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# PUBLIC MATTER

## THE STATE BAR COURT HEARING DEPARTMENT - LOS ANGELES

In the Matter of )  
DAVID WESTON NAPIER, )  
Member No. 192275, )  
A Member of the State Bar. )

Case No. 04-PM-13718-RAH  
**ORDER GRANTING MOTION TO  
REVOKE PROBATION AND ORDER OF  
INVOLUNTARY INACTIVE  
ENROLLMENT**

### I. INTRODUCTION

In this disciplinary matter which proceeded by default, Jayne Kim appeared for the Office of Probation of the State Bar of California (Office of Probation). Respondent, David Weston Napier, did not appear in person or by counsel.

Based upon alleged probation violations, the Office of Probation filed a motion to revoke the probation of Respondent imposed by the Supreme Court in its order filed on February 11, 2002, in case number S110458 (State Bar Court case number 01-J-05222).

After considering the evidence and the law in this matter, the Court finds by a preponderance of the evidence that Respondent wilfully failed to comply with the terms of his probation. (Bus. & Prof. Code section 6093(c).)<sup>1</sup> The Court hereby grants the Office of Probation's motion to revoke Respondent's probation and its request to involuntarily enroll him as an inactive member of the State Bar pursuant to section 6007(d). The Court therefore recommends that Respondent's probation be revoked, that the previously ordered stay be lifted, and that Respondent be actually suspended from

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<sup>1</sup>Unless otherwise indicated, all further references to "section" refer to provisions of the Business and Professions Code.

1 the practice of law for eighteen months. The Court also orders the involuntary inactive enrollment  
2 of Respondent pursuant to section 6007(d).

## 3 **II. PERTINENT PROCEDURAL HISTORY**

4 On August 10, 2004, the Office of Probation filed a motion to revoke Respondent's  
5 probation, accompanied by the declaration of Yolanda Acosta, Exhibits 1-3 in support of motion,  
6 and a Probation Revocation Response form. A copy of these filed documents were properly served  
7 on Respondent by certified mail, return receipt requested, at his latest address shown on the official  
8 membership records of the State Bar pursuant to section 6002.1(c) and rules 60 and 563(a) of the  
9 Rules of Procedure of the State Bar of California (Rules of Procedure). The Office of Probation  
10 requested a hearing in this matter if Respondent responded to the motion, unless the Court, based  
11 upon the motion and response alone, determined that the Office of Probation's requested discipline  
12 was warranted.

13 On August 18, 2004, Respondent was properly served at his official membership records  
14 address with a notice advising him, among other things, of the particular judge and case  
15 administrator assigned to this matter. The copy of the notice of assignment was not returned to the  
16 State Bar Court by the U.S. Postal Service as undeliverable or for any other reason.

17 Respondent did not file a response to the Office of Probation's motion to revoke probation,  
18 and the time for doing so expired. On October 4, 2004, the Court filed an order taking the matter  
19 under submission.

20 On October 20, 2004, the Court filed an order vacating the submission date since the last  
21 submission order had not been properly served on Respondent. The Court subsequently took this  
22 matter under submission on November 10, 2004.

## 23 **III. FINDINGS OF FACT**

24 Failure to file a response to a motion to revoke probation shall constitute an admission of the  
25 factual allegations contained in the motion and supporting documents. (Rules Proc. of State Bar,  
26 rule 563(b)(3).) The declaration of Yolanda Acosta and Exhibits 1-3 are admitted into evidence in  
27 accordance with rule 563(e) of the Rules of Procedure. The Court's factual findings are based on  
28 the allegations contained in the motion, the declaration of Yolanda Acosta, and Exhibits 1-3 in

1 support of motion.<sup>2</sup>

2 **A. Jurisdiction**

3 Respondent was admitted to the practice of law in the State of California on December 8,  
4 1997. Respondent was a member of the California State Bar at all times relevant to the alleged  
5 misconduct.<sup>3</sup>

6 **B. Facts**

7 On January 6, 2003, the Supreme Court filed an order in case number S110458 (State Bar  
8 Court case number 01-J-05222) suspending Respondent from the practice of law for two years,  
9 staying execution of suspension, and placing Respondent on probation for two years subject to  
10 probation conditions. The Supreme Court order became effective February 5, 2003. (Cal. Rules of  
11 Court, rule 953(a).) In absence of evidence to the contrary, the Court finds that the Supreme Court  
12 order was properly served on Respondent. (Cal. Rules of Court, rule 24(a); Evid. Code section 664.)

13 Pursuant to the Supreme Court order, Respondent was ordered to comply with the following  
14 terms and conditions of probation, among others, during the probation period:

15 1. Submit written quarterly reports to the Office of Probation on each January 10, April 10,  
16 July 10, and October 10 of the period of probation, stating under penalty of perjury whether  
17 Respondent has complied with the State Bar Act, the Rules of Professional Conduct and all  
18 probation conditions during the preceding calendar quarter;

19 2. Furnish evidence with each quarterly report that Respondent is obtaining psychiatric or  
20 psychological help or treatment from a duly licensed psychiatrist, psychologist, or clinical social  
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22 <sup>2</sup>These exhibits consist of certified copies of Respondent's State Bar registration card and  
23 address history; copies of the California Supreme Court order filed January 6, 2003, in case no.  
24 S110458 and the disciplinary stipulation filed June 6, 2002, in case no. 01-J-05222; and a copy  
of a probation letter with attachments dated January 28, 2003, addressed to Respondent.

25 <sup>3</sup>There is no allegation in the revocation motion addressing Respondent's continued bar  
26 membership and the Office of Probation presented no evidence establishing Respondent's bar  
27 membership at the time he violated his probation conditions. In accordance with Evid. Code  
28 section 452(h), the Court, on its own motion, takes judicial notice of State Bar membership  
records establishing that Respondent has been a California bar member at all times since  
December 8, 1997.

1 worker. Such help or treatment should commence immediately, and in any event, no later than thirty  
2 (30) days after the effective date of the discipline in this matter. Treatment shall continue for six  
3 months or until a motion to modify this condition is granted and that ruling becomes final.<sup>4</sup>

4 On January 28, 2003, Probation Deputy Yolanda Acosta sent a letter to Respondent's official  
5 membership records address setting forth the terms and certain conditions of probation, including  
6 that quarterly reports and evidence of monthly mental health treatment were due beginning April 10,  
7 2003. The letter set forth that Respondent's failure to timely submit reports or any other proof of  
8 compliance would result in a non-compliance referral. Enclosed with the letter were, inter alia, a  
9 copy of the Supreme Court order imposing discipline, a copy of the disciplinary terms and conditions  
10 of probation, and a Quarterly Report Instructions sheet setting forth the reporting period schedule,  
11 and a Quarterly Report form. Acosta's letter was not returned to the Office of Probation as  
12 undeliverable or for any other reason.

13 On March 17, 2004, Acosta sent Respondent a message addressed to his official State Bar  
14 membership records email address requesting that he contact her regarding his delinquent quarterly  
15 report and evidence of medical treatment both due by January 10, 2004.

16 On May 13, 2004, Acosta sent a letter to Respondent's official membership records address  
17 reminding him that quarterly reports and evidence of medical treatment due January 10, 2004, and  
18 April 10, 2004, had not been received. Acosta's letter was not returned to the Office of Probation  
19 as undeliverable or for any other reason.

20 Respondent did not submit written quarterly reports due no later than January 10, April 10,  
21 and July 10, 2004. Respondent also did not submit evidence of monthly mental health treatment  
22 with his quarterly reports due no later than April 10, July 10, October 10 in 2003 and January 10,  
23 April 10, and July 10 in 2004.

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25 <sup>4</sup>Since there is no language stating that the condition that occurs first shall control, the  
26 required duration of Respondent's mental health treatment is ambiguous. There is no evidence  
27 that any motion to modify this condition was filed. The Court thus interprets the ambiguity of  
28 this condition in a light most favorable to Respondent and concludes that his requirement to  
obtain mental health treatment terminated six months after March 5, 2003, the latest date that  
treatment could commence.



1 treatment, he made no attempt to rectify or atone for the consequences of his misconduct. (Std.  
2 1.2(b)(v); *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702 [Failure  
3 to rectify misconduct by belatedly filing probation reports and proof of CLE completion in reprobation  
4 matter demonstrates indifference towards rectification].)

5 4. Respondent's lack of cooperation during a disciplinary proceeding, evidenced by his  
6 failure to participate in this proceeding, is an aggravating circumstance. (Std. 1.2(b)(vi); *Conroy v.*  
7 *State Bar* (1991) 53 Cal.3d 495, 507.)

8 **B. Mitigating Circumstances**

9 Since Respondent did not appear in person or by counsel in this disciplinary proceeding, no  
10 mitigating evidence was offered or received into evidence on his behalf and none can be gleaned  
11 from the record.

12 **C. Discussion**

13 The purpose of disciplinary proceedings is not to punish the attorney, but to protect the  
14 public, preserve public confidence in the profession, and maintain the highest possible professional  
15 standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; Standard 1.3.)

16 Public protection and rehabilitation of the attorney are the primary goals of disciplinary  
17 probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452.)  
18 Violating probation conditions significantly related to the misconduct for which probation was given  
19 warrants greater discipline than violating less significant conditions that do not call into question an  
20 attorney's progress toward rehabilitation or raise concerns about the need for public protection.  
21 (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. 525, 540.) In determining the appropriate  
22 level of discipline, the Court also considers the total length of stayed suspension which could be  
23 imposed as actual suspension and the total amount of actual suspension imposed earlier as a  
24 condition of the discipline when probation was granted. (*Ibid.*) Furthermore, according to rule 562  
25 of the Rules of Procedure, any actual suspension recommended cannot exceed the entire period of  
26 stayed suspension.

27 Respondent has been found culpable of failing to comply with the terms of his probation.  
28 There is no mitigation. In aggravation, the Court has found a prior record of discipline, multiple acts

1 of misconduct, indifference toward rectification or atonement, and failure to participate in the  
2 proceeding. In determining the discipline appropriate for the probation violations and aggravating  
3 factors present in Respondent's matter, the Court finds instructive *In the Matter of Broderick*  
4 (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 145.

5 In *Broderick* an attorney received a three-year stayed suspension and four years of probation  
6 conditioned on a one-year actual suspension for wilfully violating sections 6093(b), 6068(k), and  
7 6103 due to his failure to comply with the restitution, therapy evidence, and quarterly reporting  
8 requirements of his probation. In aggravation the attorney had a prior record of discipline, multiple  
9 acts of wrongdoing, and uncharged misconduct. The attorney was afforded significant mitigation  
10 for having made good faith attempts to pay restitution and obtain therapy, and for cooperating with  
11 the State Bar.

12 Although Respondent did not violate a restitution condition, in balance, his misconduct  
13 closely parallels that in *Broderick*. Furthermore, Respondent's matter involves more extensive  
14 factors in aggravation and none of the significant mitigation described in *Broderick*. The Court also  
15 finds that filing quarterly reports and submitting evidence of mental health treatment are important  
16 steps toward rehabilitation. Respondent's failure to comply with these probation violations reflects  
17 adversely on his rehabilitation efforts and thereby calls into question the need to protect the public.  
18 For these reasons, the Court concludes that Respondent's misconduct warrants a longer period of  
19 actual suspension than was imposed in *Broderick*.

20 The Office of Probation recommends, among other things, actual suspension of the entire  
21 period of stayed suspension.

22 After considering Respondent's misconduct and the law and balancing the aggravating  
23 factors and absence of mitigating factors, the Court concludes that Respondent's probation should  
24 be revoked and that Respondent should be actually suspended for eighteen months.

#### 25 **V. DISCIPLINE RECOMMENDATION**

26 The Court hereby recommends to the Supreme Court that Respondent's probation pursuant  
27 to the Supreme Court order in case number S110458 (State Bar case number 01-J-05222) be  
28 revoked, that the previous stay of execution of the suspension be lifted, and that Respondent, DAVID

1 WESTON NAPIER, be actually suspended from the practice of law for eighteen months.

2 **VI. ORDER REGARDING INACTIVE ENROLLMENT**

3 The Office of Probation requests that Respondent be involuntarily enrolled inactive pursuant  
4 to section 6007(d). Since Respondent is subject to a stayed suspension, he has been found to have  
5 violated probation, and it has been recommended that he be actually suspended due to the probation  
6 violation, the requirements of section 6007(d)(1) are satisfied.

7 IT IS THEREFORE ORDERED that Respondent, DAVID WESTON NAPIER, be  
8 involuntarily enrolled as an inactive member of the State Bar of California in accordance with  
9 section 6007(d). This enrollment shall be effective three days after this order is filed.

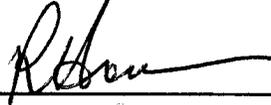
10 IT IS ALSO ORDERED that his inactive enrollment be terminated as provided in section  
11 6007(d)(2).

12 IT IS FURTHER RECOMMENDED that Respondent's actual suspension in this matter  
13 commence as of the date of his inactive enrollment pursuant to this order. (Bus. & Prof. Code  
14 section 6007(d)(3).)

15 **VII. COSTS**

16 It is further recommended that costs be awarded to the State Bar pursuant to section 6086.10  
17 and that those costs be payable in accordance with section 6140.7:

18  
19 Dated: November 24, 2004

  
\_\_\_\_\_  
20 RICHARD A. HONN  
21 Judge of the State Bar Court  
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**CERTIFICATE OF SERVICE**  
**[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]**

I am a Case Administrator of the State Bar Court. 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 November 29, 2004, I deposited a true copy of the following document(s):

**ORDER GRANTING MOTION TO REVOKE PROBATION AND ORDER OF  
INVOLUNTARY INACTIVE ENROLLMENT, filed November 29, 2004**

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

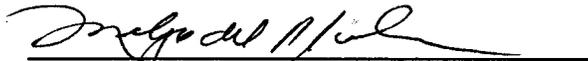
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**DAVID W NAPIER  
ATTORNEY AT LAW  
P O BOX 1114  
BISBEE, AZ 85603**

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

**Jayne Kim, Supervising Attorney Office of Probation, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **November 29, 2004.**

  
\_\_\_\_\_  
**Milagro del R. Salmeron**  
Case Administrator  
State Bar Court