

JAN 27 2016



STATE BAR COURT CLERK'S OFFICE
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STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos.: 12-O-18141-LMA
)	(13-O-10217; 13-O-11014;
GERALD BRYAN SMITH,)	13-O-11427; 13-O-11583);
Member No. 152127,)	14-O-00577 (Cons.)
)	
A Member of the State Bar.)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
)	

Introduction¹

In this disciplinary proceeding, respondent **Gerald Bryan Smith**² was accepted for participation in the State Bar Court’s Alternative Discipline Program (ADP). As the court has now found that Respondent has successfully completed the ADP, the court will recommend to the Supreme Court that Respondent be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for two years subject to certain conditions, including a 60-day period of suspension.

Pertinent Procedural History

On November 8, 2013, the State Bar of California’s Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) against Respondent in case nos. 12-O-18141 (13-O-10217; 13-O-11014; 13-O-11427; 13-O-11583). Respondent sought to

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

² Respondent was admitted to the practice of law in this state on April 11, 1991, and has been a member of the State Bar of California since that time.

participate in the State Bar Court's ADP. This matter was referred to the ADP on January 6, 2014.

On October 22, 2013, Respondent contacted the State Bar's Lawyer Assistance Program (LAP) to assist him with his mental health issue. On January 23, 2014, Respondent submitted a declaration to the court, establishing a nexus between his substance abuse issues and the charges in this matter. On March 17, 2014, Respondent signed a LAP Participation Plan.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) on January 27, 2014. The Stipulation set forth the factual findings, legal conclusions, and mitigating and aggravating circumstances. The stipulation was received by the court on January 27, 2014.

Following briefing by the parties, the court issued a Confidential Statement of Alternative Dispositions and Orders dated May 5, 2014, formally advising the parties of: (1) the discipline which would be recommended to the Supreme Court if Respondent successfully completed the ADP, and (2) the discipline which would be recommended if Respondent failed to successfully complete or was terminated from the ADP. After agreeing to those alternative dispositions, Respondent executed the Contract and Waiver for Participation in the State Bar Court's ADP, the court accepted Respondent for participation in the ADP, and Respondent's period of participation in the ADP began on May 5, 2014.

The State Bar filed a second NDC against Respondent in case no. 14-O-00577 on September 3, 2014. On September 15, 2014, the second NDC was consolidated with case nos. 12-O-18141, et al., and referred to the ADP. The parties entered into a Stipulation Re Facts and Conclusions of Law in case no. 14-O-00577 on October 22, 2014. The stipulation set forth the factual findings, legal conclusions, and mitigating and aggravating circumstances. The stipulation was received by the court on October 22, 2014. On January 6, 2015, the court issued

an order amending the Confidential Statement of Alternative Dispositions and Orders to include case no. 14-O-00577. An agreement and order amending Respondent's contract and waiver for participation in the State Bar Court's ADP was lodged that same day.

On December 14, 2015, after receiving a certificate of one year of participation in the LAP and a report from the Office of Probation that Respondent had completely satisfied his restitution obligations, the court issued an order finding that Respondent successfully completed the ADP.

Findings of Fact and Conclusions of Law

The parties' Stipulations, including the court's orders approving the Stipulations, are attached and hereby incorporated by reference, as if fully set forth herein.

In case no. 12-O-18141, Respondent stipulated that he willfully failed to refund unearned advanced fees in violation of rule 3-700(D)(2).

In case no. 13-O-10217, Respondent stipulated that he willfully: (1) failed to competently perform legal services in violation of rule 3-110(A); (2) failed to take reasonable steps to avoid foreseeable prejudice to his client upon termination of employment in violation of rule 3-700(A)(2); and (3) failed to refund unearned advanced fees in violation of rule 3-700(D)(2).

In case no. 13-O-11014, Respondent stipulated that he willfully: (1) failed to maintain respect to a court by making an appearance while under the influence of alcohol in violation of section 6068, subdivision (b); and (2) failed to cooperate in a disciplinary investigation by not providing a written response to a State Bar investigator's letter regarding a client complaint in violation of section 6068, subdivision (i).

In case no. 13-O-11427, Respondent stipulated that he willfully: (1) failed to competently perform legal services by not preparing an order and taking no action on his client's

behalf for approximately 21 months in violation of rule 3-110(A); and (2) failed to keep his client reasonably informed of significant developments in violation of section 6068, subdivision (m).

In case no. 13-O-11583, Respondent stipulated that he willfully: (1) failed to refund unearned advanced fees in violation of rule 3-700(D)(2); (2) failed to comply with a court order in violation of section 6103; and (3) failed to respond promptly to reasonable client status inquiries in violation of section 6068, subdivision (m).

In case no. 14-O-00577, Respondent stipulated that he willfully: (1) failed to take reasonable steps to avoid foreseeable prejudice to his client upon termination of employment in violation of rule 3-700(A)(2); and (2) failed to provide his client with an accounting in violation of rule 4-100(B)(3).

In aggravation, Respondent had a prior record of discipline,³ engaged in multiple acts of misconduct, and caused significant harm to one of his clients. In mitigation, Respondent cooperated with the State Bar by entering into a pretrial stipulation.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but rather to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve confidence in the legal profession.

(*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate alternative discipline recommendations if Respondent successfully completed the ADP and if he did not successfully complete the ADP, the court considered the parties' briefs on discipline as well as certain standards and case law. In

³ Respondent's prior record of discipline consisted of a public reproof that became effective on July 31, 2008.

particular, the court considered Former Standards⁴ 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 2.5, 2.8, and 2.15, and *Hawes v. State Bar* (1990) 51 Cal.3d 587; *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071; and *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151.

Because Respondent has now successfully completed the ADP, this court, in turn, now recommends to the Supreme Court the imposition of the lower level of discipline, set forth more fully below, contained in the Confidential Statement of Alternative Dispositions and Orders, as amended on January 6, 2015.

Recommended Discipline

It is hereby recommended that respondent **Gerald Bryan Smith**, State Bar no. 152127, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation⁵ for a period of two years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first 60 days of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of Respondent's probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including Respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, Respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
4. 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 of the conditions of Respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier

⁴ Effective July 1, 2015, the standards were amended. As the Confidential Statement was prepared prior to the amending of the standards, this court relied on and applied the standards that were in effect at the time the Confidential Statement was signed.

⁵ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, Respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to Respondent personally or in writing, relating to whether Respondent is complying or has complied with Respondent's probation conditions.
6. Within 30 days after 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.
7. Within one year after the effective date of the discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
8. Respondent must comply with all provisions and conditions of his Participation Agreement/Plan with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Respondent must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Agreement/Plan to the Office of Probation. Respondent must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of Respondent's participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition. Respondent will be relieved of this condition upon providing to the Office of Probation satisfactory certification of completion of the LAP.

At the expiration of the probation period, if Respondent has complied with all conditions of probation, Respondent will be relieved of the stayed suspension.⁶

Multistate Professional Responsibility Examination

It is recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the

⁶ Respondent completely satisfied the financial conditions listed in the Confidential Statement. Accordingly, the present recommendation does not include restitution or other financial conditions.

Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Direction Re Decision and Order Sealing Certain Documents

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 5.388 of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to:

(1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court, and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosures. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: January 27, 2016



LUCY ARMENDARIZ
Judge of the State Bar Court

(Do not write above this line.)

**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		
Bar # 152127 In the Matter Of: GERALD BRYAN SMITH	Submitted to: Assigned Judge	
Bar # 152127 A Member of the State Bar of California (Respondent)	STIPULATION RE FACTS AND CONCLUSIONS OF LAW <input type="checkbox"/> PREVIOUS STIPULATION REJECTED	

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."



(Do not write above this line.)

- (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 Reprimand.
- (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:

(Do not write above this line.)

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.

(Do not write above this line.)

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";

(Do not write above this line.)

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 wilfull 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.)

(Do not write above this line.)

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

(Do not write above this line.)

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

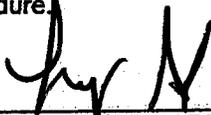
Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- 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.)

May 5, 2014

Date


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

(Do not write above this line.)

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

Counsel For The State Bar Susan I. Kagan Senior Trial Counsel 180 Howard Street San Francisco, CA 94015 (415) 538-2037 Bar # 214209	Case Number (s) 14-O-00577- LMA	(for Court's use) PUBLIC MATTER FILED  JAN 06 2015 STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO
In Pro Per Respondent Gerald Bryan Smith 25 Cadillac Dr., Suite 220 Sacramento, CA 95825 (916) 517-8644 Bar # 152127		
In the Matter Of: GERALD BRYAN SMITH Bar # 152127 A Member of the State Bar of California (Respondent)	Submitted to: Program Judge STIPULATION RE FACTS AND CONCLUSIONS OF LAW <input type="checkbox"/> PREVIOUS STIPULATION REJECTED	

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 **6** 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."

(Do not write above this line.)

- (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. 4.]
- (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 Reprimand**.
- (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.
- (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. 5.**
- (8) **Restitution:** Respondent failed to make restitution.
- (9) **No aggravating circumstances are involved.**

Additional aggravating circumstances:

(Do not write above this line.)

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. 5.

Multiple Acts of Misconduct (Std. 1.5(b)): Respondent's violation of rules 3-700(A)(2) and 4-100(B)(3) represents multiple acts of misconduct.

MITIGATING CIRCUMSTANCES.

Additional Mitigating Circumstances:

Pretrial 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. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [where mitigative credit was given for entering into a stipulation as to facts and culpability].)

COSTS OF DISCIPLINARY PROCEEDINGS.

Respondent acknowledges that the Office of the Chief Trial Counsel has informed respondent that as of October 15, 2014, the prosecution costs in this matter are \$3,497. 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

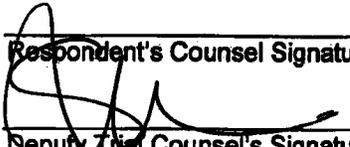
Pursuant to rule 3201, Respondent may not receive MCLE credit for completion of State Bar Ethics School. (Rules Proc. of State Bar, rule 3201.)

(Do not write above this line.)

In the Matter of: GERALD BRYAN SMITH	Case number(s): 14-O-00577
---	-------------------------------

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>10-16-2014</u> Date	<u></u> Respondent's Signature	<u>Gerald Bryan Smith</u> Print Name
<u>10/22/14</u> Date	<u></u> Deputy Trial Counsel's Signature	<u>N/A</u> Print Name
		<u>Susan I. Kagan</u> Print Name

(Do not write above this line.)

In the Matter of:
GERALD BRYAN SMITH

Case Number(s):
14-O-00577

ALTERNATIVE DISCIPLINE PROGRAM ORDER

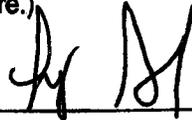
Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- 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.)

Jan 6, 2015

Date



Judge of the State Bar Court

CERTIFICATE OF SERVICE

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

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on January 6, 2015, I deposited a true copy of the following document(s):

STIPULATION RE FACTS AND CONCLUSIONS OF LAW

in a sealed envelope for collection and mailing on that date as follows:

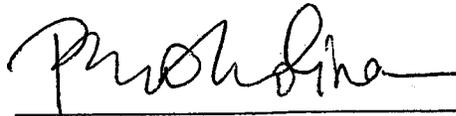
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

GERALD B. SMITH
BRYAN SMITH, ATTORNEY AT LAW
25 CADILLAC DR
STE 220
SACRAMENTO, CA 95825

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

SUSAN I. KAGAN, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on January 6, 2015.



Bernadette C.O. Molina
Case Administrator
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 January 27, 2016, I deposited a true copy of the following document(s):

DECISION AND ORDER SEALING CERTAIN DOCUMENTS

STIPULATION RE FACTS AND CONCLUSIONS OF LAW filed 5/05/14

STIPULATION RE FACTS AND CONCLUSIONS OF LAW filed 1/06/15

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:

GERALD B. SMITH
BRYAN SMITH, ATTORNEY AT LAW
25 CADILLAC DR
STE 220
SACRAMENTO, CA 95825

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

SUSAN I. KAGAN, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on January 27, 2016.



Bernadette Molina
Case Administrator
State Bar Court