

PUBLIC MATTER

FILED

DEC 07 2004

**THE STATE BAR COURT
HEARING DEPARTMENT - SAN FRANCISCO**

STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

In the Matter of
MICHELLE D. PERRY,
Member No. 168729,
A Member of the State Bar.

Case No. 03-C-00415-PEM
DECISION

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INTRODUCTION

This disciplinary proceeding arises out of the criminal conviction of respondent Michelle D. Perry on July 14, 1999, of a misdemeanor violation of Vehicle Code section 23152(a) [driving under the influence of alcohol or drugs]. The Office of the Chief Trial Counsel ("OCTC") was represented by Cydney Batchelor. Respondent did not participate in the proceedings.

After considering the facts and the law applicable to this matter, the Court recommends, among other things, actual suspension of 60 days and until respondent complies with rule 205, Rules Proc. of State Bar.

SIGNIFICANT PROCEDURAL HISTORY

On November 17, 2003, OCTC filed the Transmittal of Records of Conviction of Attorney which had been properly served on respondent on November 14, 2003.

By order filed January 27, 2004, the State Bar Court Review Department referred this disciplinary proceeding to the Hearing Department, pursuant to rule 951(a) of the California Rules of Court, for a hearing and decision regarding whether the facts and circumstances surrounding Respondent's violation of Vehicle Code section 23152(a) involved moral turpitude or other misconduct warranting discipline and, if so, for a recommendation as to the discipline

1 that should be imposed. A copy of the referral order was properly served on respondent on that
2 same date. The correspondence was returned bearing a notation to return it to the sender since
3 respondent was not at that address.

4 Thereafter, on February 11, 2004, this Court filed a Notice of Hearing on Conviction and
5 caused it to be properly served upon respondent on the same date by certified mail, return receipt
6 requested, at her official State Bar membership records address. A notice setting a status
7 conference on April 12, 2004, was served at the same time. This correspondence was returned
8 bearing a notation to return it to the sender since respondent was not at that address.

9 Respondent did not file a response to the notice of hearing. She also did not appear at the
10 April 12 status conference. An order memorializing the status conference and advising
11 respondent that the matter would proceed by default was properly served on her at her official
12 address on April 13, 2004. This correspondence was returned bearing a notation to return it to
13 the sender since respondent was not at that address.

14 On June 23, 2004, a motion to enter respondent's default was filed and properly served at
15 her official membership records address by certified mail, return receipt requested. The motion
16 advised respondent that the following minimum level of discipline would be sought if he was
17 found culpable: one year and until compliance with standard 1.4(c)(ii), Standards for Attorney
18 Sanctions for Professional Misconduct ("standard(s)"), stayed; three years probation; and 60 days
19 actual suspension. She did not file a response to the motion.

20 On July 13, 2004, the Court entered respondent's default and enrolled her inactive
21 effective three days after service of the order. The order was properly served on her at her
22 official address by certified mail, return receipt requested.

23 OCTC's attempts to locate respondent were fruitless.

24 The matter was submitted for decision without hearing after OCTC filed a brief on
25 culpability and discipline on September 7, 2004.

26 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

27 Respondent's culpability is conclusively established by the record of **his/her** conviction.
28 (Section 6101(a); *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr.

1 581, 588.)

2 **Jurisdiction**

3 Respondent was admitted to the practice of law in California on December 14, 1993, and
4 has been a member of the State Bar at all times since.

5 **Facts**

6 On May 31, 1999, respondent was arrested for driving on the freeway while intoxicated.
7 The driver of another vehicle contacted the California Highway Patrol after seeing respondent's
8 car weaving on the road while traveling at 60 - 65 miles per hour.

9 The CHP officer stopped respondent's car. When he approached respondent, who was
10 driving with a passenger, he noted the strong odor of alcohol inside the car. Respondent came
11 out of the car and was unsteady on her feet. She had watery, bloodshot eyes and smelled of
12 alcohol. She would not respond to the officer's questions. After she was arrested, she gave a
13 breath test which indicated a blood alcohol level of 28%.

14 On June 23, 1999, respondent was charged in a misdemeanor complaint with one count
15 each of violating Vehicle Code sections 23152(a) and (b) with one prior instance of driving under
16 the influence within seven years¹ and section 14601.1(a) (driving with a suspended or revoked
17 license). There was also a special allegation of violating probation pursuant to Penal Code
18 section 1203.3. Respondent pleaded "no contest" to the section 23152(a) charge on July 14,
19 1999. The remaining charges were dismissed.

20 On October 13, 1999, respondent was sentenced to, among other things, four years
21 probation without supervision; 10 days in a work alternative program; payment of \$1190 fine and
22 \$100 restitution; completion of a Drinking Driver's Program; and one year restricted license.

23 **Conclusions of Law**

24 The Court finds the facts and circumstances surrounding the conduct leading to the
25 conviction for violation of Vehicle Code section 23152(a) do not involve moral turpitude, but do
26

27 ¹Respondent had one prior instance of driving under respondent the influence on December
28 17, 1997.

1 involve other misconduct warranting discipline.

2 **MITIGATING AND AGGRAVATING FACTORS**

3 **Aggravating Factors**

4 Respondent's failure to participate in these proceedings prior to the entry of default is also
5 an aggravating factor. (Standard 1.2(b)(vi).) She has demonstrated her contemptuous attitude
6 toward disciplinary proceedings as well as her failure to comprehend the duty of an officer of the
7 court to participate therein, a serious aggravating factor. ((Standard 1.2(b)(vi); Cf. *In the Matter*
8 *of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

9 **Mitigating Factors**

10 Since respondent did not participate in these proceedings and she bears the burden of
11 establishing mitigation by clear and convincing evidence, the Court has been provided no basis
12 for finding mitigating factors.

13 The Court is concerned about the unexplained delay in initiating the prosecution of this
14 1999 conviction but will not consider it in mitigation since there is no showing of prejudice to
15 respondent. (Standard 1.2(e)(ix).)

16 **DEGREE OF DISCIPLINE**

17 The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to
18 protect the public, to preserve public confidence in the profession and to maintain the highest
19 possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111;
20 *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; Standard 1.3.)

21 Standard 1.6 provides that the appropriate sanction for the misconduct found must be
22 balanced with any mitigating or aggravating circumstances, with due regard for the purposes of
23 imposing discipline. If two or more acts of professional misconduct are found in a single
24 disciplinary proceeding, the sanction imposed shall be the most severe of the applicable
25 sanctions. (Standard 1.6(a).) The level of discipline is progressive. (Standard 1.7(b).)

26 Standard 3.4 provides that the final conviction of a member of a crime which does not
27 involve moral turpitude but which does involve other misconduct warranting discipline shall
28 result in a sanction that is appropriate to the nature and extent of the misconduct found to have

1 been committed by the member. (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct.
2 Rptr. 108, 118; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.)
3 The standards, however, are guidelines from which the Court may deviate in fashioning the most
4 appropriate discipline considering all the proven facts and circumstances of a given matter. (*In*
5 *re Young* (1989) 49 Cal.3d 257, 267 (fn. 11); *Howard v. State Bar* (1990) 51 Cal.3d 215.) They
6 are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar*
7 (1988) 44 Cal. 3d 820, 828.)

8 In a conviction referral proceeding, "discipline is imposed according to the gravity of the
9 crime and the circumstances of the case."(*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State
10 Bar Ct. Rptr. 502, 510.) An attorney's commission of a crime involving moral turpitude is
11 always a matter of serious consequence but does not always result in disbarment; the sanction
12 imposed is determined in each case depending on the nature of the crime and the circumstances
13 presented by the record. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct.
14 Rptr. 96, 103.)

15 OCTC seeks 60 days actual suspension, among other things.

16 The Court found *In re Kelley* (1990) 52 Cal.3d 487 instructive. In *Kelley*, the Supreme
17 Court publicly reprovved an attorney and placed her on disciplinary probation for a period of three
18 years subject to conditions which included her referral to the State Bar's Program on Alcohol
19 Abuse. The attorney was convicted of drunk driving on two occasions over a 31-month period.
20 The second incident constituted a violation of her criminal probation in the first case. The
21 attorney's blood alcohol level in the second case was between 0.16% and 0.17%. The attorney
22 participated in the disciplinary proceeding and presented evidence in mitigation, including the
23 absence of a prior disciplinary record, extensive community service, compliance with all criminal
24 probation conditions since her second conviction and cooperation in the disciplinary proceedings.

25 The instant case merits greater discipline than *Kelley* because respondent herein did not
26 participate in the proceedings and no mitigating circumstances were presented. Accordingly, the
27 Court recommends that respondent be actually suspended for 60 days and until she complies with
28 rule 205. In order to be able to practice again, respondent will have to explain to this Court the

1 reason for not participating in this proceeding and declare her willingness to comply fully with
2 probation conditions that may hereafter imposed, among other things. This is adequate to protect
3 the public and proportionate to the misconduct found and the Court so recommends.

4 **RECOMMENDED DISCIPLINE**

5 IT IS HEREBY RECOMMENDED that respondent MICHELLE D. PERRY be
6 suspended from the practice of law for two years; that said suspension be stayed; and that she be
7 actually suspended from the practice of law for 60 days and until the State Bar Court grants a
8 motion to terminate respondent's actual suspension at its conclusion or upon such later date
9 ordered by the Court. (Rule 205(a), (c), Rules Proc. of State Bar.)

10 It is also recommended that she be ordered to comply with the conditions of probation, if
11 any, hereinafter imposed by the State Bar Court as a condition for terminating her actual
12 suspension.

13 If the period of actual suspension reaches or exceeds two years, it is further recommended
14 that respondent remain actually suspended until she has shown proof satisfactory to the State Bar
15 Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to
16 Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also,
17 rule 205(b).)

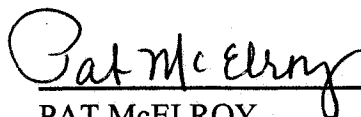
18 It is further recommended that respondent be ordered to take and pass the Multistate
19 Professional Responsibility Examination given by the National Conference of Bar Examiners
20 within one year from the effective date of the Supreme Court's order or during the period of her
21 actual suspension, whichever is longer, and furnish satisfactory proof of such to the Office of
22 Probation within said period. Failure to pass the MPRE, and to provide proof of such passage,
23 within the specified time period will result in actual suspension by the State Bar Court Review
24 Department without further hearing and that suspension will continue until respondent provides
25 the required proof of passage of the MPRE.

26 **COSTS**

27 It is recommended that costs be awarded to the State Bar pursuant to Business and
28 Professions Code section 6086.10, and that such costs be made payable and enforceable in

1 accordance with Business and Professions Code sections 6086.10, subdivision (a) and 6140.7.

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5 Dated: December 2, 2004

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7 PAT McELROY
8 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 San Francisco, on December 7, 2004, I deposited a true copy of the following document(s):

DECISION

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 San Francisco, California, addressed as follows:

**MICHELLE D. PERRY
171 12TH ST #300
OAKLAND CA 94607 4911**

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

CYDNEY BATCHELOR , Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **December 7, 2004.**



**Laurretta Cramer
Case Administrator
State Bar Court**