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**State Bar Court of California
Hearing Department
San Francisco**

<p>Counsel For The State Bar</p> <p>Allen Blumenthal Supervising Trial Counsel 180 Howard St. San Francisco, CA 94105 (415) 538-2228</p> <p>Bar # 110243</p>	<p>Case Number (s) 06-O-15059</p>	<p>(for Court's use)</p> <p>PUBLIC MATTER</p> <p>FILED </p> <p>JUL 10 2008</p> <p>STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO</p>
<p>Counsel For Respondent</p> <p>Arthur L. Margolis 2000 Riverside Dr. Los Angeles, CA 90039 (323) 953-8996</p> <p>Bar # 57703</p>	<p>Submitted to: Settlement Judge</p> <p>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING</p> <p>PUBLIC REPROVAL</p> <p><input type="checkbox"/> PREVIOUS STIPULATION REJECTED</p>	
<p>In the Matter Of: Gerald Bryan Smith</p> <p>Bar # 152127</p> <p>A Member of the State Bar of California (Respondent)</p>		

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 **April 11, 1991**.
- (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 **11** 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."

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- (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.

- (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. **Respondent's failure to refund the clients' fees for five months after an arbitration decision awarded them to the client harmed the client. However, ultimately, respondent reimbursed them the funds with interest.**
- (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.
- (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:

While respondent's misconduct was serious, he has no prior record of discipline in 15 years of practicing law in California prior to the misconduct. Further, respondent was admitted in Georgia on November 10, 1986 and was in good standing until April 18, 2002 when he was suspended for noncompliance with Georgia's MCLE requirements. In or about July 2006 he was reinstated to active status. He has never been disciplined in Georgia.

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 Reproval:

- (1) Respondent must comply with the conditions attached to the reproof for a period of **one year**.
- (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: **The parties agree that Ethics School is sufficient in this case for the protection of the public and, thus, will not require the MPRE in this case. Although ordinarily the MPRE would be required, given the unique facts in this case, the parties agree that only Ethics School will be required.**

- (11) The following conditions are attached hereto and incorporated:
 - Substance Abuse Conditions
 - Medical Conditions
 - Law Office Management Conditions
 - Financial Conditions

F. Other Conditions Negotiated by the Parties:

ATTACHMENT TO

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF: Gerald Bryan Smith

CASE NUMBER(S): 06-O-15059

FACTS AND CONCLUSIONS OF LAW.

FACTS

1. Gerald Bryan Smith ("Respondent") was admitted to the practice of law in the State of California on April 11, 1991, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

2. On or about June 13, 2006, Gerald and Venessa Coghlan (the Coghlan's) hired respondent to prepare a revocable trust/pour over will and durable powers of attorney for them. They paid respondent \$1,200 as an initial retainer. The agreement stated that the \$1,200 was a flat fee earned upon receipt, but had stricken the words non refundable fee from the fee agreement.

3. Subsequently, respondent failed to perform the services for which he was hired, to wit draft the trust documents and will, and provide them to the Coghlan's in a reasonable period of time, and failed to communicate with his clients despite several messages from them requesting that respondent communicate with them and advise them of the status of their matter.

4. Between on or about July 10, 2006 and on or about October 24, 2006, Mr. and Ms. Coghlan telephoned respondent about five times asking when the documents would be ready. Respondent failed to respond to these requests, except once. On or about September 18, 2006, respondent left a message on Mr. and Ms. Coghlan's answering machine stating that he had been busy and promising to complete the documents shortly.

5. Subsequent to on or about September 18, 2006, respondent failed to draft the documents and provide them to the Coghlan's. He failed to communicate with his clients or advise them when he would be able to complete the matter or that he was too busy to complete the matter. Respondent had accepted employment when he did not have sufficient resources or time to diligently perform those services because of other cases he was handling.

6. On or about September 21, 2006, the Coghlan's telephoned respondent again requesting information when the documents would be finished. They left a message on respondent's answering machine requesting that information and requesting that respondent contact them. Respondent received this message, but failed to reply to this message.

7. Between on or about September 21, 2006 and on or about October 24, 2006, respondent failed to perform the services for which he was hired and failed to communicate with the Coughlans.

8. On or about October 24, 2006 at around 9:31 a.m., Mr. and Ms. Coghlan telephoned respondent again, requesting that respondent communicate with them and advise them when the trust documents would be finished.

9. Respondent failed to respond to the Coghlan's message on or about October 24, 2006. The Coughlans then telephoned him again that same day at around 1:05 p.m., and left a message that they were terminating his services and requesting a refund of their fees.

10. Respondent responded to this second telephone message and informed the Coghlan's that he would not refund the fee.

11. On October 24, 2006, the Coghlan's complained to the State Bar because of respondent's failure to perform, failure to communicate, and failure to refund unearned fees.

12. On or about the Coghlan's received trust documents from respondent. The cover letter was dated October 24, 2006. The cover letter did not explain the trust. The documents respondent sent to the Coghlan's had 51 typographical errors and 11 additional errors, including that the Trust documents stated that the estate passed to their daughter, Kate Dolores Coghlan on her 21st birthday, although they had informed respondent that they wanted it to pass to their daughter immediately upon their death. The papers were bewildering to the clients and was of no value to them. Respondent claims that by law the Coghlan's could not pass the estate directly to a minor. However, he failed to explain that to the Coghlan's.

13. Respondent refused to refund any portion of his fee. On or about November 20, 2006, the Coghlan's requested fee arbitration with San Mateo County.

14. On or about February 7, 2007, respondent sent a letter to the State Bar responding to an investigator's inquiry regarding the Coghlan's complaint. In that letter, respondent contended that the Coghlan's had failed to provide him with all the necessary information. However, respondent failed to communicate with the Coghlan's to obtain that information and, instead, prepared the documents without it.

15. On or about May 10, 2007, after a fee arbitration hearing, the arbitrator awarded the Coghlan's \$1,200 plus \$100 filing fee paid by the Coghlan's, for a total of \$1,300.. Respondent received a copy of this award by on or about May 15, 2007. The arbitrator found that the fees were unearned: the delay until October 24, 2006 to mail the first draft of the Trust and related documents exceeded the clients' reasonable expectations when they paid the fee and signed the fee agreement on June 13, 2006, there was no evidence of a cover letter explaining a difficult to discern Trust, the trust had numerous typographical errors. The papers when received were bewildering and of no value to the clients.

16. Subsequently, respondent failed to appeal the arbitrator's decision, but failed to refund the unearned fees. The fee award became final and binding on respondent.

17. On or about July 19, 2007, the Coghlan's sent respondent a letter demanding a refund of their fees as awarded by the arbitrator. Respondent received this letter by on or about July 24, 2007.

18. Between on or about May 10, 2007 and on or about October 10, 2007, respondent failed to refund any of the unearned fees or honor the arbitration award.

19. On or about October 10, 2007, almost a year after the Coghlan's first requested the refund of their fees and five months after the arbitrator awarded the Coghlan's \$1,300, respondent issued a check for \$1,355 as full payment of the arbitration award with some interest. On or about October 15, 2007, the Coghlan's received the check and deposited it into their account.

CONCLUSIONS OF LAW

By failing to draft the trust and related documents for the Coghlan's for about four months, by failing to communicate with his clients, including informing them of the status of the representation and when they could expect their documents, and by drafting and sending the clients documents that contained numerous typographical and other errors, respondent intentionally, recklessly, or repeatedly failing to perform legal services with competence, in wilful violation of rule 3-110(A) of the Rules of Professional Conduct.

By failing to respond to the clients' telephone calls, by failing to advise them when he would have the documents drafted, respondent failed to respond promptly to reasonable status inquiries of a client and failed to keep a client reasonably informed of significant developments in a matter in which Respondent had agreed to provide legal services, in wilful violation of Business and Professions Code, section 6068(m).

By failing to refund the unearned fees for five months after the arbitrator awarded the Coghlan's \$1,200 for unearned fees, respondent wilfully failed to refund promptly any part of a

fee paid in advance that has not been earned, in wilful violation of rule 3-700(D)(2) of the Rules of Professional Conduct.

PENDING PROCEEDINGS.

The disclosure date referred to, on page one, paragraph A.(7), was June 16, 2008.

AUTHORITIES SUPPORTING DISCIPLINE.

Standard 2.4(b) of the Standards for Attorney Sanctions for Professional Misconduct (hereinafter "Standards) for wilful failure to perform or communicate not demonstrating a pattern of misconduct shall result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client. Standard 2.10 for the failure to refund unearned fees shall result in reproof or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in Standard 1.3.

The Supreme Court recently re-affirmed that great weight is to be given the Standards and that they should be followed *whenever possible*. (*In re Silvertown* (2005) 36 Cal.4th 81, 92 [emphasis added])

Thus, while the Standards are not mandatory, the Supreme Court has held that they should be followed unless the charged attorney can demonstrate the existence of extraordinary circumstances justifying a lesser sanction. (*In re Silvertown*, supra, 36 Cal.4th at 92.) It is Respondent's burden to demonstrate that there are extraordinary circumstances justifying a lesser sanction than that recommended by the Standards.

Likewise, case law ranges from reproof to suspension for these violations.

In *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, an attorney who failed to perform in one matter, improperly withdrew, failed to refund unearned fees, and failed to render an accounting to a client, received a 45 day actual suspension. In *Bach v. State Bar* (1991) 52 Cal.3d 1201, an attorney who failed to communicate, failed to perform, purported to withdraw without the consent of either the client or the court, and failed to respond to two State Bar inquiries, received a 30 day actual suspension. Bach had no priors in 17 years of practice.

In *Stuart v. State Bar* (1985) 40 Cal.3d 838, an attorney was actually suspended for 30 days for failing to perform and improper withdrawal in one matter. He had previously been privately reproofed for encouraging a third party to cash two checks that Stuart issued but later failed to honor.

reproved for encouraging a third party to cash two checks that Stuart issued but later failed to honor.

In *Layton v. State Bar* (1990) 50 Cal.3d 889, an attorney was suspended for three years, stayed, with 30 days actual suspension for failing to perform in one matter involving an estate.¹ He acted as both executor and attorney for the estate. Layton had no priors in 30 years of practice.

In *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, an attorney was suspended for two years, stayed with 30 days actual suspension for in one matter failing to complete work on creating a family trust and retaining \$2,000 in unearned fees in one matter. In a second matter, he failed to inform a client that he would not file an answer in defense of a promissory note dispute and improperly withdrew.

In *Van Slotten v. State Bar* (1989) 48 Cal.3d 921, an attorney was suspended for six months, stayed, and placed on probation for one year for failing to perform in one matter. He had no priors in twelve years of practice.

In *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, an attorney was publicly reprovved for failing to refund unearned fees and improper withdrawal.

In *In the Matter of Respondent G*, (Review Dept. 1992), 2 Cal. State Bar Ct. Rptr. 175), an attorney was privately reprovved for delay in performing his duties, failing to communicate, and failing to promptly refund the fees.

Respondent's case is most like *Kennon*, *Van Slotten*, *Hanson*, and *Respondent G*. Considering all the circumstances, respondent's matter is more egregious than *Respondent G* and most like *Hanson* and *Van Slotten*. Thus, a public reprovval with the conditions here is fair to respondent and protects the public, maintains the profession's high standards, and preserves public confidence in the legal profession.

Respondent is aware that a failure to comply with the conditions of the public reprovval will likely result in even greater discipline.

¹The Supreme Court's Opinion also states that he was found culpable of violating Business & Professions Code §6103 for violating his duties as an attorney. The Opinion does not clearly address what the §6103 violation is for.

(Stipulation form approved by SBC Executive Committee 10/16/00. Revised 12/16/2004; 12/13/2006.) Signature Page

Date 7/2/08
 Date 6/30/08
 Date 06-27-08

Allen Blumenthal
 Deputy Trial Counsel's Signature
Arthur L. Margolis
 Respondent's Counsel Signature
Gerald Bryan Smith
 Respondent's Signature

Print Name Allen Blumenthal
 Print Name Arthur L. Margolis
 Print Name Gerald Bryan Smith

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.

SIGNATURE OF THE PARTIES

In the Matter of Gerald Bryan Smith	Case number(s): 06-O-15059
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In the Matter Of
Gerald Bryan Smith

Case Number(s):
06-O-15059

ORDER

Finding that the stipulation protects the public and that the interests of Respondent will be served by any conditions attached to the reproval, 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 reproval may constitute cause for a separate proceeding for willful breach of rule 1-110, Rules of Professional Conduct.

Date

7.8.08

Judge of the State Bar Court

Lucy Armentariz

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 San Francisco, on July 10, 2008, I deposited a true copy of the following document(s):

**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION
AND ORDER APPROVING**

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

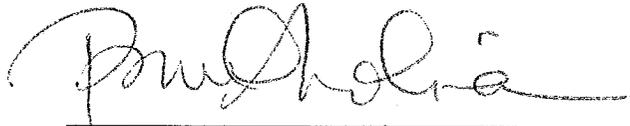
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**ARTHUR LEWIS MARGOLIS
MARGOLIS & MARGOLIS LLP
2000 RIVERSIDE DR
LOS ANGELES, CA 90039**

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

ALLEN BLUMENTHAL, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **July 10, 2008**.



Bernadette C. O. Molina
Case Administrator
State Bar Court