

PUBLIC MATTER

FILED

JUN 22 2005

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

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In the Matter of)	Case No. 03-C-03937-PEM
JOHN F. MORKEN,)	DECISION
Member No. 153979,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

This disciplinary proceeding arises out of the criminal conviction of respondent John F. Morken on January 30, 2004, of a misdemeanor violation of Vehicle Code section 23152, subdivision (a) [driving while under the influence of alcohol or drugs].

After respondent had reached a stipulation as to facts and conclusions of law with the Office of the Chief Trial Counsel of the State Bar of California (State Bar), which incorporated his criminal conviction, this Court approved the stipulation and accepted respondent as a participant in the State Bar Court's Program for Respondents with Substance Abuse or Mental Health Issues (hereinafter referred to as Alternative Discipline Program). (Rules Proc. of State Bar, rules 800-807.)

As set forth in greater detail below, respondent was terminated from the Alternative Discipline Program (ADP) as a result of his decision that he would no longer comply with the requirements of either the State Bar's Lawyer Assistance Program¹ (LAP) or the ADP.

In light of his misconduct in this proceeding and his history of prior discipline for alcohol-related driving offenses, this Court hereby publicly reprovves respondent and orders him to comply,

¹ (See Bus. & Prof. Code, § 6230 et seq.)

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1 for a period of three years, with the conditions set forth in the Discipline section of this Decision.

2 **II. SIGNIFICANT PROCEDURAL HISTORY**

3 By minute order filed June 8, 2004, the State Bar Court Review Department referred State
4 Bar Court case No. 03-C-03937 to the Hearing Department, pursuant to the California Rules of
5 Court, rule 951(a), for a hearing and decision regarding whether the facts and circumstances
6 surrounding respondent's violation of Vehicle Code section 23152, subdivision (a), involved moral
7 turpitude or other misconduct warranting discipline and, if so, for a recommendation as to the
8 discipline that should be imposed.

9 Thereafter, on June 30, 2004, this Court filed a Notice of Hearing on Conviction and properly
10 served it on respondent. On August 2, 2004, respondent filed an Answer to Notice of Hearing on
11 Conviction in which he admitted that a conviction of Vehicle Code section 23152, subdivision (a),
12 was entered in Marin County but denied that such conviction constituted moral turpitude or any other
13 misconduct warranting discipline.

14 At a status conference on December 7, 2004, State Bar Court Hearing Judge JoAnn M.
15 Remke referred respondent to this Court for a status conference on December 13, 2004, to determine
16 if respondent desired to participate in the ADP.

17 On March 21, 2005, this Court approved a Stipulation re Facts and Conclusions of Law
18 signed by the parties. (Rules Proc. of State Bar, rule 802(a).) The stipulation included respondent's
19 admission that his violation of Vehicle Code section 23152, subdivision (a), involved other
20 misconduct warranting discipline.

21 On the same date, this Court issued its Decision re Alternative Recommendations for Degree
22 of Discipline. (Rules Proc. of State Bar, rule 803(a).) After considering the Court's alternative
23 disciplinary recommendations, respondent elected to participate in the State Bar Court's ADP.
24 Following execution of a Contract and Waiver for Participation in the State Bar Court's ADP
25 (Program Contract) by respondent and his counsel, John S. Morken (respondent's father), this Court
26 accepted respondent into the ADP, effective March 21, 2005.

27 At a status conference conducted on June 13, 2005, respondent informed the Court that he
28 no longer wished to participate in the ADP.

1 This Court warned him of the consequences of his termination from the ADP. Among other
2 things, this Court warned respondent that paragraph 4 of the Program Contract signed by respondent
3 and his counsel on March 21, 2005, specifically provided that, if respondent ceases to participate in
4 the ADP or is terminated from the Program, the higher level of discipline set forth in the Decision
5 re Alternative Recommendations for Degree of Discipline will be imposed. Despite the Court's
6 warning, respondent was adamant that he would no longer comply with the terms and conditions of
7 the LAP and the ADP.

8 As a result, at the June 13, 2005 status conference, this Court terminated respondent from
9 the ADP and ordered that the Stipulation re Facts and Conclusions of Law (Stipulation) be filed.²
10 This Court further stated that it would prepare this decision regarding respondent's culpability and
11 the discipline to be imposed in this proceeding.

12 **III. FACTS AND CONCLUSIONS OF LAW**

13 The findings of fact are based on the Stipulation, which is incorporated by reference as if set
14 forth herein, and other documentary evidence.

15 **A. Jurisdiction**

16 Respondent was admitted to the practice of law in California on September 12, 1991, and has
17 been a member of the State Bar of California at all times relevant to this proceeding.

18 **B. Criminal Conviction**

19 On August 30, 2003, respondent was stopped by the California Highway Patrol for weaving
20 and for speeding in heavy fog conditions. Respondent was asked to take a chemical test for alcohol
21 or drugs but refused to do so.

22 Respondent was subsequently charged with a misdemeanor violation of Vehicle Code section
23 23152, subdivision (a) [driving under the influence of alcohol or drugs] and Vehicle Code section
24 23577 [refusal to submit to a chemical test]. The complaint also alleged that respondent had suffered
25 one prior misdemeanor conviction on September 15, 1998, of a violation of Vehicle Code section
26 23152, subdivision (b) [driving with blood alcohol level in excess of 0.08%].

27
28 ²The Stipulation is filed June 22, 2005, since it was inadvertently not filed June 13, 2005.

1 Respondent signed a "Guilty Plea Waiver Form" on January 29, 2004. The court accepted
2 respondent's guilty plea to the charged violation of Vehicle Code section 23152, subdivision (a), on
3 January 30, 2004, and struck the charged violation of Vehicle Code section 23577. Respondent also
4 admitted that he suffered a prior conviction on September 15, 1998. The court suspended imposition
5 of sentence and placed respondent on three years probation, with 15 days in jail. The court also
6 ordered respondent to attend a post-conviction drinking driver program and restricted his driver's
7 license for a period of one year.

8 The parties have stipulated, and the Court concludes, that the facts and circumstances
9 surrounding respondent's commission of a violation of Vehicle Code section 23152, subdivision (a),
10 did not involve moral turpitude but involved other misconduct warranting discipline. Additionally,
11 the parties stipulated, and the Court concludes, that respondent wilfully violated Business and
12 Professions Code section 6068, subdivision (a), which provides that it is the duty of a member of the
13 State Bar to support the Constitution and laws of the United States and of the State of California.

14 **IV. AGGRAVATION AND MITIGATION**

15 **A. Aggravation**

16 The parties have stipulated, and the Court finds, that respondent's admitted misconduct in
17 the current proceeding involved multiple acts of misconduct, since respondent both drove his
18 automobile while intoxicated and refused to submit to a chemical test. He also has a prior conviction
19 for driving under the influence of alcohol. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions
20 for Prof. Misconduct, std. 1.2(b)(ii).)³

21 **B. Mitigation**

22 Respondent has no record of prior discipline in approximately 12 years of practice prior to
23 his commission of the conduct that resulted in his criminal conviction. Such a period of practice
24 without prior discipline is entitled to weight as a mitigating factor. (Standard 1.2(e)(i); *Hawes v.*
25 *State Bar* (1990) 51 Cal.3d 587, 596 [significant weight given to more than 10 years of practice
26 without prior discipline]; *Schneider v. State Bar* (1987) 43 Cal.3d 784, 798-799 [13 years of practice
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28 ³All further references to standards are to this source.

1 without discipline was entitled to significant weight as a mitigating factor].)

2 The parties have also stipulated, and the Court finds, that respondent displayed candor and
3 cooperation with the State Bar during the disciplinary investigation and proceedings in this matter.
4 (Standard 1.2(e)(v).)

5 V. DISCUSSION

6 In determining the appropriate disposition in this matter, the Court looks at the purposes of
7 disciplinary proceedings and sanctions. The purpose of State Bar disciplinary proceedings is not to
8 punish the attorney, but to protect the public, preserve public confidence in the profession and
9 maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989)
10 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; Standard 1.3.) Standard
11 1.6(b) provides that the specific discipline for a particular violation found must be balanced with any
12 mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary
13 sanctions.

14 The Supreme Court has stated that the State Bar Court should always look to the Standards
15 for Attorney Sanctions for guidance when making a disciplinary recommendation. Although the
16 State Bar Court is not required to strictly follow the Standards in every case, the guidance of the
17 Standards should be followed whenever possible to help ensure greater consistency in disciplinary
18 sanctions for similar offenses. (*In re Young* (1989) 49 Cal.3d 257, 267 (fn. 5); *In re Naney* (1990)
19 51 Cal.3d 186, 190.)

20 Standard 3.4 provides that for the conviction of a crime that involves other misconduct
21 warranting discipline, the discipline should be appropriate to the nature and extent of the misconduct.
22 (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, 118; *In the Matter of Katz*
23 (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.)

24 The Court finds *In re Kelley* (1990) 52 Cal.3d 487 to be instructive. That case involved an
25 attorney with separate DUI convictions in 1984 and 1986. Kelley's second conviction occurred
26 while she was still on probation for the first offense and constituted a violation of her probation in
27 the earlier matter. Kelley's blood alcohol level in the second case was between .16 percent and .17
28 percent. Before the Supreme Court, Kelley argued that she should not be subject to any discipline

1 because her conduct was unrelated to the practice of law.

2 Because the Supreme Court found that a nexus existed between the attorney's misconduct
3 and the practice of law, the Court expressly declined to decide whether such a nexus was necessary
4 in finding that the misconduct warranted the imposition of discipline. The Supreme Court concluded
5 that a nexus existed between Kelley's second DUI conviction and the practice of law in two ways.
6 First, Kelley's second DUI conviction occurred while she was still on criminal probation from her
7 first offense and, therefore, evidenced a disregard for the conditions of her probation, the law and
8 the safety of the public. (*In re Kelley*, supra, 52 Cal.3d at p. 495.)

9 Second, and more importantly, the Supreme Court found that the circumstances surrounding
10 Kelley's two DUI convictions indicated a continuing problem with alcohol abuse. As for its finding
11 on the nexus issue, the Supreme Court stated:

12 "Petitioner's behavior evidences both a lack of respect for the legal
13 system and an alcohol abuse problem. Both problems, if not checked,
14 may spill over into petitioner's professional practice and adversely
affect her representation of clients and her practice of law." (*In re
Kelley*, supra, 52 Cal.3d at p. 496.)

15 The Supreme Court found that the facts and circumstances surrounding Kelley's conviction
16 involved other misconduct warranting discipline and that the imposition of a public reproof was
17 appropriate. (*In re Kelley*, supra, 52 Cal.3d at p. 498.)

18 In this Court's view, respondent's misconduct in the current case is substantially similar to
19 the misconduct in Kelley except for the fact that respondent was apparently not still on criminal
20 probation from his first DUI offense at the time of his commission of the second offense on August
21 30, 2003. Nevertheless, respondent's commission of multiple DUI offenses within a period of less
22 than six years evidences a disregard for the law and the safety of the public.

23 Additionally, respondent clearly has a substance abuse problem with alcohol since he has
24 suffered alcohol-related driving convictions in September 1998 and January 2004.

25 In light of the foregoing, the Court finds a clear nexus between respondent's misconduct and
26 the practice of law. Moreover, respondent has specifically acknowledged that the facts and
27 circumstances surrounding his conviction involved other misconduct warranting discipline. This
28 Court concludes that the discipline similar to that imposed upon the attorney in *In re Kelley*, i.e.

1 public reproof, is entirely appropriate.

2 **VI. DISCIPLINE**

3 **IT IS ORDERED** that respondent **JOHN F. MORKEN** is hereby publicly reproofed and,
4 for a period of three (3) years from the effective date of this Order, must comply with the following
5 conditions:

- 6 1. Respondent must comply with the provisions of the State Bar Act and of the Rules of
7 Professional Conduct;
- 8 2. Within 10 days of any change in the information required to be maintained on the State Bar's
9 membership records pursuant to Business and Professions Code section 6002.1, subdivision
10 (a), including his office address and telephone number, respondent must report such changes
11 in writing to the Membership Records Office of the State Bar and to the State Bar's Office
12 of Probation;
- 13 3. Respondent must submit written quarterly reports to the State Bar's Office of Probation no
14 later than each January 10, April 10, July 10 and October 10 of the period during which these
15 conditions are in effect. Under penalty of perjury, respondent must state whether he has
16 complied with the State Bar Act, the Rules of Professional Conduct and all conditions
17 attached to this public reproof during the preceding calendar quarter. If the first report will
18 cover a period of less than 30 days, that report must be submitted on the reporting date for
19 the next calendar quarter and must cover the extended period. In addition to all quarterly
20 reports, respondent must submit a final report, containing the same information required by
21 the quarterly reports. The final report must be submitted no earlier than 20 days before the
22 last day of the period during which these conditions apply and no later than the last day of
23 that period;
- 24 4. Within 30 days from the effective date of the discipline in this proceeding, respondent must
25 contact the Office of Probation and schedule a meeting with his assigned probation deputy
26 to discuss the conditions attached to this public reproof. Upon the direction of the Office
27 of Probation, respondent must meet with the probation deputy either in person or by
28 telephone. During the period in which these conditions are applicable, respondent must

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- promptly meet with the probation deputy as directed and upon request;
5. Respondent must comply with all conditions of probation in the underlying criminal matters and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation;
 6. Respondent must abstain from the use of any alcoholic beverages, and may neither use nor possess any narcotics, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription;
 7. Respondent must select a licensed medical laboratory approved by the Office of Probation and must furnish that laboratory with such blood and/or urine samples as may be required by the Office of Probation to show that respondent has abstained from the use of alcohol and drugs. The samples must be furnished to the laboratory in whatever manner may be specified by the laboratory to ensure specimen integrity. Respondent must cause the laboratory to provide to the Office of Probation, at respondent's expense, a screening report on or before the 10th day of each month of the period of probation, containing an analysis of respondent's blood and/or urine obtained not more than 10 days previously;
 8. Respondent must maintain with the Office of Probation a current address and a current telephone number at which he can be reached. Respondent must return any telephone call from the Office of Probation concerning testing of his blood or urine within 12 hours. For good cause, the Office of Probation may require respondent to deliver his blood and/or urine sample(s) for additional reports to the laboratory described above no later than 6 hours after actual notice to him that the Office of Probation requires an additional screening report;
 9. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether respondent is complying or has complied with the conditions attached to this public reproof;
 10. Within one year of the effective date of the public reproof in this proceeding, respondent must provide the Office of Probation with satisfactory proof of his attendance at a session of State Bar Ethics School and his passage of the test given at the end of that session; and

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11. The conditions attached to this public reproval will commence upon the date this Decision becomes final.

VII. COSTS

Costs are hereby awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and are payable in accordance with Business and Professions Code sections 6086.10, subdivision (a), and 6140.7.

Dated: June 22, 2005

Pat McElroy

PAT McELROY
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 22, 2005, I deposited a true copy of the following document(s):

DECISION
STIPULATION RE FACTS AND CONCLUSIONS OF LAW
, filed June 22, 2005

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:

JOHN STEVENSON MORKEN
760 MARKET ST #938
SAN FRANCISCO CA 94102

- 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 **June 22, 2005**.


Laretta Cramer
Case Administrator
State Bar Court