ORIGINAL

(Do not write above this line.)

State Bar Court of California
Hearing Department
Los Angeles
ACTUAL SUSPENSION

PUBLIC MATTER

Counsel For The State Bar	Case Number(s):	For Court use only
Dane C. Dauphine Supervising Trial Counsel 1149 South Hill St. Los Angeles, CA 90015-2299 (213) 765-1293 Bar # 121606	11-J-11428	FILED JUN 13 2011 STATE BAR COURT CLERK'S OFFICE LOS ANGELES
Counsel For Respondent Robert G. Sbardellati Sheppard, Mullen, et al. 501 W. Broadway, 19th Fl. San Diego, CA 92101-3598 (619) 338-6500 Bar # 62643	Submitted to: **Assigned Judge** STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING **ACTUAL SUSPENSION** ☐ PREVIOUS STIPULATION REJECTED	
In the Matter of: Donald Edward Fergus, Jr. Bar # 87334 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 August 1, 1979.

(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.

kwiktag ® 018 040 743

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".

(6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

(7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):

- ☒ 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

(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.

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 candid and cooperative with the State Bar in entering into this stipulation.

(4) ☐ **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.

(5) ☐ **Restitution:** Respondent paid $ on in restitution to without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.

(7) ☐ **Good Faith:** Respondent acted in good faith.

(8) ☐ **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.

(9) ☐ **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

(10) ☐ **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.

(11) ☐ **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.

(12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ **No mitigating circumstances** are involved.

Additional mitigating circumstances:

Respondent has no prior discipline since his admission in 1979.

D. Discipline:

(1) ☒ **Stayed Suspension:**

(a) ☒ Respondent must be suspended from the practice of law for a period of four (4) 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 four (4) 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.

(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 ☐ Law Office Management Conditions

☐ Medical Conditions ☐ 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:**

ATTACHMENT TO

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF: Donald Edward Fergus, Jr., no. 87334

CASE NUMBER(S): 11-J-11428

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. 11-J-11428 (Discipline in Other Jurisdiction)

PROCEDURAL BACKGROUND IN OTHER JURISDICTION:

1. On May 21, 1999, Respondent was licensed to practice law in the State of Arizona.

2. On November 13, 2009, the State Bar of Arizona filed a Complaint against Respondent before a Hearing Officer of the Supreme Court of Arizona in case no. 08-2061, and Respondent filed an Answer on January 8, 2010.

3. On March 15, 2010, a hearing held in the matter, and On April 23, 2010, the Hearing Officer filed a report finding that the State Bar of Arizona had proven by clear and convincing evidence that Respondent had committed violations of ER 1.7, ER 8.4(a), ER 8.4(b), and ER 8.4(c) of the Arizona Rules of Professional Conduct (Rule 42, Ariz. R. Sup. Ct.) and recommending that Respondent be suspended from the practice of law for one year to be followed with a one-year probation.

4. On July 10, 2010, Respondent's case came before the Disciplinary Commission of the Supreme Court of Arizona for consideration of the Hearing Officer's Report. On or about August 9, 2010, the Commission filed its report adopting the findings of the Hearing Officer but recommended a three-year suspension from the practice of law followed by a one-year probation.

5. On or about November 30, 2010, the Arizona Supreme Court filed its Judgment and Order denying Respondent's petition for review and ordering that Respondent be suspended from the practice of law for three years for the violations as disclosed in the Disciplinary Commission Report. Thereafter, the order of the Arizona Supreme Court became final.

FACTS:

1. On or about March 6, 2008, Respondent began representing Hugo Van Vliet ("Hugo") relating to an estate matter.

2. At the time, Hugo was suffering from terminal lung cancer, was near death and was receiving hospice care.

3. On March 10, and 11, 2008, Hugo was unable to speak.

4. On March 10, 2008, Respondent attended a meeting with Van Vliet family members relating to Hugo's estate; on that date, Hugo's three adult children signed an engagement letter Respondent had prepared retaining him to conduct estate planning and/or other legal tasks relating to Hugo's estate.

5. On March 11, 2008, under Respondent's supervision and direction, Respondent's paralegal and his secretary worked to prepare a power of attorney for Hugo's signature and a trust document. On March 11, 2008, work on those documents continued until approximately 6:00 p.m.; work on at least one of the documents continued on the morning of March 12, 2008.

6. Respondent had previously instructed his secretary to be prepared to travel to Hugo's home on the morning of March 12, 2008, to notarize Hugo's signature on the power of attorney, and to witness the execution of the power of attorney and trust.

7. Hugo died at approximately 4:00 a.m. on March 12, 2008.

8. When Respondent arrived at his office on the morning of March 12, 2008, he instructed his secretary that she did not need to accompany him to Hugo's home.

9. Respondent knew prior to his arrival at his office, prior to his arrival at Hugo's home, and/or prior to the execution of the power of attorney and trust that Hugo had died.

10. Respondent traveled to Hugo's home on the morning of March 12, 2008, bringing with him the unsigned power of attorney and trust documents.

11. The signature on the power of attorney purports to be that of Hugo, and the document bears the date of March 11, 2008. Respondent witnessed the signing of the power of attorney and swore that Hugo had signed the document on March 11, 2008, and that he had been of sound mind when he did so. Respondent's sworn statements were false and known by him to be false.

12. When Respondent arrived at Hugo's home, Respondent knowingly instructed and/or permitted Nick Van Vliet ("Nick"), Hugo's son, to fraudulently forge Hugo's name on the power of attorney.

13. Using the fraudulent power of attorney, Nick and Hugo's other adult children executed the separate property trust prepared by Respondent and his staff affecting some or all of Hugo's property.

14. Respondent knowingly assisted, permitted and/or instructed Nick and the other Van Vliet heirs to execute the trust based on the fraudulent power of attorney.

15. Respondent returned to his office on March 12, 2008, and his secretary thereafter notarized the power of attorney pursuant to direction from Respondent. Respondent falsely indicated to his secretary that the purported signature of Hugo on the power of attorney was authentic when he knew that it was a forgery.

16. Respondent thereafter continued to represent Hugo's estate.

17. In October 2008, the attorneys for Geri Van Vliet (Hugo's widow) filed on her behalf a pleading entitled "Objection to Inventory, Request for Emergency Hearing, and Petition to Remove Personal Representative," in Maricopa County Superior Court in PB2008-05244. The pleading alleged, among other things, doubts that Hugo had executed the power of attorney and trust, or that he was not competent to do so at the time.

18. Prior to Geri's filing of the Objection, Respondent had consulted attorneys Michael J. Farrell ("Mr. Farrell") and John R. Christian, members of Respondent's firm Jennings Strouss and Salmon, about matters relating to the probate of Hugo's estate but knowingly and/or intentionally had not revealed to them any misconduct relating to the execution of the power of attorney and trust.

19. In preparation for the October 16, 2008, hearing, Mr. Farrell met with Respondent; Respondent admitted to Mr. Farrell only that there had been some "irregularities" relating to the notarization of the power of attorney. Respondent did not, however, at that time, reveal the true nature of the false signature on the power of attorney nor his specific role in obtaining that signature.

CONCLUSIONS OF LAW:

20. The disciplinary proceeding in the other jurisdiction provided Respondent with fundamental constitutional protection.

21. Respondent's conduct in the other jurisdiction as set forth above would warrant the imposition of discipline in California as violation(s) of the following:

22. By instructing or permitting Hugo's son to sign Hugo's name on the power of attorney after Hugo's death and to use the power of attorney to execute a separate property trust affecting some or all of Hugo's property, Respondent advised the violation of a law without believing in good faith that the law was invalid in willful violation of rule 3-210, Rules of Professional Conduct.

23. By signing as a witness to the false signature of his client on the power of attorney and instructing his secretary to notarize the false signature, Respondent committed an act involving moral turpitude, dishonesty or corruption in willful violation of section 6106, Business and Professions Code.

PENDING PROCEEDINGS.

The disclosure date referred to, on page 2, paragraph A(7), was May 4, 2011.

AUTHORITIES SUPPORTING DISCIPLINE.

Culpability for offenses involving moral turpitude, fraud, dishonesty or concealment shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or mislead and the magnitude of the act of misconduct and the degree to which it relates to the practice of law. (Standard 2.3, Standards for Attorney Discipline.)

Here, the magnitude of Respondent's act of moral turpitude was great since it concerned his representation of a client and involved the client's son in potentially criminal conduct. Thereafter, he continued to represent the estate knowing that the power of attorney was fraudulent and concealed that fact from members of his firm when consulting them prior to a hearing on the widow's objections to the administration of the estate. The misconduct is mitigated by Respondent's many years of practice without discipline and his agreeing to stipulate to a disposition in this matter. Respondent was suspended in Arizona for three years. A suspension in California for two years and until he demonstrates rehabilitation is sufficient to protect the public and ensure that he is rehabilitated prior to returning to active practice.

(Do not write above this line.)

In the Matter of:	Case number(s):
Donald Edward Fergus, Jr., no. 87334	11-J-11428

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.

5/8/2011		Donald E. Fergus, Jr.
Date	Respondent's Signature	Print Name
5/16/2011		Robert G. Sbardellati
Date	Respondent's Counsel Signature	Print Name
5/23/2011		Dane C. Dauphine
Date	Deputy Trial Counsel's Signature	Print Name

(Do not write above this line.)

In the Matter of: Donald Edward Fergus, Jr., no. 87334	Case Number(s): 11-J-11428

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:

- [x] 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.

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.)**

6-10-11

Date

Judge of the State Bar Court

RICHARD A. HONN

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 June 13, 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 Los Angeles, California, addressed as follows:

ROBERT GEORGE SBARDELLATI ESQ
SHEPPARD MULLIN ET AL LLP
501 W BROADWAY 19FL
SAN DIEGO, CA 92101 - 3598

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

Dane C. Dauphine, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on June 13, 2011.

Julieta E. Gonzales
Case Administrator
State Bar Court