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State Bar Court of California Hearing Department San Francisco ACTUAL SUSPENSION		
Counsel For The State Bar Donald R. Steedman Supervising Trial Counsel 180 Howard Street, 7th Floor San Francisco, CA 94105 (415) 538-2345 Bar # 104927	Case Number(s): 09-O-13160; 10-O-00078	For Court use only PUBLIC MATTER FILED OCT 12 2011 <i>[Signature]</i> STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO
Counsel For Respondent Jerome Fishkin Fishkin & Slatter LLP 1111 Civic Dr Ste 215 Walnut Creek, CA 94596 (925)944-5600 Bar # 47798	Submitted to: Settlement Judge STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING ACTUAL SUSPENSION <input type="checkbox"/> PREVIOUS STIPULATION REJECTED	
In the Matter of: Mark Epstein Bar # 159801 A Member of the State Bar of California (Respondent)		

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 September 21, 1992.
- (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.

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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):
- Until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 5.130, Rules of Procedure.
 - Costs are to be paid in equal amounts prior to February 1 for the following membership years: 2012, 2013 and 2014. (Hardship, special circumstances or other good cause per rule 5.132, Rules of Procedure.) If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.
 - Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs".
 - Costs are entirely waived.

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.
- (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.
- (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.

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- (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. The conduct involves multiple acts, but not a pattern of wrongdoing.
- (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. Respondent was admitted in 1991 and has no prior discipline.
- (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. Respondent has been fully cooperative with the State Bar.
- (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.

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- (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. Respondent has a history of performing substantial public service.
- (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) **Stayed Suspension:**
- (a) Respondent must be suspended from the practice of law for a period of one year.
- i. and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii) Standards for Attorney Sanctions for Professional Misconduct.
- ii. and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii. and until Respondent does the following:
- (b) The above-referenced suspension is stayed.

- (2) **Probation:**

Respondent must be placed on probation for a period of two years, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)

- (3) **Actual Suspension:**

- (a) Respondent must be actually suspended from the practice of law in the State of California for a period of 60 days.
- i. and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct
- ii. and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii. and until Respondent does the following:

E. Additional Conditions of Probation:

- (1) If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in the general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

(Effective January 1, 2011)

Actual Suspension

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- (2) During the probation period, 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 period of probation. 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 probation during the preceding calendar quarter. Respondent must also state 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 days, that report must be submitted on the next 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 period of probation and no later than the last day of probation.

- (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 to the monitor 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 probation 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 probation conditions.
- (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) 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:

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- (1) **Multistate Professional Responsibility Examination:** 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 during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) & (E), Rules of Procedure.**
- No MPRE recommended. Reason: _____
- (2) **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (3) **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (4) **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension: _____
- (5) **Other Conditions:** _____

Attachment language (if any):

FACTS AND CONCLUSIONS OF LAW

COUNT ONE

Case No. 10-O-00078

Business and Professions Code, section 6068(a)

[Failure to Comply With Laws]

1. Respondent wilfully violated Business and Professions Code, section 6068(a), by failing to support the Constitution and laws of the United States and of this state, as follows:

2. State Farm Insurance was the homeowner's insurance company for Nancy Mattingly. On or about October 26, 2006, State Farm Insurance issued a check in the amount of \$29,917.91 in compensation for vandalism damages to Mattingly's residence. The check was jointly payable to Mattingly and Bayview Loan Servicing, L.L.C., which was the servicing agent for the first deed of trust on Mattingly's property.

3. In or about November 2006, Mattingly hired respondent to represent her with respect to several real estate matters. Bayview Loan Servicing and Mattingly had a dispute concerning the insurance proceeds in that both wanted to hold the funds. In particular, Bayview Loan Servicing declined to release the funds except in payment for the vandalism repairs. As servicing agent for the first deed of trust, Bayview Loan Servicing had a valid interest in assuring that the funds were used for the vandalism repairs. Mattingly signed the check and gave it to respondent.

4. On or about November 30, 2006, respondent deposited the check into his trust account at Bank of America (account number ending in 0728). Respondent took this action without the consent of Bayview Loan Servicing and without the consent of the beneficiaries of the first deed of trust in violation of Commercial Code section 3417 subdivision (a)(1).

5. When respondent assumed control of the funds, entered a fiduciary relationship with Bayview Loan Services and the beneficiaries of the first deed of trust.

6. After assuming custody of the funds, respondent used the money for purposes other than repairs to the condominium and did so without the consent of either Bayview Loan Services or the beneficiaries of the first deed of trust. Specifically, respondent disbursed the funds from his trust account as follows:

November 30, 2006	\$11,442.37
February 2, 2007	\$2,237.00
March 12, 2007	\$2,200.00
March 14, 2007	\$415.00
May 3, 2007	\$747.66
June 7, 2007	\$10,000.00
September 5, 2007	\$2,829.89

7. With the exception of the November 30, 2006 and May 3, 2007 payments, respondent personally received all these payments based on his claim for attorney fees. Respondent violated his fiduciary duties to Bayview Loan Services and the beneficiaries of the first deed of trust each time he removed the funds from trust. The payments were made with Mattingly's permission.

8. At the time respondent made the June 7, 2007 payment, respondent was aware that Bayview Loan Services and the beneficiaries of the first deed were in the process of foreclosing on Mattingly's condominium and that the foreclosure was imminent.

9. On or about June 15, 2007, Bayview Loan Services and the beneficiaries of the first deed of trust foreclosed on Mattingly's condominium, thereby eliminating Mattingly's ownership interest in the property

and eliminating any claim she might have to the insurance proceeds. Respondent was aware of foreclosure at the time he withdrew the last of the insurance proceeds from his trust account on September 5, 2007.

10. Respondent paid the Bayview Loan Services \$10,000 on April 28, 2008, and the remaining \$19,971.92 on April 13, 2009.

11. By violating Commercial Code section 3417 subdivision (a)(1) and by violating his fiduciary duties to Bayview Loan Services and the beneficiaries of the first deed of trust, respondent failed to support the Constitution and laws of the United States and of this state.

COUNT TWO

Case No. 10-O-00078

Rules of Professional Conduct, rule 4-100(A)

[Commingling Personal Funds in Client Trust Account]

12. Respondent wilfully violated Rules of Professional Conduct, rule 4-100(A), by depositing and commingling funds belonging to respondent in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, as follows:

13. Between November 2006, and March 2009, respondent commingled non-client funds, i.e., his personal funds and his law office operating funds, into his trust account at Bank of America (labeled "The Epstein Group Attorney Client Trust Account", account number ending with 0728) on more than 20 occasions, including numerous deposits of several thousand dollars.

COUNT THREE

Case No. 09-O-13160

Rules of Professional Conduct, rule 4-100(A)

[Failure to Deposit Client Funds in Trust Account]

14. Respondent wilfully violated Rules of Professional Conduct, rule 4-100(A), by failing to deposit funds received for the benefit of a client in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, as follows:

15. At all pertinent times, respondent represented Augustus Puglia in a number of legal business litigation matters.

16. On or about October 9, 2007, respondent issued a bill to Puglia for services performed in a lawsuit entitled Puglia v. Avila. This bill included a charge of \$4,396.25 for court reporting services.

17. On or about October 9, 2007, Puglia gave respondent a check in the amount of \$13,031.95, which included payment for the above-mentioned court reporting services.

18. On or about October 9, 2007, respondent deposited the check into a non-trust account.

19. Respondent should have deposited the funds into a trust account because he had been entrusted with those funds by a client to pay the court reporting costs and because respondent had not yet paid the court reporting firm.

20. By depositing the funds into a non-trust account, respondent failed to deposit funds received for the benefit of a client in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import.

21. On November 2, 2007, respondent paid the court reporter \$600.00. Respondent paid the remainder of the court reporter's bill until on or about February 4, 2008.

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DISCLOSURE OF PENDING INVESTIGATIONS

The disclosure mentioned in paragraph A.7 was made on September 15, 2011.

SUPPORTING AUTHORITY

See *Kelley v. State Bar* (1991) 53 Cal.3d 509, 518; In the Matter of *Bleecker* (Review Dept. 1990) 1 Cal State Bar Ct. Rptr. 113. The State Bar also considered the fact that this matter is being settled at an early stage and that respondent is able to present significant evidence in mitigation.

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In the Matter of: Mark Epstein	Case Number(s): 09 O 13160; 10 O 00078
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Nolo Contendere Plea Stipulations to Facts, Conclusions of Law, and Disposition

The terms of pleading nolo contendere are set forth in the Business and Professions Code and the Rules of Procedures of the State Bar. The applicable provisions are set forth below:

Business and Professions Code § 6085.5 Disciplinary Charges; Pleas to Allegations

There are three kinds of pleas to the allegations of a notice of disciplinary charges or other pleading which initiates a disciplinary proceeding against a member:

- (a) Admission of culpability.
- (b) Denial of culpability.
- (c) Nolo contendere, subject to the approval of the State Bar Court. The court shall ascertain whether the member completely understands that a plea of nolo contendere will be considered the same as an admission of culpability and that, upon a plea of nolo contendere, the court will find the member culpable. The legal effect of such a plea will be the same as that of an admission of culpability for all purposes, except that the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, or the factual basis for, the pleas, may not be used against the member as an admission in any civil suit based upon or growing out of the act upon which the disciplinary proceeding is based.

Rules of Procedure of the State Bar, rule 5.56. Stipulations to Facts, Conclusions of Law, and Disposition

“(A) Contents. A proposed stipulation to facts, conclusions of law, and disposition must comprise:

[¶] . . . [¶]

(5) a statement that the member either:

- (a) admits the truth of the facts comprising the stipulation and admits culpability for misconduct; or
- (b) pleads nolo contendere to those facts and misconduct;

[¶] . . . [¶]

(B) Plea of Nolo Contendere. If the member pleads nolo contendere, the stipulation must also show that the member understands that the plea is treated as an admission of the stipulated facts and an admission of culpability.”

I, the Respondent in this matter, have read the applicable provisions of Business and Professions Code section 6085.5 and rule 5.56 of the Rules of Procedure of the State Bar. I plead nolo contendere to the charges set forth in this stipulation and I completely understand that my plea will be considered the same as an admission of culpability except as stated in Business and Professions Code section 6085.5(c).

9/27/11
Date


Respondent's Signature

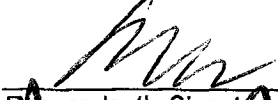
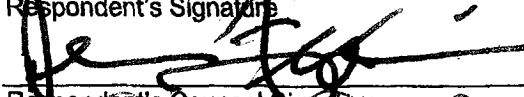

Mark Epstein
Print Name

(Do not write above this line.)

In the Matter of: Mark Epstein	Case number(s): 09 O 13160; 10 O 00078
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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 Facts, Conclusions of Law, and Disposition.

9/27/11		Mark Epstein
Date	Respondent's Signature	Print Name
9/28/11		Jerome Fishkin
Date	Respondent's Counsel Signature	Print Name
9/29/2011		Donald Steedman
Date	Deputy Trial Counsel's Signature	Print Name

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In the Matter of:
Mark Epstein

Case Number(s):
09-O-13160; 10-O-00078

ACTUAL SUSPENSION ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, 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 DISCIPLINE RECOMMENDED to the Supreme Court.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- All Hearing dates are vacated.

1. On page 2 of the stipulation, in paragraph A. (8), which relates to costs, DELETE the membership years, "2012, 2013 and 2014." And, in their place, INSERT the following membership years: "2013, 2014, and 2015."

2. On page 4, DELETE the "x" from the box next to paragraph E.(1). The inclusion of a conditional 1.4(c)(ii) requirement is inappropriate, since respondent is only being suspended for one year, stayed, and 60 days actual.

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 5.58(E) & (F), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

October 12, 2011
Date


Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); 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 October 12, 2011, 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:

JEROME FISHKIN
FISHKIN & SLATTER LLP
1111 CIVIC DR STE 215
WALNUT CREEK, CA 94596

- by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

- by overnight mail at , California, addressed as follows:

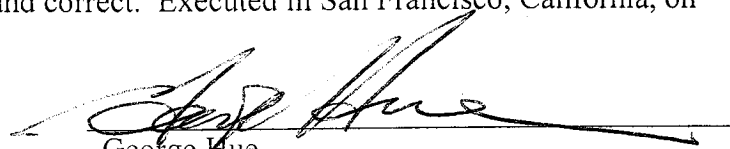
- by fax transmission, at fax number . No error was reported by the fax machine that I used.

- By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

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

Donald Steedman, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on October 12, 2011.


George Hue
Case Administrator
State Bar Court