

**STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of	)	Case No. 08-O-10471-RAH
	)	
<b>JAMES B. MARKUM,</b>	)	<b>DECISION</b>
	)	
<b>Member No. 170326,</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

In this default proceeding, respondent **James B. Markum** is found culpable, by clear and convincing the evidence, of failing to comply with the conditions of his probation. The court recommends, among other things, that respondent be suspended from the practice of law for eighteen months, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for one year and until he makes restitution as specified below and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

**II. Pertinent Procedural History**

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed a notice of disciplinary charges (NDC) on March 13, 2008, and properly served it on respondent at his official membership records address. On April 7, 2008, the NDC was returned to the State Bar as "Unclaimed."

On April 8, 2008, the State Bar mailed a copy of the NDC via regular first class mail to respondent at his official membership records address. The copy of the NDC was not returned as undeliverable or for any other reason.

Respondent did not file a response to the NDC. (Rules Proc of State Bar, rule 103.)

On motion of the State Bar, respondent's default was entered on April 25, 2008. Respondent was enrolled as an inactive member under Business and Professions Code section 6007(e)<sup>1</sup> on April 28, 2008.

Respondent did not participate in the disciplinary proceedings. The court took this matter under submission on April 28, 2008, following the filing of the State Bar's brief on culpability and discipline.

### **III. Findings of Fact and Conclusions of Law**

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on June 2, 1994, and has been a member of the State Bar of California at all times since that date.

#### **B. Failure to Comply with Probation Conditions**

On August 29, 2006, the California Supreme Court ordered respondent suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for three years subject to certain conditions, including restitution, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed May 9, 2006. (Supreme Court case No. S144526, State Bar Court case Nos. **04-O-15325** (04-O-15843; 05-O-00396; 05-O-00459); **05-O-04049** (06-O-10683) (Cons.).) The order became effective September 28, 2006, and was properly served upon respondent in the manner prescribed by California Rules of Court, rule 8.532(a), at respondent's official address in accordance with section 6002.1.

Among the probation conditions, respondent was required to:

1. Submit to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation, a written probation report stating, under penalty of

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<sup>1</sup>All references to section are to the Business and Professions Code, unless otherwise indicated.

perjury, whether he complied with the Rules of Professional Conduct of the State Bar of California, the State Bar Act, and all the conditions of probation during the preceding calendar quarter (quarterly probation reports);

2. Attend at least two AA meetings per month and provide to the Office of Probation satisfactory proof of attendance for each month, on or before the tenth (10th) day of the following month, during the probation period.
3. Provide 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 within one year from the effective date of his discipline, i.e., by September 28, 2007.
4. Make restitution to complainant (1) Sue Newton (Newton) (or the Client Security Fund, if applicable) in the amount of \$2,500 plus interest at the rate of 10 percent per annum from December 20, 2004; (2) Lyle Crowe (Crowe) (or the Client Security Fund, if applicable) in the amount of \$5,000 plus interest at the rate of 10 percent per annum from December 20, 2004; (3) Kristen DiValentin (DiValentin) (or the Client Security Fund, if applicable) in the amount of \$10,000 plus interest at the rate of 10 percent per annum from December 20, 2004; (4) Issa Ballat (Ballat) (or the Client Security Fund, if applicable) in the amount of \$5,000 plus interest at the rate of 10 percent per annum from December 20, 2004; and Linda Boruff (Boruff) (or the Client Security Fund, if applicable) in the amount of \$2,500 plus interest at the rate of 10 percent per annum from December 20, 2004, and provide proof of all such restitution to the Office of Probation in his quarterly reports;
5. Pay the above-referenced complainants, restitution within three years of the effective date of the Supreme Court Order imposing discipline, pursuant to a payment schedule of \$569 per month with \$100 per month paid to each of the following: Newton, Crowe, Ballat and Boruff and \$169 per month paid to DiValentin, and provide satisfactory proof of payment to the Office of Probation with each quarterly report.

Additionally, on November 9, 2006, the Office of Probation sent respondent a letter at his official address, reminding him of his probation conditions, and enclosing various related documents. The

letter was not returned as undeliverable or for any other reason.

Nevertheless, respondent did not provide satisfactory proof to the Office of Probation of his attendance at any AA meetings since September 28, 2006. Respondent did not make any restitution payments to Newton, Crowe, Ballat, Boruff and/or DiValentin (or to the Client Security Fund). Furthermore, he did not submit to the Office of Probation the quarterly reports due on April 10, July 10, and October 10, 2007, and on January 10, 2008; nor did he timely submit the quarterly report due on January 10, 2007. Moreover, respondent did not provide satisfactory proof to the Office of Probation of his attendance at the State Bar Ethics School.

***Count 1: Business and Professions Code Section 6068, Subdivision (k)***

Section 6068, subdivision (k), provides that it is the duty of an attorney to comply with all conditions attached to a disciplinary probation.

The State Bar has shown by clear and convincing evidence that respondent willfully violated section 6068, subdivision (k), by failing to: (1) provide to the Office of Probation proof of attendance at any AA meetings; (2) make restitution to Newton, Crowe, Ballat, Boruff and/or DiValentin (or the Client Security Fund); (3) timely submit the quarterly report due on January 10, 2007; (4) submit quarterly reports due on April 10, July 10, and October 10, 2007, or the report due on January 10, 2008; and (5) provide satisfactory proof to the Office of Probation of his attendance at the State Bar Ethics School pursuant to the SCO.

**IV. Mitigating and Aggravating Circumstances**

**A. Mitigation**

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, Std. 1.2(e).)<sup>2</sup>

**B. Aggravation**

There are several aggravating factors. (Std. 1.2(b).)

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) In the underlying matter, respondent stipulated to a one-year stayed suspension and three-year

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<sup>2</sup>All further references to standards are to this source.

probation with certain conditions, as discussed above, for his misconduct in six client matters. In case Nos. 04-O-15325, 04-O-15843, 05-O-00396, and 05-O-00459, respondent failed to perform with competence and failed to return unearned advanced fees. In case Nos. 05-O-04049 and 06-O-10683, respondent failed to perform with competence. (Supreme Court case No. S144526; State Bar Court case No. 04-O-15325 et al.).

Respondent committed multiple acts or wrongdoing. (Std.1.2(b)(ii).) He violated four separate conditions of probation.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by failing to comply with the probation conditions even after the NDC in the instant proceeding was filed. (Std. 1.2(b)(v).) He has yet to make restitution or attend a course in ethics.

Respondent's failure to participate in this proceeding prior to the entry of his default is a serious aggravating factor. (Std.1.2(b)(vi).)

## **V. Discussion**

\_\_\_\_\_The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.) Disciplinary probation serves the critical function of protecting the public and rehabilitating the attorney. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

Respondent is found culpable of violating his probation conditions. The standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 1.7(a), and 2.6.)

Standard 1.7(a) provides "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by Standard 1.2(f), the degree of discipline in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that

imposing greater discipline in the current proceeding would be manifestly unjust.”

Standard 2.6(a) provides for discipline ranging from suspension to disbarment for violations of subdivisions of section 6068, depending on the gravity of the offense or the harm to the victim.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.) The court will look to applicable case law for guidance. Nevertheless, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The extent of the discipline to recommend in this matter is dependent, in part on the nature of the probation violation and its relationship to respondent’s prior misconduct. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

The State Bar urges an actual suspension of one-year, citing *In the Matter of John Henry Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, *In the Matter of Charles Clinton Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, and *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445 in support of its recommendation.

In *John Henry Hunter*, a probation revocation matter, an attorney violated his disciplinary probation by failing to pay restitution and by filing a tardy, incomplete quarterly probation report. He had a record of prior discipline. The attorney was actually suspended for one year and until he completes restitution.

In *Howard*, the attorney was actually suspended for one year because he failed to submit two quarterly probation reports, to timely deliver financial records to a former client’s accountant, and defaulted in the disciplinary proceeding. The attorney’s lack of cooperation with the State Bar was a serious concern.

In *Charles Clinton Hunter*, in consideration of three consolidated matters involving a probation revocation proceeding and two original disciplinary matters, the Review Department recommended that the attorney be actually suspended for three years for violating his probation conditions, but disbarred for the two original disciplinary matters. The attorney also had one prior record of discipline and defaulted in the consolidated matters.

The court finds the misconduct found in *Charles Clinton Hunter* is more serious than that of respondent and that *John Henry Hunter* and *Howard* are more analogous to this matter.

“[A] probation ‘reporting requirement permits the State Bar to monitor [an attorney probationer’s] compliance with professional standards.’” (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, “an attorney probationer’s filing of quarterly probation reports is an important step towards the attorney’s rehabilitation.” (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) Thus, respondent’s failure to file quarterly reports warrants significant discipline.

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) Failing to appear and participate in this hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His failure to participate in this proceeding leaves the court without information about the underlying cause of respondent’s misconduct or of any mitigating circumstances surrounding his misconduct.

Therefore, in view of respondent’s misconduct, the case law and the aggravating evidence, placing respondent on an actual suspension for one year and until he makes restitution and until he shows rehabilitation would be appropriate to protect the public and to preserve public confidence in the profession.

## **VI. Recommended Discipline**

Accordingly, the court hereby recommends that respondent **James B. Markum** be suspended from the practice of law for eighteen months, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for one year and until: (A) he files and the State Bar Court grants a motion to terminate his actual suspension (Rules Proc. of the State Bar, rule 205) and (B) he makes restitution to:

1. Sue Newton in the amount of \$2,500 plus interest at the rate of 10 percent per annum from December 20, 2004 (or the Client Security Fund to the extent of any payment from the

fund to Sue Newton, plus interest and costs, in accordance with Business and Professions Code section 6140.5);

2. Lyle Crowe in the amount of \$5,000 plus interest at the rate of 10 percent per annum from December 20, 2004 (or the Client Security Fund to the extent of any payment from the fund to Lyle Crowe, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
3. Kristen DiValentin in the amount of \$10,000 plus interest at the rate of 10 percent per annum from December 20, 2004 (or the Client Security Fund to the extent of any payment from the fund to Kristen DiValentin, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
4. Issa Ballat in the amount of \$5,000 plus interest at the rate of 10 percent per annum from December 20, 2004 (or the Client Security Fund to the extent of any payment from the fund to Issa Ballat, plus interest and costs, in accordance with Business and Professions Code section 6140.5); and
5. Linda Boruff in the amount of \$2,500 plus interest at the rate of 10 percent per annum from December 20, 2004 (or the Client Security Fund to the extent of any payment from the fund to Linda Boruff, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

It is also recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)



If the period of actual suspension reaches or exceeds two years, it is recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

It is further recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20(a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Wilful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.<sup>3</sup>

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination as he was previously ordered to do so in S144526.

#### **VII. Costs**

The court recommends 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.

#### **VIII. Order Regarding Inactive Enrollment**

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(d). (Rules Proc. of State Bar, rule 564.)

Dated: July 18, 2008

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RICHARD A. HONN  
Judge of the State Bar Court

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<sup>3</sup>Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)