
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SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Fact, Conclusions of Law and Disposition.

March <u>2</u> , 2009 Date	 Respondent's Signature	<u>Brian Dinsmore Gard</u> Print Name
March <u>2</u> , 2009 Date	 Respondent's Counsel Signature	<u>Albert W. Arena</u> Print Name
March <u>9</u> , 2009 Date	 Deputy Trial Counsel's Signature	<u>Larry DeSha</u> Print Name

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In the Matter Of BRIAN DINSMORE GARD	Case Number(s): 06-O-14198-DFM
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ORDER

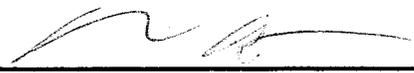
Finding that the stipulation protects the public and that the interests of Respondent will be served by any conditions attached to the reproof, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulated facts and disposition are APPROVED AND THE REPROVAL IMPOSED.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the REPROVAL IMPOSED.
- All court dates in the Hearing Department are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 125(b), Rules of Procedure.) **Otherwise the stipulation shall be effective 15 days after service of this order.**

Failure to comply with any conditions attached to this reproof may constitute cause for a separate proceeding for willful breach of rule 1-110, Rules of Professional Conduct.

03-10-09
Date


Judge of the State Bar Court

RICHARD A. PLATEL

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on March 16, 2009, I deposited a true copy of the following document(s):

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING PUBLIC REPROVAL

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**ALBERT WILLIAM ARENA
ARENA & SCHNITZER, APLC
110 W C ST STE 1709
SAN DIEGO, CA 92101 - 3909**

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

LARRY DESHA, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on March 16, 2009.



Tammy Cleaver
Case Administrator
State Bar Court