


**State Bar Court of California**  
**Hearing Department**  
**San Francisco**

<b>Counsel For The State Bar</b>  <b>Esther Rogers</b> <b>State Bar of California</b> <b>180 Howard Street</b> <b>San Francisco, CA 94105</b> <b>(415)538-2000</b>  <b>Bar # 148246</b>	<b>Case Number (s)</b> <b>06-O-14419</b>	<b>(for Court's use)</b>  <b>PUBLIC MATTER</b>  <b>FILED</b>   <b>JUN 21 2007</b>  <b>STATE BAR COURT CLERK'S OFFICE</b> <b>SAN FRANCISCO</b>
<b>In Pro Per Respondent</b>  <b>Mark S. Axup</b> <b>1012 19<sup>th</sup> St.</b> <b>Sacramento, CA 95814</b> <b>(916)442-4224</b>  <b>Bar # 112876</b>	<b>Submitted to: Settlement Judge</b>	
<b>In the Matter Of:</b> <b>Mark S. Axup</b>  <b>Bar # 112876</b>  <b>A Member of the State Bar of California</b> <b>(Respondent)</b>	<b>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING</b>  <b>STAYED SUSPENSION; NO ACTUAL SUSPENSION</b>  <input type="checkbox"/> <b>PREVIOUS STIPULATION REJECTED</b>	

**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 **December 27, 1983**.
- (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 **9** 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):
- ☒ costs added to membership fee for calendar year following effective date of discipline.
  - ☐ costs to be paid in equal amounts prior to February 1 for the following membership years:  
(hardship, special circumstances or other good cause per rule 284, Rules of Procedure)
  - ☐ costs waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs"
  - ☐ costs entirely waived

**B. Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.**

- (1) ☒ **Prior record of discipline** [see standard 1.2(f)]
- (a) ☒ State Bar Court case # of prior case **See Attached**
  - (b) ☐ Date prior discipline effective
  - (c) ☐ Rules of Professional Conduct/ State Bar Act violations:
  - (d) ☐ Degree of prior discipline
  - (e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below or a separate attachment entitled "Prior Discipline."
- (2) ☐ **Dishonesty:** Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.
- (3) ☐ **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (4) ☐ **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.
- (5) ☐ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (6) ☐ **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.
- (7) ☐ **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.
- (8) ☐ **No aggravating circumstances** are involved.

**Additional aggravating circumstances**

**C. Mitigating Circumstances [see standard 1.2(e)]. Facts supporting mitigating circumstances are required.**

- (1) ☐ **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.
- (2) ☐ **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.
- (3) ☒ **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings. **Respondent agreed to the imposition of discipline without requiring a hearing.**
- (4) ☐ **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.
- (5) ☐ **Restitution:** Respondent paid \$ \_\_\_\_\_ on \_\_\_\_\_ in restitution to \_\_\_\_\_ without the threat or force of disciplinary, civil or criminal proceedings.
- (6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7) ☐ **Good Faith:** Respondent acted in good faith.
- (8) ☐ **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.
- (9) ☐ **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.
- (10) ☐ **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11) ☐ **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.
- (12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.
- (13) ☐ **No mitigating circumstances** are involved.

**Additional mitigating circumstances**

**D. Discipline:**

(1) ☒ **Stayed Suspension:**

(a) ☒ Respondent must be suspended from the practice of law for a period of **six months**.

- I. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.
- ii. ☐ and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii. ☐ and until Respondent does the following:

The above-referenced suspension is stayed.

(2) ☒ **Probation:**

Respondent is placed on probation for a period of **one year**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18 California Rules of Court)

**E. Additional Conditions of Probation:**

- (1) ☒ During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (2) ☒ 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.
- (3) ☒ 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.
- (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 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.

- (5) ☐ 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.
- (6) ☒ 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.

- (7) ☒ 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 State Bar Ethics School, and passage of the test given at the end of that session.
- ☐ No Ethics School recommended. Reason: .
- (8) ☐ 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.
- (9) ☐ 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 within one year. **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 321(a)(1) & (c), Rules of Procedure.**
- ☐ No MPRE recommended. Reason: .
- (2) ☐ **Other Conditions:**

**ATTACHMENT TO**  
**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION**

IN THE MATTER OF:        Mark S. Axup

CASE NUMBER(S):        06-O-14419

**FACTS AND CONCLUSIONS OF LAW.**

**Count One**

Facts

In or about September 2002, Keith Kessel was injured when the all terrain vehicle he was driving in a recreational area collided with the all terrain vehicle being driven by Amy Feuerstein. Prior to August 2003, Kesel employed attorney James Murphy to represent him in a civil lawsuit against Feuerstein. On August 25, 2003, Murphy filed a civil lawsuit against Feuerstein in the matter *Kesel v. Feuerstein*, Yolo County Superior Court, case number PM03-1602. On November 4, 2003, attorney Michael Jansen filed a cross complaint on Feuerstein's behalf against Kesel. Thereafter, Murphy failed to file an answer to the cross complaint on Kesel's behalf.

On March 5, 2004, Murphy filed a Case Management Conference Statement indicating that no discovery plan was pending because Kesel intended to substitute in new counsel. On March 19, 2004, Murphy filed a substitution of attorney, substituting in Kesel as a pro per. On March 22, 2004, Kesel and respondent appeared at a case management conference. Because respondent had not formally substituted into the case, respondent made a special appearance.

On April 2, 2004, Murphy filed a Request for Entry of Default. On April 2, 2004, the court entered default against Kesel on the cross complaint. On or about April 3, 2004, Kesel employed respondent to set aside the default judgment on the cross complaint and to represent him in the *Kesel v. Feuerstein* matter. At the time Kesel employed respondent to set aside the default, Kesel paid respondent \$3,000 in advanced fees.

On April 26, 2004 and June 14, 2004, respondent appeared on behalf of Kesel at Case Management Conferences. On August 9, 2004, the court set a Case Management Conference for October 4, 2004. Respondent learned of the October 4, 2004 Case Management Conference soon after it was set. On October 4, 2004, respondent arranged for his assistant to write a letter to the Yolo County Superior Court requesting a continuance of the Case Management Conference because he was in trial in Sacramento. On October 4, 2004, the court denied the request because respondent failed to notify opposing counsel. On October 4, 2004, respondent failed to appear at the Case Management Conference.

On October 4, 2004, Jensen filed a default prove up with supporting documentation, including a proposed judgment of \$250,742.65. Jensen served Kesel and respondent. On October 7, 2004, the court issued a judgment in favor of Feuerstein and against Kesel in the amount of \$250,742.65. On October 24, 2004, Jensen served Kesel with the Notice of Entry of Judgment and Judgment.

On April 29, 2005, respondent filed a Motion to Set Aside Default. The motion was set for June 16, 2005. Between on or about June 14, 2005 and on or about July 27, 2006, respondent continued the hearing on the Motion to Set Aside Default several times.

On July 27, 2006, the court continued the motion to set aside the default until October 26, 2006. The court order stated that the motion was original filed in April 2005, the proof of service filed with the motion indicated that service on defendant's counsel was proper and no new substantive papers had been filed since the original motion was filed. The court stated that it would not continue the matter again. The order also stated that if no new substantive papers were filed prior to the next hearing date, the court would drop the motion from calendar.

On or about October 26, 2006, Jansen wrote a letter to the court indicating that he had not been served with the Motion to Set Aside Default, that he had requested that respondent provide him with a copy, and that Jensen objected to the motion being granted since Jensen had no opportunity to respond. Respondent failed to appear at the October 26, 2006 hearing.

On October 26, 2006, the court issued an order taking the Motion to Set Aside Default off calendar pending Kesel's filing of substantive papers in accordance with the court's July 27, 2006 order. The order directed Kesel to set the matter for hearing once he complied with the court's order. Thereafter, respondent failed to re-set the matter for hearing and failed to take any action to set aside the default judgment.

On or about November 27, 2006, the Feuersteins assigned their right in the judgment to an asset and debt collector. In or about late November 2006, respondent informed Kesel that the court had dropped the default. However, the court filed indicated that the default had not been set aside and the default judgment remained valid and enforceable.

Respondent never informed Kesel that respondent failed to get a final ruling on the motion to set aside the default.

#### Conclusion of Law

Respondent repeatedly failed to perform with competence by failing to have the Motion to Set Aside the Default heard in a timely fashion, or at all, in wilful violation of Rules of Professional Conduct, rule 3-110(A).

## **Count Two**

### Facts

Count One is incorporated by reference as if fully set forth herein.

Respondent failed to inform Kesel that respondent never received a final ruling on the Motion to Set Aside Default because respondent failed to have the matter heard.

### Conclusions of Law

By failing to inform Kesel that respondent had never received a final ruling on the Motion to Set Aside the Default, respondent failed to inform his client of significant developments, in wilful violation of Business and Professions Code section 6068(m).

## **PRIOR RECORD OF DISCIPLINE**

Effective November 24, 1996, respondent received a public reproof in Case Number 94-0-13640 for issuing checks for insufficient funds from his trust account in violation of Rules of Professional Conduct, rule 4-100(B)(3).

## **ETHICS SCHOOL AND MPRE**

Respondent has indicated that he intends to take Ethics School and the MPRE as soon as possible and prior to the approval of this discipline by the Supreme Court. If respondent attends Ethics School and/or passes the MPRE prior to the effective date of his discipline, respondent shall receive credit for attending Ethics School and/or passing the MPRE and will not be required to repeat them after the effective date of this discipline.

## **PENDING PROCEEDINGS.**

The disclosure date referred to, on page one, paragraph A.(7), was May 21, 2007.

(Do not write above this line.)

In the Matter of  
MARK S. AXUP, #112876

Case number(s):  
06-O-14419

### 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 Fact, Conclusions of Law and Disposition.

6/4/07  
Date

  
Respondent's Signature

MARK S. AXUP  
Print Name

          
Date

          
Respondent's Counsel Signature

          
Print Name

6/6/07  
Date

  
Deputy Trial Counsel's Signature

ESTHER ROGERS  
Print Name

(Do not write above this line.)

In the Matter of Mark S. Axup	Case number(s): 06-O-14419
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## 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.

The Stipulation is modified as follows: On page 6, Third paragraph under the heading "Facts," the first sentence is modified to reflect that Jensen filed the Request for Entry of Default, not Murphy.

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 135(b), 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 953(a), California Rules of Court.)**

Date

6-21-07

GEORGE SCOTT

Judge of the State Bar Court

**CERTIFICATE OF SERVICE**  
**[Rule 62(b), Rules Proc.; 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 June 21, 2007, 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:

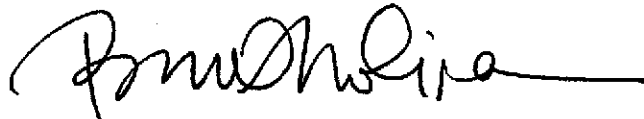
- [X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**MARK STEWART AXUP  
LAW OFC MARK S AXUP  
1012 19TH ST  
SACRAMENTO, CA 95814**

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

**ESTHER ROGERS, Enforcement, San Francisco**

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **June 21, 2007.**



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**Bernadette C. O. Molina**  
Case Administrator  
State Bar Court