



ORIGINAL

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State Bar Court of California Hearing Department Los Angeles ACTUAL SUSPENSION			PUBLIC MATTER
Counsel For The State Bar Kimberly G. Anderson Senior Trial Counsel 845 S. Figueroa St. Los Angeles, CA 90017 Phone: (213) 765-1083 Bar # 150359	Case Number(s): 15-O-14260-WKM	For Court use only <div style="text-align: center;"> FILED JUN 13 2016 P.B. STATE BAR COURT CLERK'S OFFICE LOS ANGELES </div>	
In Pro Per Respondent Herchel McCoy Sims 7668 El Camino Real, Ste 438 LaCosta, CA 92009 Phone: (858) 518-1972 Bar # 154185	Submitted to: Assigned Judge STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING ACTUAL SUSPENSION <input checked="" type="checkbox"/> PREVIOUS STIPULATION REJECTED		
In the Matter of: HERCHEL McCOY SIMS Bar # 154185 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 **October 10, 1991**.
- (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 **13** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".

- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."
- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (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: **Costs to be paid in equal amounts prior to February, for the three billing cycles following the effective date of the Supreme Court order.** (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 [Standards for Attorney Sanctions for Professional Misconduct, standards 1.2(h) & 1.5]. Facts supporting aggravating circumstances are required.

- (1) ☒ **Prior record of discipline**
- (a) ☒ State Bar Court case # of prior case **14-O-00393 et al.**
 - (b) ☒ Date prior discipline effective **October 15, 2015**
 - (c) ☒ Rules of Professional Conduct/ State Bar Act violations: **Rules 2-100(A) and 4-100(A) (Commingleing), and Business and Professions Code section 6103.**
 - (d) ☒ Degree of prior discipline **ninety (90) days' actual suspension, one (1) year stayed suspension and three (3) years probation.**
 - (e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below.
- (2) ☐ **Intentional/Bad Faith/Dishonesty:** Respondent's misconduct was dishonest, intentional, or surrounded by, or followed by bad faith.
- (3) ☐ **Misrepresentation:** Respondent's misconduct was surrounded by, or followed by, misrepresentation.
- (4) ☐ **Concealment:** Respondent's misconduct was surrounded by, or followed by, concealment.
- (5) ☐ **Overreaching:** Respondent's misconduct was surrounded by, or followed by, overreaching.
- (6) ☐ **Uncharged Violations:** Respondent's conduct involves uncharged violations of the Business and Professions Code, or the Rules of Professional Conduct.

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- (7) ☐ **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.
- (8) ☐ **Harm:** Respondent's misconduct harmed significantly a client, the public, or the administration of justice.
- (9) ☐ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (10) ☒ **Candor/Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct, or to the State Bar during disciplinary investigations or proceedings. See Stipulation Attachment at page 9.
- (11) ☐ **Multiple Acts:** Respondent's current misconduct evidences multiple acts of wrongdoing.
- (12) ☐ **Pattern:** Respondent's current misconduct demonstrates a pattern of misconduct.
- (13) ☐ **Restitution:** Respondent failed to make restitution.
- (14) ☐ **Vulnerable Victim:** The victim(s) of Respondent's misconduct was/were highly vulnerable.
- (15) ☐ **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see standards 1.2(i) & 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 likely to recur.
- (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 or to the State Bar during disciplinary investigations and proceedings.
- (4) ☐ **Remorse:** Respondent promptly took objective steps demonstrating spontaneous 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 objectively 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:

Pretrial Stipulation - See Stipulation Attachment at page 9.

D. Discipline:

(1) ☒ **Stayed Suspension:**

(a) ☒ Respondent must be suspended from the practice of law for a period of **two (2) years**.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1) 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 **three (3) 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 **six (6) months**.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1), 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 present learning and ability in the general law, pursuant to standard 1.2(c)(1), 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: .

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- (9) ☐ Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (10) ☐ The following conditions are attached hereto and incorporated:
- | | |
|---|---|
| <input type="checkbox"/> Substance Abuse Conditions | <input type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions | <input type="checkbox"/> Financial Conditions |

F. Other Conditions Negotiated by the Parties:

- (1) ☐ **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: **See "Other Conditions," below.**
- (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:**

Ethics School: On September 15, 2015, the Supreme Court of California filed Order No. S226323 imposing discipline pursuant to a Stipulation re Facts, Conclusions of Law and Disposition and Order Approving in Case Nos. 14-O-00393 et al., effective October 15, 2015. If Respondent timely completes Ethics School, passes the test given at the end, and submits satisfactory proof of the same to the Office of Probation in satisfaction of the requirement of discipline imposed in Case Nos. 14-O-00393 et al., Respondent's completion of Ethics School in that matter shall satisfy the requirement that Respondent complete Ethics School as a condition of probation in this matter. (See, e.g. rule 5.135(A), Rules of Procedure of the State Bar of California).

MPRE: On September 15, 2015, the Supreme Court of California filed Order No. S226323 imposing discipline pursuant to a Stipulation re Facts, Conclusions of Law and Disposition and Order Approving in Case Nos. 14-O-00393 et al., effective October 15, 2015. Pursuant to Order No. S226323, Respondent is required to take and pass the MPRE within one year after the effective date of the Order. The protection of the public and the interests of the Respondent do not require passage of the MPRE in this case. (See In the Matter of Respondent G (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr.)

ATTACHMENT TO
STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF: HERCHEL McCOY SIMS

CASE NUMBER: 15-O-14260-WKM

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. 15-O-14260-WKM (Complainant: Kerry M. Kinney, Esq.)

FACTS:

1. On September 9, 2013, Respondent caused to be filed a verified complaint on behalf of a client against several defendants, including defendant TMP Gas and Food Mart and defendant 5600 West Gateway Center, LLC ("Gateway") in Los Angeles County Superior Court Case No. 13K12801. In the lawsuit, Respondent alleged Americans with Disabilities Act ("ADA") and discrimination violations by TMP Gas & Food Mart, which was located at 5800 West Manchester Avenue, Los Angeles, California 90045. There was no probable cause to file the lawsuit against Gateway because Gateway did not own or control the subject property, nor did Gateway have any involvement with TMP Gas & Food Mart where the alleged ADA violation occurred. In the lawsuit, Respondent alleged Gateway was the owner of the property located at 5800 West Manchester Avenue, Los Angeles, California 90045. While Gateway did own a property located at 5600 West Manchester Boulevard, it did not own the subject property at 5800 West Manchester Avenue.

2. On October 18, 2013, Respondent caused the verified complaint to be served upon Gateway.

3. On October 23, 2013, attorney Kerry Kinney ("Kinney"), the attorney for Gateway, contacted Respondent's office by telephone and asked to speak with Respondent. Respondent's assistant told Kinney that Respondent was not available, so Kinney advised Respondent's assistant that Gateway had been erroneously named in the lawsuit. Respondent's assistant advised Kinney that Respondent would return his call.

4. On October 25, 2013, when Kinney had not received a return phone call from Respondent, Kinney called Respondent's office a second time. Respondent's assistant stated that Respondent was not available, but assured Kinney the matter was being handled and that Respondent's call would be returned that day.

5. On October 29, 2013, Kinney sent Respondent a letter via email and U.S. mail advising him that his lawsuit had named his client in error. Kinney also stated in the letter that Respondent could simply Google TMP Gas & Food Mart, and then he would learn that the property where that business was located was not 5600 West Manchester Boulevard. Respondent did not respond to Kinney in any way. Neither the letter nor the email were returned as undeliverable. Respondent received the letter.

6. On November 8, 2013, Respondent served Kinney and Gateway with a Notice of Change of Address wherein Respondent indicated he was changing his address from 11622 El Camino Real, Suite #100, San Diego, California 92130 ("the San Diego office") to 41593 Winchester Rd., Ste. 200, Temecula, California 92590 ("the Temecula office").

7. Gateway's initial responsive pleading to the verified complaint was due on or before November 18, 2013.

8. Kinney attempted to call Respondent several more times in the days leading up to this deadline, including specifically on November 16 and 17, 2013, but only received Respondent's voice mail.

9. On November 18, 2013, because Respondent failed to remove Gateway from the pending lawsuit, Kinney was forced to file a demurrer to the verified complaint on behalf of Gateway. As Respondent had recently served Kinney with a Notice of Change of Address, Kinney served this demurrer on both the San Diego and Temecula office addresses for Respondent. The demurrer was not returned as undeliverable. Respondent received the demurrer. Because of the court's budgetary constraints, the hearing on the demurrer was not set to be heard until June 4, 2014. Respondent had notice of the hearing.

10. On June 4, 2014, the demurrer was heard. Respondent did not file any opposition to the demurrer and he did not appear at the hearing on behalf of his client. The court sustained the demurrer with 20 days to amend. Kinney served Respondent with Notice of the Court's Ruling on the demurrer and the notice was not returned as undeliverable. Respondent received notice of the ruling, but Respondent did not amend the complaint, and he did not dismiss the case.

11. On February 2, 2015, Kinney gave notice by facsimile and telephone to Respondent that Gateway would be appearing on February 3, 2015 to apply for an ex parte order of dismissal with prejudice based on plaintiff's failure to amend the complaint following the demurrer. The notice again informed Respondent that he had named Gateway as a defendant in error. Respondent received the notice, but Respondent did not reply.

12. On February 3, 2015, Respondent did not appear at the ex parte hearing. The court heard Gateway's ex parte motion and then dismissed the lawsuit against Gateway with prejudice.

CONCLUSIONS OF LAW:

13. Between September 9, 2013 and February 3, 2015 Respondent failed to counsel or maintain such actions, proceedings, or defenses only as appear to Respondent legal or just by filing and serving a complaint on behalf of a client against Gateway in the lawsuit without probable cause, by continuing to maintain the lawsuit against Gateway between approximately September 9, 2013 and February 3, 2015, and by failing to dismiss Gateway from the lawsuit despite receiving multiple demands from Gateway's attorney to dismiss Gateway since it was not a proper party defendant, in willful violation of Business and Professions Code, section 6068(c).

AGGRAVATING CIRCUMSTANCES.

Prior Record of Discipline (Std. 1.5(a)): Respondent has a prior record of discipline. Effective October 15, 2015, Respondent was suspended for 90 days' actual suspension, one year stayed suspension and three years' probation in Supreme Court Case No. S226323 (State Bar Court Case Nos. 14-O-00393, 14-O-02120 and 14-O-04730). The misconduct occurred in three matters between January 2011 and June 2014. In the first matter, Respondent commingled personal funds in his client trust account between January 2011 and June 2014 and issued 162 checks for personal expenses over a three and a half year period totaling in excess of \$205,000. In the second matter, Respondent failed to comply with a court order in violation of Business and Professions Code section 6106 to pay \$650 in sanctions to his opposing counsel in an Americans with Disabilities Act ("ADA") case as a result of his failure to appear at hearings. The misconduct in that matter occurred between September 2012 and May 30, 2014, when Respondent finally paid the sanctions after becoming aware of the State Bar's investigation against him. In the third matter Respondent violated rule 2-100 (A) of the Rules of Professional Conduct by communicating with a represented party in ADA litigation. The misconduct in that matter occurred between February and April 2014. In aggravation, Respondent was found to have exhibited indifference and engaged in multiple acts of misconduct. In mitigation, Respondent exhibited remorse and presented eight character letters. Respondent also received additional mitigation credit for no prior discipline and entering into a pre-filing stipulation in all three matters.

Lack of Candor to the State Bar During the State Bar Investigation (Std. 1.5 (I)): On August 13, 2015, the State Bar opened an investigation into the misconduct in the current matter and the State Bar Investigator wrote to Respondent in an attempt to obtain an explanation for Respondent's misconduct. On October 2, 2015 and on December 11, 2015, Respondent sent correspondence to the State Bar wherein he initially blamed a non-attorney assistant for his misconduct and claimed he had fired the non-attorney assistant in an attempt to minimize the significance of his misconduct. When the State Bar Investigator asked Respondent for the non-attorney assistant's contact information, so that she could be interviewed regarding the veracity of Respondent's claims, Respondent refused to provide the non-attorney assistant's last known contact information. Respondent now acknowledges that his claims about the non-attorney's involvement in the misconduct were false and misleading.

MITIGATING CIRCUMSTANCES.

Pretrial Stipulation: Respondent has entered into this complete stipulation as to facts, conclusion of law and discipline, and has thereby saved the State Bar and the State Bar Court significant time and resources in having to litigate this matter. (*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].) While Respondent is entitled to some credit in mitigation for entering into this pretrial stipulation, the mitigation is significantly diminished as a result of Respondent's lack of candor with the State Bar during the investigation into this matter.

AUTHORITIES SUPPORTING DISCIPLINE.

The Standards for Attorney Sanctions for Professional Misconduct "set forth a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances." (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.1. All further references to Standards are to this source.) The Standards help fulfill the primary purposes of discipline, which include: protection of the public, the

courts and the legal profession; maintenance of the highest professional standards; and preservation of public confidence in the legal profession. (See std. 1.1; *In re Morse* (1995) 11 Cal.4th 184, 205.)

Although not binding, the standards are entitled to “great weight” and should be followed “whenever possible” in determining level of discipline. (*In re Silvertown* (2005) 36 Cal.4th 81, 92, quoting *In re Brown* (1995) 12 Cal.4th 205, 220 and *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Adherence to the standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar attorney misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 190.) If a recommendation is at the high end or low end of a Standard, an explanation must be given as to how the recommendation was reached. (Std. 1.1.) “Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure.” (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

In determining whether to impose a sanction greater or less than that specified in a given standard, in addition to the factors set forth in the specific standard, consideration is to be given to the primary purposes of discipline; the balancing of all aggravating and mitigating circumstances; the type of misconduct at issue; whether the client, public, legal system or profession was harmed; and the member’s willingness and ability to conform to ethical responsibilities in the future. (Stds. 1.7(b) and (c).)

Standard 2.9(b) is the applicable standard where an attorney is found culpable of one count of violating Business and Professions Code section 6068(c), and where, as here, the harm caused by Respondent’s misconduct, was not significant. Standard 2.9(b) states:

Suspension or reproof is the presumed sanction when a member counsels or maintains a frivolous claim or action for an improper purpose, resulting in harm to an individual or the administration of justice.

Thus, the range of discipline for a violation of Business and Professions Code section 6068(c) as set forth in Standard 2.9(b) is from a private reproof, on the low end, to a three-year actual suspension, on the high end. A six-month actual suspension is within the appropriate range of discipline.

Standard 1.8(a) states:

If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.

Since Respondent received a 90-day actual suspension in his prior discipline, and since discipline should generally be progressive (See Standard 1.8(a)), the appropriate discipline in this matter should include a six-month actual suspension, a two-year stayed suspension, three years’ probation. Standard 1.2(c)(1) states, in pertinent part, that, “Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met.” The prior discipline was not remote in time and was serious enough so that imposing progressive discipline would not be manifestly unjust.

While a portion of the Respondent’s prior misconduct occurred during the same time period as some of the misconduct in the current matter, the weight of Respondent’s prior record of discipline should not be

diminished pursuant to *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. The misconduct in Respondent's prior case took place between January 2011 and June 2014, whereas the misconduct in the instant matter took place between September 2013 and February 2015. Respondent also signed the stipulation in the prior disciplinary matter on February 25, 2015, but he was placed on notice in April 2014 of the disciplinary investigation regarding the commingling incident, as well as the other two matters involved in that case. All of the misconduct resulted from Respondent's ADA law practice. Thus, Respondent should have had a heightened sense of awareness that he needed ethically run his ADA law practice. After having received notice of other ethical problems with his ADA law practice in April 2014, Respondent's misconduct in the current matter continued in the following specific ways:

- Respondent failed to dismiss the lawsuit against Gateway after having been served with a demurrer in June 2014;
- Respondent failed to dismiss the lawsuit after having been served with a notice of ruling from the June 4, 2014 hearing where the court granted the demurrer; and
- Respondent failed to respond to a February 2, 2015 fax and telephone call from Kinney to avoid having Kinney have to appear at the February 3, 2015 ex parte hearing to dismiss the case.

In addition, the misconduct in this matter is for a new and different violation, to wit a violation of Business and Professions Code section 6068(c). With respect to the current misconduct, Respondent also exhibited a lack of candor in his correspondence with the State Bar Investigator during the investigation in this matter between October 2, 2015 and December 11, 2015, which is of even greater concern than the actual underlying misconduct. This lack of candor occurred approximately seven months after Respondent executed the stipulation on February 25, 2015 in his first disciplinary matter.

Balanced against the two aggravating factors of Respondent's prior record of discipline and his initial lack of candor, is the mitigating credit for entering into a Pre-Trial Stipulation.

Therefore, taking into consideration the current misconduct, and the aggravating and mitigating factors, a six-month actual suspension, a two-year stayed suspension and three years' probation is the appropriate level of discipline to protect the public and the legal profession, to maintain the highest professional standards for attorneys, and to preserve the public confidence in the legal profession.

Case law also supports this discipline. In *Olguin v. State Bar* (1980) 28 Cal.3d 195, an attorney with a prior discipline involving a private reproof based upon his criminal conviction for making a false claim of citizenship received a six-month actual suspension where the attorney failed to perform competently for his client and failed to communicate. In order to avoid culpability, the attorney also presented false testimony to the State Bar Court. In its decision in *Olguin*, the Court emphasized that Respondent's dishonesty was of greater concern than the underlying misconduct. The *Olguin* case is somewhat analogous to the facts in this case, even if the weight of the prior discipline were considered diminished, as all of the misconduct in both matters, if they had occurred at the same time, would still warrant a six-month actual suspension.

COSTS OF DISCIPLINARY PROCEEDINGS.

Respondent acknowledges that the Office of Chief Trial Counsel has informed Respondent that as of May 11, 2016, the prosecution costs in this matter are approximately \$3,584. 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

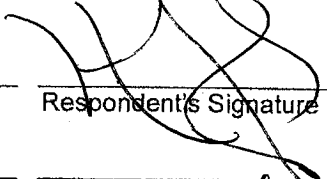
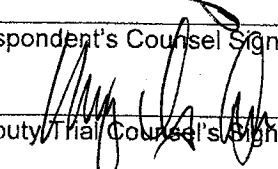
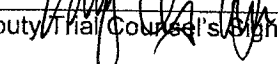
Pursuant to rule 3201, Respondent may not receive MCLE credit for completion of for State Bar Ethics School, State Bar Client Trust Accounting School, and/or any other educational course(s) to be ordered as a condition of reproof or suspension. (Rules Proc. of State Bar, rule 3201.)

(Do not write above this line.)

In the Matter of: HERCHEL McCOY SIMS	Case number(s): 15-O-14260-WKM
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SIGNATURE OF THE PARTIES

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

<u>5/13/16</u> Date	 Respondent's Signature	<u>HERCHEL SIMS</u> Print Name
<u>5/20/16</u> Date	 Respondent's Counsel Signature	<u>KIMBERLY G. ANDERSON</u> Print Name
<u>5/20/16</u> Date	 Deputy Trial Counsel's Signature	<u>KIMBERLY G. ANDERSON</u> Print Name

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In the Matter of: HERCHEL McCOY SIMS	Case Number(s): 15-O-14260-WKM
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ACTUAL SUSPENSION ORDER

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

- ☐ The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.
 - ☒ The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
 - ☒ All Hearing dates are vacated.
1. On page 5 of the stipulation, in subsection E(8): the "X" in the first box is DELETED to remove the probation condition requiring that respondent attend and successfully complete the State Bar's Ethics School; an "X" is INSERTED in the second box to expressly provide that no Ethics School probation condition is recommended in this proceeding; and the following text is INSERTED after the word "Reason:"
- Respondent was recently required to attend and successfully complete the State Bar's Ethics School under the Supreme Court's disciplinary order in case number S226323 (State Bar Court case number 14 O 00393, etc.). (Cf. Rules Proc. of State Bar, rule 5.135(A).) If respondent fails to comply with the Ethics School requirement imposed on him in case number S226323, he will be subject to further discipline.
2. On page 6 of the stipulation, in section F(5) (Other Conditions), the first paragraph, which begins "Ethics School," is DELETED in its entirety.

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.)**

June 13, 2016
Date

W. Kearse McGill
W. KEARSE MCGILL
Judge of the State Bar Court

CERTIFICATE OF SERVICE

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

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on June 13, 2016, 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:

**HERCHEL M. SIMS
LAW OFC H J SIMS
7668 EL CAMINO REAL STE 438
LA COSTA, CA 92009**

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

KIMBERLY G. ANDERSON, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on June 13, 2016.



Paul Barona
Case Administrator
State Bar Court