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**State Bar Court of California
Hearing Department
San Francisco
ALTERNATIVE DISCIPLINE PROGRAM**

Counsel For The State Bar Robert A. Henderson Senior Trial Counsel 180 Howard St. San Francisco, CA 94105 (415) 538-2385	Case Number (s) 12-O-18141-LMA 13-O-10217; 13-O-11014; 13-O-11427; 13-O-11583	(for Court's use) PUBLIC MATTER FILED  MAY - 5 2014 STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO
Bar # 173205 In Pro Per Respondent Gerald Bryan Smith 25 Cadillac Dr., Suite 220 Sacramento, CA 95825 (916) 517-8644	Submitted to: Assigned Judge STIPULATION RE FACTS AND CONCLUSIONS OF LAW <input type="checkbox"/> PREVIOUS STIPULATION REJECTED	
Bar # 152127 In the Matter Of: GERALD BRYAN SMITH Bar # 152127 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 **April 11, 1991**.
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition (to be attached separately) are rejected or changed by the Supreme Court. However, except as otherwise provided in rule 804.5(c) of the Rules of Procedure, if Respondent is not accepted into the Alternative Discipline Program, this stipulation will be rejected and will not be binding on the Respondent or the State Bar.
- (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, except for Probation Revocation proceedings. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **12 pages**, excluding 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."



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- (6) 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.
- (7) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7 and will pay timely any disciplinary costs imposed in this proceeding.

B. Aggravating Circumstances [see Standards for Attorney Sanctions for Professional Misconduct, standards 1.2(f) & 1.5]. Facts supporting aggravating circumstances are required.

- (1) **Prior record of discipline**
 - (a) State Bar Court case # of prior case **06-O-15059**. [See attachment to stipulation at p. 10.]
 - (b) Date prior discipline effective **July 31, 2008**.
 - (c) Rules of Professional Conduct/ State Bar Act violations: **Rules of Professional Conduct, rule 3-110(A) [failure to perform competently] and rule 3-700(D)(2) [failure to refund unearned fees] and Business and Professions Code section 6068(m) [failure to communicate]**.
 - (d) Degree of prior discipline **Public Reproval**.
 - (e) If Respondent has two or more incidents of prior discipline, use space provided below:
- (2) **Dishonesty:** Respondent's misconduct was intentional, 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. **See attachment to stipulation at p. 10.**
- (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. **See attachment to stipulation at p. 10.**
- (8) **Restitution:** Respondent failed to make restitution.
- (9) **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see standards 1.2(g) & 1.6]. 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, the public, or the administration of justice.
- (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 with a good faith belief that was honestly held and reasonable.
- (8) **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical or mental 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 the difficulties or disabilities no longer pose a risk that Respondent will commit misconduct.
- (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 extraordinarily 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:

Pre-trial stipulation. See attachment to stipulation at p. 10.

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In the Matter of: GERALD BRYAN SMITH	Case Number(s): 12-O-18141-LMA [13-O-10217; 13-O-11014; 13-O-11427; 13-O-11583]
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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
Harrison Orr	\$1,500	November 30, 2012
Dennis Chandler	\$750	December 15, 2012
Mark and Sheri Yeadaker	\$1,500	December 10, 2012

- Respondent must pay above-referenced restitution and provide satisfactory proof of payment to the Office of Probation not later than **twenty-four months after the effective date of discipline.**

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
Harrison Orr	\$62.50	Monthly
Dennis Chandler	\$31.25	Monthly
Mark and Sheri Yeadaker	\$62.50	Monthly

- 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";

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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.

Case No. 13-O-10217 (Complainant: Dennis Chandler)

FACTS:

9. On April 10, 2012, Dennis Chandler ("Chandler") employed Respondent to write a letter to Hartford Insurance and Negotiate with Hartford Insurance regarding a claim of disability and life insurance.

10. On April 12, 2012, Chandler paid respondent \$750 in advanced fees for the services Respondent was hired to perform.

11. Between April 10, 2012 and December 2012, Respondent took no affirmative action on behalf of Chandler. Respondent's services were of no value to Chandler. Respondent did not earn any portion of the \$750 paid as advanced fees.

12. As of December 2012, Respondent had constructively terminated the attorney client relationship by failing to perform any service on behalf of Chandler. Respondent did not inform Chandler of his intent to withdraw from representation, refund the unearned advanced fee of \$750 or take any steps to avoid reasonably foreseeable prejudice to Chandler.

CONCLUSIONS OF LAW:

13. By failing to perform legal services, Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in wilful violation of Rules of Professional Conduct, rule 3-110(A).

14. By constructively terminating employment without informing his client that he was withdrawing from employment, Respondent wilfully failed upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to a client, in violation of Rules of Professional Conduct, rule 3-700(A)(2).

15. By failing to refund \$750 in unearned advanced fees, Respondent failed to refund promptly, upon Respondent's termination of employment, unearned fees, in willful violation of Rules of Professional Conduct, rule 3-700(D)(2).

Case No. 13-O-11014 (Complainant: Judge Christopher Krueger)

FACTS:

16. On November 1, 2012, Respondent appeared before Judge Christopher Krueger, in *In the Matter of Gloria Vaughn*, Sacramento Superior Court case no. 04PR01521, while under the influence of alcohol.

17. On February 14, 2013, the State Bar opened an investigation in case no. 13-O-11014.

18. On April 8, 2013, a State Bar investigator sent Respondent a letter regarding the allegation of appearing in court while under the influence of alcohol. Respondent received the letter, but did not provide a substantive response.

CONCLUSIONS OF LAW:

19. By appearing in court while under the influence of alcohol, Respondent wilfully failed to maintain the respect due to the courts of justice and judicial officers, in violation of Business and Professions Code section 6060(b).

20. By failing to provide a substantive response to the allegations of misconduct, Respondent wilfully failed to cooperate in a disciplinary investigation in violation of Business and Professions Code section 6068(i).

Case No. 13-O-11427 (Complainant: Kimberly Sosa)

FACTS:

21. On September 11, 2001, Kimberly Sosa employed Respondent to perform legal services, namely to file and obtain a dissolution of marriage. Thereafter Respondent appeared as counsel of record for the client in *Sosa vs. Sosa*, San Mateo County Superior Court, case no. 067367.

22. On March 16, 2004, the court issued an order directing Respondent to prepare a formal order terminating marital status effective March 16, 2004. Thereafter, Respondent took no action on behalf of Sosa.

23. Between March 16, 2004 and February 2012, Respondent failed to inform Sosa that he had not prepared a formal order terminating marital status effective March 16, 2004.

24. In February 2012, Sosa discovered that Respondent had failed to finalize her marital dissolution. Sosa immediately contacted Respondent regarding his failure to finalize the dissolution of marriage. Respondent assured Sosa he would finalize the dissolution of marriage.

25. Between March 16, 2004 and November 4, 2013, Respondent failed to prepare a formal order terminating marital status.

26. On November 4, 2013, Respondent filed a proposed judgment with the court. The proposed judgment complied with the court's March 16, 2004 order.

27. On December 5, 2013, the judge signed the judgment.

28. On December 16, 2013, judgment was entered in *Sosa vs. Sosa*, San Mateo County Superior Court, case no. 067367. The judgment included an ending date for marital status of March 16, 2004.

CONCLUSIONS OF LAW:

29. By failing to prepare the formal order from March 16, 2004 to November 4, 2013, and by taking no action in the Sosa matter from February 2012 to November 4, 2013, Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of Rules of Professional Conduct, rule 3-110(A).

30. By failing to inform Sosa that he had not prepared the formal order terminating marital status effective March 16, 2004, and by failing to inform Sosa that the marital status had not been terminated, Respondent wilfully failed to keep a client informed of significant developments in a matter in which Respondent had agreed to provide legal services in violation of Business and Professions Code section 6068(m).

Case No. 13-O-11583 (Complainant: Mark and Sheri Yeadaker)

FACTS:

31. On April 10, 2012, Mark and Sheri Yeadaker ("the Yeadakers") hired Respondent to represent them in *In re Mark Yeadaker and Sheri Yeadaker*, U.S. Bankruptcy Court Northern District of California, case no. 10-33304 ("Bankruptcy matter").

32. In October 2012, the Yeadakers paid, in full, all claims in the Bankruptcy matter.

33. On October 3, 2012, Respondent received advanced fees of \$1,500 from the Yeadakers, for Respondent to file a Motion to Dismiss in the Bankruptcy matter.

34. From October 3, 2012 to November 19, 2012, Respondent failed to file a Motion to Dismiss in the Bankruptcy matter.

35. Between November 7, 2012 and December 10, 2012, the Yeadakers left multiple messages with Respondent requesting a status update on the Motion to Dismiss. Respondent received these messages shortly after they were left, but did not respond.

36. From October 3, 2012 to December 10, 2012, Respondent performed no service of value to the Yeadakers in the Bankruptcy matter. Respondent failed to take any action whatsoever with respect to the Motion to Dismiss. Respondent did not earn any portion of the \$1,500 paid as advanced fees.

37. On December 10, 2012, the trustee, at the request of the Yeadakers, and at further expense to them, filed a Motion to Dismiss in the Bankruptcy matter.

38. On January 24, 2013, the trustee filed a Motion for Disgorgement of Fees paid to Respondent.

39. On January 25, 2013, the court issued its Order Dismissing the Bankruptcy matter.

40. On March 22, 2013, the court granted the Motion for Disgorgement of Fees. The court ordered that by April 30, 2013, Respondent was required to send a cashier's check in the amount of \$1,500, to the trustee, made payable to the Yeadakers. Respondent received the order.

41. To date, Respondent has failed to disgorge the fees as ordered by the court on March 22, 2013.

CONCLUSIONS OF LAW:

42. By failing to refund the \$1,500 advanced fee to the Yeadakers, Respondent failed to refund promptly, upon Respondent's termination of employment, unearned fees, in willful violation of Rules of Professional Conduct, rule 3-700 (D)(2).

43. By failing to comply with the court's March 22, 2013 order, Respondent wilfully failed to comply with an order of the court requiring Respondent to do or forbear an act connected with or in the course of Respondent's profession which Respondent ought in good faith to do or forbear in wilful violation of Business and Professions Code section 6103.

44. By failing to respond to the Yeadakers' multiple status inquiry messages from November 7, 2012 to December 10, 2012, Respondent wilfully failed to respond promptly to reasonable status inquiries of a client in a matter in which Respondent had agreed to provide legal services in wilful violation of Business and Professions Code section 6068(m).

AGGRAVATING CIRCUMSTANCES.

Prior Record of Discipline (Std. 1.5(a)): Respondent has a prior record of discipline which stemmed from his misconduct in a single client matter. In 2006-2007, Respondent ceased performing, ceased communicating and failed to refund unearned fees to his client.

Harm (Std. 1.5(f)): Respondent's failure to perform competently resulted in the Yeadakers paying \$593.04 in additional fees to the trustee in order to have their Bankruptcy case dismissed, causing significant harm.

Multiple Acts of Misconduct (Std. 1.5(b)): Respondent engaged in eleven acts of misconduct in his representation of five clients. These multiple acts of misconduct constitute an aggravating factor.

MITIGATING CIRCUMSTANCES.

Pre-trial Stipulation: Respondent is entitled to mitigation for entering into a full stipulation with the Office of the Chief Trial Counsel, prior to trial, thereby saving the office and State Bar Court time and resources. (See *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079; *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 156; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 993-994 [where mitigative credit was given for entering into a stipulation as to facts and culpability].) The weight of the mitigation is tempered by the fact that Respondent failed to participate during the investigation in case no. 13-O-11014.

DISMISSALS.

The parties respectfully request the Court to dismiss the following alleged violations in the interest of justice:

<u>Case No.</u>	<u>Count</u>	<u>Alleged Violation</u>
13-O-11427	Eight	Failure to Obtain Court Permission to Withdraw
13-O-11427	Nine	Failure to Refund Unearned Fees

COSTS OF DISCIPLINARY PROCEEDINGS.

Respondent acknowledges that the Office of the Chief Trial Counsel has informed respondent that as of January 22, 2014, the prosecution costs in this matter are \$7,151. 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.

EXCLUSION FROM MCLE CREDIT

Pursuant to rule 3201, Respondent may not receive MCLE credit for completion of State Bar Ethics School. (Rules Proc. of State Bar, rule 3201.)

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In the Matter of:
GERALD BRYAN SMITH

Case number(s):
12-O-18141-LMA [13-O-10217; 13-O-11014; 13-O-11427;
13-O-11583]

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.

01-23-2014 *Gerald Bryan Smith* Gerald Bryan Smith
Date Respondent's Signature Print Name

1/27/14 *Robert A. Henderson* Robert A. Henderson
Date Deputy Trial Counsel's Signature Print Name

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In the Matter of: GERALD BRYAN SMITH	Case Number(s): 12-O-18141-LMA [13-O-10217; 13-O-11014; 13-O-11427; 13-O-11583]
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ALTERNATIVE DISCIPLINE PROGRAM 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 stipulation as to facts and conclusions of law is APPROVED.
- The stipulation as to facts and conclusions of law is APPROVED AS MODIFIED as set forth below.
- All court dates in the Hearing Department are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation; or 3) Respondent is not accepted for participation in the Program or does not sign the Program Contract. (See rule 5.58(E) & (F) and 5.382(D), Rules of Procedure.)

Date May 5, 2014 
LUCY ARMENDARIZ
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on May 5, 2014, I deposited a true copy of the following document(s):

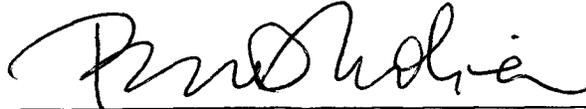
STIPULATION RE FACTS AND CONCLUSIONS OF LAW

By personally delivering a copy of said document(s) to:

ROBERT A. HENDERSON
180 HOWARD STREET, 6TH FLOOR
SAN FRANCISCO, CA 94105

GERALD B. SMITH
180 HOWARD STREET, 6TH FLOOR
SAN FRANCISCO, CA 94105

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on May 5, 2014.



Bernadette C.O. Molina
Case Administrator
State Bar Court