

**STATE BAR COURT OF CALIFORNIA**  
**HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of	)	Case No.: <b>10-H-03269-LMA</b>
	)	
<b>JAMES HADRIAN KLINKNER,</b>	)	<b>DECISION &amp; DIRECTIVE TO CASE</b>
	)	<b>ADMINISTRATORS</b>
<b>Member No. 197236,</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

In this reproof violation proceeding, which proceeded by default, the court finds that respondent **JAMES HADRIAN KLINKNER** is culpable of willfully violating his duty, under State Bar Rules of Professional Conduct, rule 1-110 (hereafter rule 1-110), to comply with the conditions attached to the public reproof that was imposed on him in December 2008 in *In the Matter of James Hadrian Klinkner*, State Bar Court case number 08-O-10535, etc. (hereafter *Klinkner I*). Specifically, the court finds respondent culpable of failing to comply with two of the seven conditions attached to his public reproof in *Klinkner I*.

For the reasons set forth *post*, the court concludes that the appropriate level of discipline for the found misconduct is one year’s stayed suspension together with a sixty-day suspension that will continue until respondent files his final reproof report and until respondent makes and the State Bar Court grants a motion to terminate the suspension (Rules Proc. of State Bar, rule 205).

The Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar) was represented by Deputy Trial Counsel Tammy M. Albertsen-Murray (hereafter DTC Albertsen-Murray). Respondent did not appear in person or by counsel.

## **II. Pertinent Procedural History**

On April 20, 2010, the State Bar filed the notice of disciplinary charges (hereafter NDC) against respondent and, in accordance with Business and Professions Code section 6002.1, subdivision (c),<sup>1</sup> properly served a copy of the NDC on respondent by certified mail, return receipt requested, at his then latest address shown on the official membership records of the State Bar of California (hereafter official address). However, the United States Postal Service returned the service copy of the NDC to the State Bar undelivered and stamped “RTS/Return to Sender/Unclaimed/Closed Mailbox.” Even though respondent never received a copy of the NDC, service on respondent was deemed complete when mailed on April 20, 2010. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.)

Respondent failed to file a response to the NDC, which was due no later than May 17, 2010 (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time]). On May 24, 2010, respondent updated his official address. And, in a telephone conversation on May 26, 2010, DTC Albertsen-Murray and respondent “discussed” the present proceeding and respondent’s failure to timely file a response to the NDC was discussed.<sup>2</sup> However, respondent thereafter still failed to file a response to the NDC.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

<sup>2</sup> It is disappointing that, in her May 26, 2010 telephone conversation with respondent, DTC Albertsen-Murray failed to extend to respondent the professional courtesy of offering to promptly mail, fax, or email a copy of the NDC to him. (Cf. California Attorney Guidelines of Civility and Professionalism (Adopted by State Bar Board of Governors on Jul. 20, 2007), § 4, example (h).)

And, on June 11, 2010, the State Bar filed a motion for the entry of respondent's default and served a copy of that motion on respondent by certified mail, return receipt requested, at his updated official address. Thereafter, respondent failed to file a response to the motion for entry of default or to the NDC, and the time in which respondent was to have filed those responses has run.

Because all of the statutory and rule prerequisites were met and because respondent has actual knowledge of this proceeding, the court filed an order on June 29, 2010, entering respondent's default and, as mandated by section 6007, subdivision (e)(1), ordering that respondent be involuntary enrolled as an inactive member of the State Bar of California effective July 2, 2010.<sup>3</sup>

On July 9, 2010, the State Bar filed a waiver of default hearing and a brief regarding discipline. Thereafter, the court took the matter under submission for decision without a hearing.

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

Under section 6088 and Rules of Procedure of the State Bar, rules 200(d)(1)(A) and 201(c), upon the entry of respondent's default, the factual allegations (but not the charges or conclusions) set forth in the NDC were deemed admitted and no further proof was required to establish the truth of those facts.<sup>4</sup> Accordingly, the court adopts the facts alleged (but not the charges or the conclusions) in the NDC as its factual findings. Briefly, those factual findings establish the following charged disciplinary violations by clear and convincing evidence.

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<sup>3</sup> Of course, an inactive member of the State Bar of California cannot lawfully practice law in this state. (§ 6126, subd. (b).) Moreover, an attorney who has been enrolled inactive cannot lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

<sup>4</sup> Notwithstanding the entry of respondent's default, "All reasonable doubts must [still] be resolved in [his] favor . . . , and if equally reasonable inferences may be drawn from a proven fact, the inference which leads to a conclusion of innocence rather than guilt [must] be accepted [by the court]. [Citation.]" (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.)

## **A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on December 7, 1998, and has been a member of the State Bar of California since that time.

## **B. Repeal Violations**

On December 1, 2008, the State Bar Court filed an order in *Klinkner I* imposing, on respondent, a public reproof with seven conditions attached thereto for one year. (§ 6078; Cal. Rules of Court, rule 9.19(a).) That December 1, 2009 order became final and the public reproof became effective on December 21, 2008. Soon after December 1, 2008, respondent received notice of and obtained actual knowledge of the public reproof and the seven conditions attached to it.

In *Klinkner I*, the State Bar Court imposed the public reproof, including each of the seven reproof conditions, on respondent in accordance with a stipulation as to facts, conclusions of law, and disposition that respondent entered into with the State Bar and that was approved by the State Bar Court. Thus, the misconduct found in the present proceeding represents respondent's failure to comply with his own agreement.

### **1. Quarterly-Reporting Repeal Condition**

Respondent's quarterly-reporting reproof condition required that, on every January 10, April 10, July 10, and October 10, respondent submit, to the Office of Probation, a written report stating, under penalty of perjury, whether he complied with the State Bar Rules of Professional Conduct and the State Bar Act (§ 6000, et seq.) during the preceding calendar quarter. In addition, the condition required respondent to submit a final report with the last 20 days of his one-year reproof period.

The record establishes that respondent willfully violated his duty, under rule 1-110, to comply with this reproof condition (1) by submitting the report due July 10, 2009, six days' late

on July 16, 2009, and (2) by failing to submit the final report that was due between December 2, 2009, and December 21, 2009.

The record, however, does not establish that respondent failed to timely submit his report due November 10, 2009. Respondent did not have a report due on November 10, 2009. Accordingly, that charged violation of rule 1-110 is dismissed with prejudice.

## **2. Professional-Responsibility-Examination Reproval Condition**

Respondent's professional-responsibility-examination reproval condition required that he take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) no later than December 21, 2009. Even though respondent took the November 2009 MPRE, he did not pass the examination. To date, respondent has still not passed the MPRE.

The record establishes that respondent willfully violated his duty, under rule 1-110, to comply with his MPRE reproval condition by failing to take and pass the MPRE no later than December 21, 2009.

## **IV. Aggravation and Mitigation**

### **A. Aggravation**

#### **1. Prior Record of Discipline**

Respondent has a prior record of discipline, which is an aggravating circumstance under standard 1.2(b)(i) of the Standards for Attorney Sanctions for Professional Misconduct.<sup>5</sup>

Respondent's prior record is the public reproval imposed on him in *Klinkner I*.<sup>6</sup>

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<sup>5</sup> The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

<sup>6</sup> The State Bar has the burden of proving all aggravating circumstances by clear and convincing evidence. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932-933; *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 148.) Rules of Procedure of the State Bar, rule 216(a) provides, in pertinent part, that a prior record of discipline consists of an authenticated copy of all charges, stipulations, findings and decisions reflecting or recommending imposition of discipline. Rule 216(a) further provides that, if part or all of a prior

In *Klinkner I*, respondent stipulated to willfully failing to competently perform legal services (Rules Prof. Conduct, rule 3-110(A)) and failing to adequately communicate with his client (§ 6068, subd. (m)) in two separate client matters. In addition, in one of the two client matters, respondent also stipulated to willfully failing to return the client's file after his employment was terminated (Rules Prof. Conduct, rule 3-700(D)(1)). In aggravation, respondent's misconduct caused client harm in one matter. And, in mitigation, respondent had no prior record of discipline.

## **2. Multiple Acts**

Respondent's misconduct involves a total of three violations of two of the conditions attached to his private reproof in *Klinkner I*. (Std. 1.2(b)(ii).)

## **3. Indifference**

Respondent's failure to rectify his misconduct by filing his final report and by taking the MPRE again once he learned that the State Bar had filed the present reproof violation proceeding against him establishes respondent's indifference toward rectification, which is an aggravating circumstance. (Std. 1.2(b)(v); cf. *In the Matter of Meyer* (Review Dept. 1997) 3 Cal.

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record of discipline is lost or destroyed, the record may be established by clear and convincing evidence.

Rule 216 clearly anticipates that the State Bar will introduce certified copies of documents reflecting a respondent's prior record of discipline. Such practice makes the prior record of discipline a part of the official record of the State Bar Court proceeding and enhances the ability of the Supreme Court to conduct its independent, *de novo* review of the State Bar Court's decision and of the record supporting that decision. (*In the Matter of Kizer* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 87, 93.)

In this proceeding, the State Bar did not proffer copies of the documents reflecting respondent's prior disciplinary record into evidence. Although the court has independently obtained copies of respondent's prior disciplinary record and will take judicial notice of and consider the prior record in making its decision in this proceeding, the court insists that the State Bar fully meet its evidentiary obligations in the future.

The court hereby directs the Clerk to mark respondent's prior disciplinary record as a court exhibit in this proceeding and to include that exhibit as a part of the record that is transmitted to the Supreme Court.

State Bar Ct. Rptr. 697, 702; see also *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.)

#### **4. Failure to File a Response to the NDC**

Respondent's failures to file a response to the NDC in this proceeding, which allowed his default to be entered, is an aggravating circumstance. (Std. 1.2(b)(vi).)

#### **B. Mitigation**

Because respondent did not appear in this proceeding, he did not establish any mitigating circumstances. Nor is any mitigating circumstance otherwise apparent from the record.

### **V. Discussion**

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

The applicable standards in the instant proceeding are: (1) standard 2.9, which provides that a willful violation of rule 1-110 must result in suspension; and (2) standard 1.7(a), which provides that, when an attorney has a prior record of discipline, then “the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed 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.”

The case of *Conroy v. State Bar* (1990) 51 Cal.3d 799, is instructive on the issue of discipline here. In *Conroy*, the attorney was placed on one year’s stayed suspension and one

year's probation on conditions, including that the attorney be suspended during the first sixty days of his probation.

In *Conroy*, the attorney had previously been privately reprovved for committing three unrelated acts of misconduct. A condition attached to that reprovval required the attorney to take and pass the Professional Responsibility Examination (hereafter PRE) within one year. The attorney, however, failed to do so. In *Conroy*, the single extenuating factor was that the attorney took and passed the PRE at the next available opportunity. And the three aggravating circumstances in that case were (1) one prior record of discipline, (2) the attorney defaulted in the State Bar Court, and (3) the attorney lacked understanding of the gravity of his misconduct by arguing, before the Supreme Court, that his misconduct was a mere technical lapse.

On balance, the court finds that the appropriate level of discipline in the present proceeding is one years' stayed suspension and a sixty-day suspension that will continue until respondent files his final reprovval report and until he makes and the State Bar Court grants a motion to terminate the suspension under Rules of Procedure of the State Bar, rule 205.

## **VI. Recommended Discipline**

The court recommends that respondent **JAMES HADRIAN KLINKNER**, State Bar number 197236, be suspended from the practice of law in the State of California for one year and that execution of the one-year suspension be stayed on the condition that he be suspended from the practice of law in this state for sixty days and until (1) he files his final reprovval report in State Bar Court case number 08-O-10535, which was due no later than December 21, 2009, and (2) he makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his suspension.

Moreover, if Klinkner's suspension in this matter continues for two years or more as a result of his failure to satisfy the preceding two conditions, the court recommends that Klinkner

remain suspended until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

The court also recommends that Klinkner be ordered to comply with the conditions of probation, if any, hereafter imposed on him by the State Bar Court as a condition for terminating his suspension. (Rules Proc. of State Bar, rule 205(g).)

#### **VII. MPRE**

The court further recommends that James Hadrian Klinkner be ordered to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) within one year after the effective date of the Supreme Court's disciplinary order in this matter or during the period of his suspension, whichever is longer, and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same time period. Failure to pass the MPRE within the specified time results in actual suspension until passage without further hearing. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; see also Cal. Rules of Court, rule 9.10(b); but see Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rule 321(a)(1)&(3).)

#### **VIII. Rule 9.20**

The court also recommends that, if James Hadrian Klinkner remains suspended for 90 days or more, he be required to comply with California Rules of Court, rule 9.20 and to 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 order in this matter.

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## **IX. Costs**

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: October \_\_\_\_ 2010.

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**LUCY ARMENDARIZ**  
Judge of the State Bar Court