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State Bar Court of California
Hearing Department
San Francisco



<p>Counsel For The State Bar</p> <p>Terrie Goldade 1149 S. Hill St. Los Angeles, CA 90015</p> <p>Bar # 155348</p>	<p>Case Number (s) 10-PM06307</p>	<p>(for Court's use)</p> <p>PUBLIC MATTER</p> <p>FILED</p> <p>AUG 06 2010 <i>cf</i></p> <p>STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO</p>
<p>In Pro Per Respondent</p> <p>David Michael Smith 1855 Olympic Blvd Ste 210 Walnut Creek, CA 94596</p> <p>Bar # 242063</p>	<p>Submitted to: Settlement Judge</p>	
<p>In the Matter Of: David Michael Smith</p> <p>Bar # 242063</p> <p>A Member of the State Bar of California (Respondent)</p>	<p>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING</p> <p>PROBATION VIOLATION—"PM" PROCEEDING</p> <p><input type="checkbox"/> PREVIOUS STIPULATION REJECTED</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 25, 2006**.
- (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 **10** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".
- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."
- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

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- (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 (no actual suspension).
 - until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 284, Rules of Procedure (actual suspension).
 - costs to be paid in equal amounts prior to February 1 for the following membership years: **2012 & 2013** (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

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 **07-C-11625, 07-C-12707**
 - (b) Date prior discipline effective **February 25, 2009**
 - (c) Rules of Professional Conduct/ State Bar Act violations: **facts and circumstances surrounding his two convictions for driving under the influence of alcohol did not involve moral turpitude, but did involve other misconduct warranting discipline**
 - (d) Degree of prior discipline **one year, stayed, three years probation with conditions, including that the first 60 days he be actually suspended from the practice of law**
 - (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.
- (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 violated multiple conditions of his probation.**
- (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) **No mitigating circumstances** are involved.

Additional mitigating circumstances:

See stipulation attachment for other circumstances considered.

D. Discipline (choose only one):

- (1) **Probation extended:** Respondent's probation in _____ is extended for _____.

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- (2) **Probation revoked; Probation Reinstated; Actual Suspension:** Respondent's probation is revoked and reinstated for two years on the same terms and conditions as previously imposed in **S168110**. The terms of probation remain the same as in the prior order except as indicated below. In addition, Respondent must be actually suspended from the practice of law for **60 days**.
- (3) **Probation revoked; Probation Reinstated; No Actual Suspension:** Respondent's probation is revoked and reinstated for _____ on the same terms and conditions as previously imposed in _____. The terms of probation remain the same as in the prior order except as indicated below.
- (4) **Probation revoked; Probation not Reinstated; Actual Suspension:** Respondent's probation is revoked. Respondent must be suspended from the practice of law for _____.

E. In addition to conditions previously imposed by the Supreme court in its prior order, the following new conditions are recommended by this stipulation:

- (1) During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (2) 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 general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.
- (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 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 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

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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 type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions | <input type="checkbox"/> Financial Conditions |

F. Other Conditions Negotiated by the Parties:

- (1) **Probation Conditions Deleted or Modified:** :
- (2) **Rule 9.20, California Rules of Court:** Respondent must comply with the provisions of subdivisions (a) and (c) of rule 9.20, California Rules of Court, within 30 and 40 days, respectively, from the effective date of the Supreme Court order herein.
- (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 provisions of subdivisions (a) and (c) of rule 9.20, California Rules of Court, within 120 and 130 days, respectively, from the effective date of the Supreme Court order herein.

Attachment language (if any):

FACTS AND CONCLUSIONS OF LAW.

Respondent admits that the following facts are true and that he is culpable of violations of the specified statute.

1. On August 13, 2008, the State Bar Court filed and served upon Respondent's attorney, Charles Hicks, a Decision in State Bar Court Case Nos. 07-C-11625 and 07-C-12707 ("Decision").
2. On January 26, 2009, the California Supreme Court filed an Order in Case No. S168110 (State Bar Court Case Nos. 07-C-11625 and 07-O-12707) that Respondent be suspended from the practice of law for a period of one year, that execution of suspension be stayed and that Respondent be placed on probation for a period of three years on condition that he be actually suspended for sixty days and that he be subject to the conditions of probation as recommended by the Hearing Department of the State Bar Court in its Decision filed on August 13, 2008.

a. As a condition of probation, Respondent was ordered to comply with the Rules of Professional Conduct and the State Bar Act and to report such compliance under penalty of perjury to the Office of Probation each January 10, April 10, July 10, and October 10. Respondent did not comply as follows:

<u>Due</u>	<u>Filed</u>	<u>Comment</u>
4/10/09	6/29/09	late
7/10/09	8/7/09	late
10/10/09	10/13/09	late
1/10/10	1/11/10	late
4/10/10	4/9/10	timely

b. As a condition of probation, Respondent was required to provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School within one year after the effective date of his discipline—by February 25, 2010. Respondent did not comply because he did not attend Ethics School until March 4, 2010; he provided proof to the Office of Probation on April 9, 2010.

c. As a condition of probation, Respondent was ordered to continue his participation in the Lawyer Assistance Program ("LAP") and comply with all provisions and conditions of the LAP. Respondent was ordered to provide a waiver authorizing the LAP to provide the Office of Probation and the State Bar Court with information regarding the terms and conditions of his participation in the LAP and his compliance or non-compliance with the LAP requirements. LAP has informed the Office of Probation of Respondent's non-compliance as follows:

<u>Date Notified</u>	<u>Comments</u>
7/23/09	Respondent failed to enroll in lab testing program; Respondent missed a test on 6/23/09
9/1/09	Respondent had an unexcused lab test on 8/19/09
11/9/09	Respondent had an unexcused lab test on 11/04/09
1/21/10	Respondent had an unexcused lab test on 1/13/10
3/10/10	Respondent had two or more unexcused absences from LAP group/Therapy Sessions: 3/9/10 and 7/6/09

5/6/10 Respondent had an unexcused missed lab test on 4/30/10
5/20/10 Respondent had an unexcused missed lab test on 5/7/10

3. On March 2, 2009, the Office of Probation mailed a reminder letter to Respondent at his membership records address outlining the terms and condition of his probation. The letter reminded Respondent of his obligations to file quarterly reports, comply with LAP conditions, and provide proof of completion of Ethics School to the Office of Probation within one year. The letter enclosed numerous attachments including a quarterly report instructions form which instructed that "[t]he report with any attachments should be mailed on the last day of the month of each calendar quarter (i.e., March 31st, June 30th, September 30th and December 31st)." The quarterly report instructions form also included a chart setting forth the dates for each report period with the corresponding date each report was due and stated that the report was to contain an original signature. Information about Ethics School was included with the letter. Respondent received the letter.

4. On March 24, 2009, Respondent telephoned the Office of Probation and asked why LAP was a requirement if he had to pay for it. Respondent was told that the requirement was in the State Bar Court's decision which was approved by the Supreme Court. He was advised that he was also required to attend Ethics School, which was also an expense. Respondent stated that he believed disciplinary costs were exorbitant and was referred to Rules of Procedure of the State Bar of California, rule 282 regarding a motion for relief of costs.

5. On June 9, 2009, the Office of Probation mailed Respondent a letter advising him that he was not in compliance with the terms and conditions of his probation because his quarterly report for April 10, 2009 was missing. Respondent received the letter.

6. On June 16, 2009, Respondent telephoned the Office of Probation asking for a copy of the quarterly report form because it was not included in his reminder letter. It was faxed to him that same day, and he received it.

7. On July 9, 2009, the Office of Probation telephoned Respondent and inquired about his LAP status and his quarterly report for July. Respondent stated that he was two weeks into the 60 day evaluation and that he would send his quarterly report "tomorrow".

8. On October 6, 2009, the Office of Probation received a telephonic voice mail message from Respondent. He stated that LAP would be sending its first report and asked whether he received a passing score on the Multistate Professional Responsibility Examination. He also asked that he be e-mailed another quarterly report form. That form was e-mailed to Respondent on October 7, 2009, and he received it.

9. On February 12, 2010, Respondent left a voice mail message with the Office of Probation. On February 16, 2010, the Office of Probation returned Respondent's telephone call. Respondent stated that he had passed the MPRE and that he had signed up for Ethics School. He asked if it was going to be a problem that he was taking Ethics School after his deadline. He was told that if he did everything else timely, it was unlikely that he would be referred for doing Ethics School untimely. He was also told that he could do a motion asking for an extension of time for the deadline. He stated that he might do a motion, and that if he did so, he would serve it upon the Office of Probation.

Legal Conclusion: By failing to (1) timely file his Quarterly Reports due April 10, 2009; July 10, 2009; October 10, 2009; and January 10, 2010; (2) timely submit proof of attendance at a session of the State Bar Ethics School; and (3) comply with all provisions and conditions of the Lawyer Assistance Program, Respondent willfully violated Business and Professions Code, section 6068(k).

PENDING PROCEDURES.

The disclosure date referred to, on page one, paragraph A.(7) was July 21, 2010.

COSTS OF DISCIPLINARY PROCEEDINGS.

Respondent acknowledges that the Office of Probation has informed respondent that as of July 21, 2010, the estimated prosecution costs in this matter are approximately \$1,564. Respondent acknowledges that this figure is an estimate only and that it does not include State Bar Court costs which will be included in any final cost assessment. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

AUTHORITIES SUPPORTING DISCIPLINE.

Standard 2.6, subsection (a), states that culpability of a member of a violation of Business and Professions Code, section 6068(k), shall result in disbarment or suspension depending upon 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.

An attorney who violated his probation by failing to timely complete restitution and by failing to timely attend Ethics School, received two years' probation with a condition that he was to be actually suspended for the first 30 days. In the Matter of Gorman (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567. Neither bad purpose nor intentional evil is required to establish willful violations of disciplinary probation. *Id.* at 572. An attorney's cooperation in stipulating to facts warrants some mitigative consideration. *Id.* More serious sanctions are assigned to probation violations closely related to reasons for imposition of previous discipline or to rehabilitation. *Id.* at 573-574.

In this matter, Respondent violated more conditions than the attorney at issue in In the Matter of Gorman. Respondent's underlying disciplinary violation was in relation to convictions in two convictions for driving under the influence of alcohol. The probation conditions violated were related to his original misconduct, important for his rehabilitation, and were intended to assist the State Bar in monitoring Respondent's rehabilitation. However, in light of Respondent's circumstances (set forth below), it is agreed that the degree of discipline set forth in this stipulation is appropriate in relation to standard 2.6 based upon Respondent's eventual completion of most of his conditions, his stipulation to his violations, and his agreement to reinstate his probation.

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OTHER CIRCUMSTANCES CONSIDERED IN RESOLVING THIS MATTER

Until approximately June 10, 2009, Respondent mistakenly believed that his case manager for Lawyers Assistance Program ("LAP") would submit his quarterly reports to the Office of Probation. Regarding his unexcused absences from group meetings through LAP, Respondent contends he was not permitted to participate because he was at least 15 minutes late; however, he was attempting to participate. Respondent now understands all of his conditions and the necessity that he timely comply with each term and condition of his probation and LAP.

WAIVER OF ANY VARIANCES

The parties stipulate to waive any variance in the language, allegations, and conclusions of law between this stipulation and the Notice of Motion and Motion to Revoke Probation filed on June 30, 2010. Respondent acknowledges that this stipulation contains language, allegations, and a conclusion of law which may differ from the language, allegations, and conclusion of law contained in the Notice of Motion and Motion to Revoke Probation filed on June 30, 2010. The parties further stipulate to waive the right to have any amendment to the Notice of Motion and Motion to Revoke Probation.

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In the Matter of David Michael Smith	Case number(s): 10-PM-06307
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SIGNATURE OF THE PARTIES

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

7/28/10 *David M. Smith* David Michael Smith
Date Respondent's Signature Print Name

8.3.10 *Terrie Goldade* Terrie Goldade
Date ~~Deputy Trial Counsel's~~ Signature Print Name
Supervising Attorneys

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In the Matter Of David Michael Smith	Case Number(s): 10-PM-06307
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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 7, section B(1)(d), "a law" is deleted and replaced with "law".

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 135(b), 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.)**

Aug. 6, 2010
Date

Lucy Armendariz
Judge of the State Bar Court

LUCY ARMENDARIZ

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 August 6, 2010, 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:

DAVID M. SMITH
LAW OFC OF DAVID M. SMITH
PO BOX 30901
WALNUT CREEK, CA 94598

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:

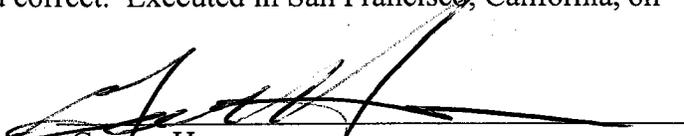
by fax transmission, at fax number . No error was reported by the fax machine that I used.

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:

Terrie Goldade, Probation, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on August 6, 2010.


George Hue
Case Administrator
State Bar Court