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| <b>State Bar Court of California</b><br><b>Hearing Department</b><br><b>Los Angeles</b><br><b>ACTUAL SUSPENSION</b>   |  |   |
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| Counsel For The State Bar<br><br>Dane C. Dauphine<br>Assistant Chief Trial Counsel<br>1149 South Hill St.<br>Los Angeles, CA 90015-2299<br>(213) 765-1293<br><br>Bar # 121606 | Case Number(s):<br>10-O-06452,<br>11-O-14633   | For Court use only<br><br><div style="text-align: center;"> <b>PUBLIC MATTER</b><br/><br/> <b>FILED</b><br/><br/>           JAN 11 2012<br/><br/>           STATE BAR COURT<br/>           CLERK'S OFFICE<br/>           LOS ANGELES         </div> |
| Counsel For Respondent<br><br>Paul J. Virgo<br>9909 Topanga Blvd., #282<br>Chatsworth, CA 91311<br>(310) 666-9701<br><br>Bar # 67900  | Submitted to: <del>Assigned Judge</del><br><b>Settlement</b><br><br>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND<br>DISPOSITION AND ORDER APPROVING<br><br><b>ACTUAL SUSPENSION</b><br><br><input checked="" type="checkbox"/> PREVIOUS STIPULATION REJECTED |   |
| In the Matter of:<br>Mark Stephen Smith<br><br>Bar # 158734<br><br>A Member of the State Bar of California<br>(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 June 8, 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 14 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."

(Effective January 1, 2011)



- (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):
  - 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: (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 00-O-14436
  - (b)  Date prior discipline effective October 11, 2001
  - (c)  Rules of Professional Conduct/ State Bar Act violations: 3-110(A), 1-311(B)
  - (d)  Degree of prior discipline Private reproof
  - (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. Respondent's misconduct has harmed clients whose medical providers were not paid timely.
- (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. Respondent's misconduct involves five separate clients.
- (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. Respondent has been cooperative with the State Bar in stipulating to misconduct in this matter without a trial.
- (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. Respondent has taken steps to pay the medical providers for clients Cisneros and Luna.
- (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:**

**D. Discipline:**

(1)  **Stayed Suspension:**

- (a)  Respondent must be suspended from the practice of law for a period of Three (3) years.
- 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 Five (5) 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 two (2) years.
- 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.
- (2)  During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.

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- (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:
- |   |  |
|---|--|
| <input type="checkbox"/> Substance Abuse Conditions | <input checked="" type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions         | <input checked="" type="checkbox"/> Financial Conditions             |

#### F. Other Conditions Negotiated by the Parties:

- (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:** If Respondent completes Ethics School and/or Trust Account School after execution of this stipulation but before the effective date of the disciplinary order, his completion of one or both of those courses will satisfy the probation condition herein that he complete those courses after the effective date of the disciplinary order.

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| In the Matter of:<br>Mark Stephen Smith, no. 158734 | Case Number(s):<br>10-O-06452, 11-O-14633 |
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**Law Office Management Conditions**

- a.  Within        days/        months/        years of the effective date of the discipline herein, Respondent must develop a law office management/organization plan, which must be approved by the Office of Probation. This plan must include procedures to (1) send periodic reports to clients; (2) document telephone messages received and sent; (3) maintain files; (4) meet deadlines; (5) withdraw as attorney, whether of record or not, when clients cannot be contacted or located; (6) train and supervise support personnel; and (7) address any subject area or deficiency that caused or contributed to Respondent's misconduct in the current proceeding.
- b.  Within        days/        months/ two (2) years of the effective date of the discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of no less than eight (8) hours of Minimum Continuing Legal Education (MCLE) approved courses in law office management, attorney client relations and/or general legal ethics. This requirement is separate from any MCLE requirement, and Respondent will not receive MCLE credit for attending these courses (Rule 3201, Rules of Procedure of the State Bar.)
- c.  Within 30 days of the effective date of the discipline, Respondent must join the Law Practice Management and Technology Section of the State Bar of California and pay the dues and costs of enrollment for year(s). Respondent must furnish satisfactory evidence of membership in the section to the Office of Probation of the State Bar of California in the first report required.

Other:

Prior to returning to active practice, Respondent must develop a law office management/organization plan which must be approved by the Office of Probation. This plan must include procedures to (1) send periodic reports to clients; (2) document telephone messages received and sent; (3) maintain files; (4) meet deadlines; (5) withdraw as attorney, whether of record or not, when clients cannot be contacted or located; (6) train and supervise support personnel; (7) obtain written client authorization for the disbursements of client funds, including specific amounts to medical providers; and (8) ensure that Respondent maintains the required records for this trust account.

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| In the Matter of:<br>Mark Stephen Smith, no. 158734 | Case Number(s):<br>10-O-06452, 11-O-14633 |
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### Financial Conditions

#### a. Restitution

- Respondent must pay restitution (including the principal amount, plus interest of 10% per annum) to the payee(s) listed below. If the Client Security Fund ("CSF") has reimbursed one or more of the payee(s) for all or any portion of the principal amount(s) listed below, Respondent must also pay restitution to CSF in the amount(s) paid, plus applicable interest and costs.

| Payee           | Principal Amount | Interest Accrues From |
|-----------------|------------------|-----------------------|
| Guadalupe Luna  | \$ 3,582.54      | 01/01/10              |
| Henrietta Brown | \$ 2,333.34      | 03/01/10              |
| Major Johnson   | \$ 1,000         | 04/01/10              |
|                 |                  |                       |

- Respondent must pay above-referenced restitution and provide satisfactory proof of payment to the Office of Probation not later than two (2) years from the effective date of the Supreme Court disciplinary order.

#### b. Installment Restitution Payments

- Respondent must pay the above-referenced restitution on the payment schedule set forth below. Respondent must provide satisfactory proof of payment to the Office of Probation with each quarterly probation report, or as otherwise directed by the Office of Probation. No later than 30 days prior to the expiration of the period of probation (or period of reprobation), Respondent must make any necessary final payment(s) in order to complete the payment of restitution, including interest, in full.

| Payee/CSF (as applicable) | Minimum Payment Amount | Payment Frequency |
|---------------------------|------------------------|-------------------|
|                           |                        |                   |
|                           |                        |                   |
|                           |                        |                   |

- 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.

#### c. Client Funds Certificate

1. If Respondent possesses client funds at any time during the period covered by a required quarterly report, Respondent must file with each required report a certificate from Respondent and/or a certified public accountant or other financial professional approved by the Office of Probation, certifying that:
- Respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Clients' Funds Account";



b. Respondent has kept and maintained the following:

- i. A written ledger for each client on whose behalf funds are held that sets forth:
  1. the name of such client;
  2. the date, amount and source of all funds received on behalf of such client;
  3. the date, amount, payee and purpose of each disbursement made on behalf of such client; and,
  4. the current balance for such client.
- ii. a written journal for each client trust fund account that sets forth:
  1. the name of such account;
  2. the date, amount and client affected by each debit and credit; and,
  3. the current balance in such account.
- iii. all bank statements and cancelled checks for each client trust account; and,
- iv. each monthly reconciliation (balancing) of (i), (ii), and (iii), above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii), above, the reasons for the differences.

c. Respondent has maintained a written journal of securities or other properties held for clients that specifies:

- i. each item of security and property held;
- ii. the person on whose behalf the security or property is held;
- iii. the date of receipt of the security or property;
- iv. the date of distribution of the security or property; and,
- v. the person to whom the security or property was distributed.

2. If Respondent does not possess any client funds, property or securities during the entire period covered by a report, Respondent must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period. In this circumstance, Respondent need not file the accountant's certificate described above.

3. The requirements of this condition are in addition to those set forth in rule 4-100, Rules of Professional Conduct.

**d. Client Trust Accounting School**

- Within one (1) year of the effective date of the discipline herein, Respondent must supply to the Office of Probation satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, within the same period of time, and passage of the test given at the end of that session.

**ATTACHMENT TO**  
**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION**

IN THE MATTER OF: Mark Stephen Smith, no. 158734

CASE NUMBER(S): 10-O-06452, 11-O-14633

**FACTS AND CONCLUSIONS OF LAW.**

Respondent admits that the following facts are true and that he is culpable of violations of the specified statutes and/or Rules of Professional Conduct.

Case No. 10-O-06452 (State Bar Investigation)

FACTS:

1. In 1992, Respondent opened a trust account at California Bank Trust, account no. XXXXXX3020<sup>1</sup> ("the CBT CTA"). In April 2009, Respondent opened a second trust account at Wells Fargo Bank, account no. XXX-XXX2558<sup>2</sup> ("the Wells Fargo CTA") and used both the CBT CTA and the Wells Fargo CTA until he closed the Wells Fargo CTA in December 2009. In October 2009, opened a trust account at Bank of America, account no. XXXXX-X3020<sup>3</sup> ("the BofA CTA"), but he made no deposits in the BofA CTA December 8, 2009.
2. During the years 2009 and 2010, Respondent regularly deposited personal funds in the various trust accounts he maintained and issued checks to pay personal expenses. In four instances described below, Respondent retained funds from client settlements to pay medical liens, but his personal use of the trust accounts depleted the funds before the funds could be paid to medical providers.
3. On October 16, 2009, Respondent deposited \$14,750 in settlement funds received on behalf of Brazell Whaley ("Whaley") in the CBT CTA. On October 20, 2009, Respondent disbursed \$5,750 to Whaley, retaining \$9,000 to pay his fees and medical liens. Allowing that Respondent was entitled to a fee of 40% of the settlement, Respondent was required to maintain approximately \$3,100 on behalf of Whaley in the CBT CTA to pay liens. Thereafter, Respondent did not disburse any of Whaley's funds from the CBT CTA to a medical provider on behalf of Whaley prior to November 4, 2009, when the balance in the CBT CTA dropped to a negative balance of (-)300.50. Respondent did not maintain Whaley's funds in trust.
4. On December 8, 2009, Respondent deposited in the BofA CTA settlement funds totaling \$25,000 received on behalf of his client Guadalupe Luna ("Luna"). This deposit was the first deposit of funds in the BofA CTA, and Respondent did not transfer any funds from the other trust accounts to the BofA CTA. On December 22, 2009, Respondent disbursed to Luna the sum of \$7,000, retaining \$18,000 to pay his fees and any medical liens. Allowing that Respondent was entitled to a fee of one-third of the settlement, Respondent was required to maintain approximately \$9,666 on behalf of Luna in

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<sup>1</sup> The account number is partially redacted to protect the privacy of the account.

<sup>2</sup> The account number is partially redacted to protect the privacy of the account.

<sup>3</sup> The account number is partially redacted to protect the privacy of the account.

the BofA CTA. Thereafter, Respondent did not disburse any of Luna's funds from the BofA CTA to a medical provider on behalf of Luna prior to December 24, 2009, when the balance in the BofA CTA dropped to \$300.36. Instead, on December 22, 2009, when the only funds in the BofA CTA were funds received on behalf of Luna, Respondent disbursed approximately \$3,210 of those funds to pay medical liens for Whaley even though he had not deposited any funds received on behalf of Whaley in the BofA CTA. Respondent did not maintain Luna's funds in trust.

5. On January 12, 2010, Respondent deposited in the BofA CTA settlement funds totaling \$14,000 received on behalf of his client Henrietta Brown ("Brown"). On January 15, 2010, Respondent disbursed from the BofA CTA \$6,000 to Brown, retaining \$8,000 to pay his fees and any medical liens. Allowing that Respondent was entitled to one-third of the settlement as his fees, Respondent was required to maintain in the BofA CTA on behalf of Brown approximately \$3,333. Thereafter, Respondent did not disburse any of Brown's funds to a medical provider prior to February 26, 2010, when the balance in the BofA CTA dropped to \$260.68. Respondent did not maintain Brown's funds in trust.

6. On March 3, 2010, Respondent deposited in the BofA CTA settlement funds received on behalf of Major Johnson ("Johnson") totaling \$12,000. On March 5, 2010, Respondent disbursed from the BofA CTA the sum of \$5,000 to Johnson, retaining \$7,000 for his fees and any medical liens. Allowing that Respondent was entitled to one-third of the settlement as his fees, Respondent was required to maintain approximately \$3,000 in the BofA CTA on behalf of Johnson. Thereafter, Respondent did not disburse any funds from the BofA CTA to pay medical liens on behalf of Johnson prior to March 18, 2010, when the balance in the BofA CTA dropped to \$161.68. Respondent did not maintain Johnson's funds in trust. In or about October 2010, Respondent paid \$2,000 to a medical provider on behalf of Johnson.

7. On September 2011, Respondent issued two checks payable to two medical providers for Luna totaling \$6,084.13. Also in September 2011, Respondent issued a check payable to a medical provider for Brown in the sum of \$1,000.

8. Respondent has fully accounted for the \$14,750 received on behalf of Whaley and owes no further restitution to Whaley. Respondent has now disbursed \$21,417.46 of the \$25,000 received on behalf of Luna and owes restitution of \$3,582.54 to Luna. Respondent has now disbursed \$11,666.66 of the \$14,000 received on behalf of Brown and owes restitution of \$2,333.34 to Brown. Respondent has now disbursed \$11,000 of the \$12,000 received on behalf of Johnson and owes restitution of \$1,000 to Johnson

#### CONCLUSIONS OF LAW:

9. By depositing personal funds in the BofA CTA and the Wells Fargo CTA in order to use the trust accounts to pay personal expenses, Respondent commingled funds belonging to Respondent in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import in willful violation of Rules of Professional Conduct, rule 4-100(A).

10. By not maintaining in a trust account funds received on behalf of clients Whaley, Luna, Brown, and Johnson which he had retained from the clients to pay medical liens, Respondent was grossly negligent and failed to maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import in willful violation of Rules of Professional Conduct, rule 4-100(A).

11. By grossly negligently misappropriating funds which he had received on behalf of clients Whaley, Luna, Brown, and Johnson and retained to pay medical liens, Respondent committed acts involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code, section 6106.

Case No. 11-O-14633 (Complainant: Salvador Cisneros)

FACTS:

12. Following an auto accident on January 14, 2007, Salvador Cisneros ("Cisneros") employed Respondent to represent him in a personal injury claim on a contingency fee basis.

13. On January 13, 2009, Respondent filed a civil action on behalf of Cisneros in the Los Angeles County Superior Court entitled *Salvador Cisneros v. Extra Space Storage, Inc.*, case no. NC052365. On September 24, 2009, Cisneros agreed to a settlement of his case for payment of \$15,000.

14. On October 5, 2009, Respondent deposited in a client trust account at California Bank Trust ("CBT CTA") a settlement check payable to Cisneros and Respondent in the sum of \$15,000. On October 7, 2009, Respondent paid Cisneros \$8,000 from the CBT CTA.

15. On October 13, 2009, Respondent disbursed \$3,250 from the CBT CTA to himself as fees from Cisneros's funds. Respondent states that he was entitled to a 40% fee, or \$6,000, but took a reduced fee. Thereafter, Respondent should have maintained in the CBT CTA the sum of \$3,750 on behalf of Cisneros to pay medical providers. Had Respondent taken his full fee of \$6,000, there would have been only \$1,000 of Cisneros's settlement funds remaining to pay medical liens. In either case, on October 13, 2009, the balance in the CBT CTA dropped to \$224.80. Respondent did not maintain even \$1,000 on behalf of Cisneros in trust to pay the medical liens.

16. On December 1, 2009, Respondent paid on behalf of Cisneros by a check drawn upon a non-trust account the sum of \$2,320.11 to Dr. Adam Velasco in satisfaction of a medical lien on Cisneros's settlement.

17. In December 2009, Respondent opened a new trust account at Bank of America ("BofA CTA"). On December 17, 2009, Respondent paid on behalf of Cisneros by a check drawn upon the BofA CTA the sum of \$375 to Dr. Kaszobowski in satisfaction of a medical lien on Cisneros's settlement.

18. On March 31, 2011, Respondent paid on behalf of Cisneros by a check drawn upon a non-trust account the sum of \$1,632.19 to Account Management Services in satisfaction of the medical lien of True MRI on Cisneros's settlement.

19. Respondent eventually paid a total of \$4,327.30 to medical providers on behalf of Cisneros which exceeded the sum of \$3,770 which he had originally retained from Cisneros's funds to pay medical providers. Respondent owes no further restitution to Cisneros.

## CONCLUSIONS OF LAW:

20. By not maintaining at least \$1,000 in the CBT CTA on behalf of Cisneros to pay medical providers, Respondent grossly negligently failed to maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import in willful violation of Rules of Professional Conduct, rule 4-100(A).

21. By misappropriating at least \$1,000 of the fund funds received on behalf of Cisneros, Respondent committed an act involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code, section 6106.

## PENDING PROCEEDINGS.

The disclosure date referred to, on page 2, paragraph A(7), was December 19, 2011.

## AUTHORITIES SUPPORTING DISCIPLINE.

According to the Standard 2.2, the appropriate sanction for willful misappropriation is disbarment or, if the amount of funds is insignificantly small or if the most compelling mitigating circumstances clearly predominate, an actual suspension of not less than one year.

"As the term is used in attorney discipline cases, 'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Edwards v. State Bar* (1990) 52 Cal.3d 28 [imposing 1 year actual suspension for willful misappropriation of \$3,000 where restitution was made promptly and there were no acts of deceit].) "Extenuating circumstances sufficient to warrant less than disbarment have been found both in the attorney's background, which demonstrate that the misconduct is aberrational and hence unlikely to recur, and in the facts relating to the mitigation, which recognizes that more severe discipline is warranted for intentional theft as opposed to negligent acts unaccompanied by evil intent." (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153 [recommending 1 year actual suspension for willful misappropriation of \$929 and gross negligence in handling client funds, among other misconduct].) See also *Snyder v. State Bar* (1990) 49 Cal.3d 1302 [imposing an actual suspension of two years for willful misappropriation of \$3,496 where restitution was made]; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1 [recommending two year actual suspension and until a 1.4(c)(ii) hearing for willful misappropriation in two instances totaling \$5,700 where restitution was made].

Here, Respondent's conduct was not surrounded by deceit but arose from his mishandling of his client trust accounts. Regarding client Cisneros, Respondent has made restitution in excess of the misappropriated sum, thereby substantially reducing his fees on that case. Respondent's mishandling of his trust accounts also resulted in misappropriation of client funds received for four other clients where the misconduct is demonstrated by the bank records and is not based on client complaints. In those matters, Respondent's cooperation and willingness to stipulate to the misconduct has assisted the State Bar to establish the misconduct. Therefore, the nature of the misconduct, although serious, indicates that a lengthy actual suspension with the requirement of a hearing to establish rehabilitation prior to any return to practice is sufficient to protect the public.

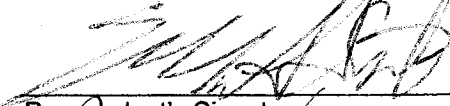
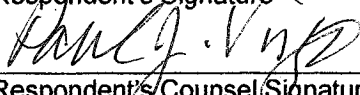
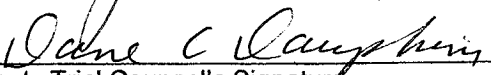
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In the Matter of:  
Mark Stephen Smith, no. 158734

Case number(s):  
10-O-06452, 11-O-14633

### 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.

|                                  |   |                                       |
|----------------------------------|---|---------------------------------------|
| <u>12-19-11</u><br>Date          | <br>Respondent's Signature           | <u>Mark S. Smith</u><br>Print Name    |
| <u>12/22/2011</u><br>Date        | <br>Respondent's Counsel Signature   | <u>Paul J. Virgo</u><br>Print Name    |
| <u>December 22, 2011</u><br>Date | <br>Deputy Trial Counsel's Signature | <u>Dane C. Dauphine</u><br>Print Name |

(Do not write above this line.)

|   |   |
|---|---|
| In the Matter of:<br>Mark Stephen Smith, no. 158734 | Case Number(s):<br>10-O-06452, 11-O-14633 |
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### 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.

On page 8 of the stipulation, under Financial Conditions, in subdivision (a) (Restitution), an "X" is INSERTED in the first box.

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.)**

Date

1/10/12

  
DONALD F. MILES  
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 Los Angeles, on January 11, 2012, 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:

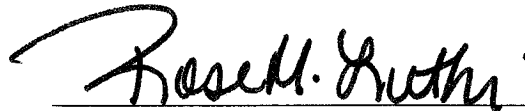
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

PAUL JEAN VIRGO  
9909 TOPANGA BLVD #282  
CHATSWORTH, CA 91311

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

DANE DAUPHINE, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on January 11, 2012.



Rose Luthi  
Case Administrator  
State Bar Court