

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT -- SAN FRANCISCO

In the Matter of) Case No.: **09-C-12897-PEM**
)
KATHARYNE GERELYN GILBERT,)
) **DECISION AND PRIVATE REPROVAL**
Member No. 256911,) **WITH CONDITIONS ATTACHED**
)
A Member of the State Bar.)

Introduction¹

This conviction referral proceeding (§§ 6101, 6102; Cal. Rules of Court, rule 9.10(a)) is based upon respondent Katharyne Gerelyn Gilbert’s April 26, 2010 misdemeanor conviction for violating California Vehicle Code section 23152, subdivision (b) (driving a vehicle while having 0.08 percent or more, by weight, of alcohol in her blood).

As set forth *post*, the Court finds that neither respondent’s conviction nor the circumstances of its commission involved moral turpitude. (§ 6102, subd. (c).) However, the court finds that the facts and circumstances surrounding respondent’s conviction involved other misconduct warranting discipline. (See, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 494.)

After considering the facts and the law, the Court concludes that the appropriate level of discipline for the found misconduct is a private reproof with probation conditions attached to it for two years, including conditions requiring that, for a one-year period, respondent abstain from

¹ Except where otherwise indicated, all statutory references are to the Business and Professions Code.

the *use or possession* of alcoholic beverages and be subject to random testing for the use of alcohol. (Cal. Rules of Court, rule 9.19(a).)

Significant Procedural History

On April 26, 2010, in accordance with a negotiated plea agreement, respondent pleaded no contest (*nolo contendere*) to and was convicted of a misdemeanor violation of California Vehicle Code section 23152, subdivision (b) (driving a vehicle while having 0.08 percent or more, by weight, of alcohol in her blood).

On November 6, 2012, the Office of the Chief Trial Counsel of the State Bar of California (OCTC) transmitted a copy of respondent's conviction to the State Bar Court Review Department. Thereafter, on November 29, 2012, the review department filed an order referring respondent's conviction to the hearing department for a hearing and decision recommending the discipline to be imposed in the event that the hearing department finds that the facts and circumstances surrounding respondent's misdemeanor violation involved moral turpitude or other misconduct warranting discipline.

On December 7, 2012, this court filed, and served on respondent, a notice of hearing on respondent's conviction. And respondent filed a response to that notice of hearing on December 28, 2012. On January 8, 2013, respondent filed a further response to the notice of hearing.

On April 19, 2013, the parties filed a partial stipulation as to facts and admission of documents.

The State Bar Court hearing on respondent's conviction was held on April 19, 2013, and following closing arguments on that date, the court took the matter under submission for decision. OCTC was represented by Deputy Trial Counsel Christopher J. Vergara, and respondent was represented by Attorney Vicki H. Young.

///

///

Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 10, 2008, and has been a member of the State Bar of California since that time.

B. Respondent's Conviction – Case Number 09-C-12897

Findings of Fact

On January 10, 2009, at about 7:30 in the morning, a California Highway Patrol officer saw respondent's car parked on the right-hand shoulder of US-101 southbound north of Whipple Avenue, in San Francisco. The officer approached respondent's car from the passenger side and saw respondent sitting in the driver's seat with the seat reclined. The officer knocked on the window. When respondent opened the window, the officer immediately smelled alcohol.

Respondent told the officer that she dropped her boyfriend² off at the San Francisco International Airport and that she pulled off the highway and parked on the shoulder because she was tired. Respondent told the officer that she had been parked on the shoulder for about 10 minutes.

The officer noticed respondent had red, watery eyes and asked respondent if she had consumed any alcohol before driving. Respondent answered that she consumed three glasses of wine the previous night. The officer had respondent get out of her car. The officer smelled alcohol on respondent's breath and person and noticed that respondent's speech was slow. The officer asked respondent some questions and had her perform a series of Field Sobriety Tests, some of which respondent could not perform. Therefore, the officer analyzed moderate samples

² Respondent's boyfriend was flying to Denmark where he had a job as a chef.

of respondent's breath on the preliminary alcohol screening device. According to one of the tests, respondent's blood alcohol content was .141 and according to the other test it was .138. In light of those tests, respondent was arrested and taken to the San Mateo County jail, where she was given two alcohol breath tests. The results of those two tests showed that respondent's blood alcohol content was .12 and .11, respectively.

On January 28, 2009, a criminal complaint was filed against respondent in the San Mateo County Superior Court charging respondent with violating California Vehicle Code section 23152, subdivision (a) (driving a vehicle under the influence of alcohol or drugs) and California Vehicle Code sections 23152, subdivision (b) (driving a vehicle while having 0.08 percent or more, by weight, of alcohol in her blood). The criminal complaint also charged respondent with a prior conviction for violating Vehicle Code section 23152, subdivision (b) in 2004 in San Mateo.

As noted *ante*, in accordance with a plea agreement, respondent pleaded no contest to and was convicted of a misdemeanor violation of Vehicle Code section 23152, subdivision (b) on April 26, 2010. Under the agreement, the charged violation of Vehicle Code section 23152, subdivision (a) was dismissed, and respondent admitted to having a prior DUI conviction in 2004.³ Also, on April 26, 2010, Respondent was sentenced to 30 days' in county jail (with credit for one-day time served) and placed on three years' court probation. In addition, respondent

³ The facts underlying respondent's 2004 conviction are as follows: On May 15, 2004, after she had been drinking to celebrate the completion of her first year of law school, respondent drove her car and crashed her car into a tree in San Mateo. Respondent was initially charged with driving under the influence and with hit and run, but the hit-and-run charge was eventually dismissed. On August 25, 2004, respondent was convicted of violating Vehicle Code section 23152, subdivision (b) and was sentenced to one-week in the county jail (or through the Sheriff's Alternative Sentencing Bureau Program) and placed on three years' probation. Respondent's prior probation ended in late 2007, which was almost three years before she engaged in the offense underlying her second conviction (i.e., her April 26, 2010 conviction) for violating Vehicle Code section 23152, subdivision (b). Respondent disclosed her 2004 conviction on her moral character application.

was ordered to pay fines, assessments, and fees that totaled about \$2,300. Under the terms and conditions of respondent's criminal probation, respondent was required, inter alia, to (1) abstain from the use or possession of alcoholic beverages, (2) submit to alcohol-use tests whenever directed by her probation officer or a peace officer, and (3) enroll in and complete the 18-month Multiple Offender Drinking Driver Program (Senate Bill 38 Program) by November 2011. To complete that program, respondent had to attend a weekly group class and to meet individually with a certified substance abuse counselor once a week. Respondent also attended 50 meetings of Alcoholics Anonymous.

On February 15, 2012, the superior court revoked respondent's criminal probation (pending a hearing) and issued a bench warrant for respondent's arrest because respondent failed to submit proof that she had completed the Multiple Offender Drinking Driver Program. Thereafter, on June 25, 2012, respondent submitted proof that she completed the program.⁴ And, on July 24, 2012, the superior court recalled the bench warrant and reinstated respondent's probation on the original terms and conditions.

At the April 19, 2013 State Bar Court hearing on respondent's April 26, 2010 conviction, respondent admitted to drinking a glass of wine the previous week while she was still on criminal probation. When questioned further, respondent also admitted to previously consuming alcohol occasionally while on criminal probation, but asserts that she no longer drinks to an excess. In addition, respondent claimed that she was unaware that one of her criminal probation conditions required that she “abstain from the use or possession of alcoholic beverages” Respondent’s claim that she was unaware of her abstinence probation condition is inconsistent with the docket sheets in respondent’s criminal case, which clearly reflects that, at the sentencing on April 26,

⁴ It took respondent two years to complete the 18-month program because of her job. Respondent represents lifers at hearings before the Board of Parole and in court challenging denials of parole. As such she is required to travel the length of the state and was unable to attend some of the weekly group meetings within 18 months. Instead, it took her two years.

2010, the superior court informed respondent of all the terms and conditions of her criminal probation, including the condition requiring her to abstain from using or possessing alcohol, and that respondent “accepted [the] terms and conditions of probation.” (State Bar Ex. 4, p. 8.)

Conclusions Regarding Moral Turpitude and Other Misconduct

In attorney disciplinary proceedings, “the record of [an attorney's] conviction [is] conclusive evidence of guilt of the crime of which he or she has been convicted.” (§ 6101, subd. (a); *In re Gross* (1983) 33 Cal.3d 561, 567.) Stated differently, an attorney’s conviction is conclusive proof that the attorney committed all of the acts necessary to constitute the crime of which he or she was convicted. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.) However, with respect to crimes that do not inherently involve moral turpitude, such as respondent’s misdemeanor DUI conviction (*In re Kelley, supra*, 52 Cal.3d at p. 494), “Whether those acts amount to professional misconduct . . . is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction.” (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6.) That is because it is the attorney’s conduct, not the conviction, that warrants discipline. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935; see also *In re Gross* (1983) 33 Cal.3d 561, 568.)

Moreover, in a conviction referral proceeding involving a crime that does not inherently involve moral turpitude, the State Bar has the burden to prove, by clear and convincing evidence, that the facts and circumstances surrounding an attorney’s conviction involved moral turpitude or other misconduct warranting discipline. (*In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 759-760, 764.) Of course, when determining whether the State Bar has met its burden, the court may consider any dismissed or pending criminal charge in addition to the charge on which the attorney was convicted. (*In re Langford* (1966) 64 Cal.2d 489, 496.) In

fact, when reviewing the circumstances surrounding an attorney's conviction, this court "may look to the whole course of [the attorney's] conduct which reflects upon his [or her] fitness to practice law. [Citations.]' [Citation.]" (*In the Matter of Oheb, supra*, 4 Cal. State Bar Ct. Rptr. at p. 935.)

Here, the court finds that the facts and circumstances surrounding respondent's conviction for drunk driving do not involve moral turpitude, but do involve other misconduct warranting discipline. (See *In re Carr* (1988) 46 Cal.3d 1089; *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208.)

In *In re Kelley, supra*, 52 Cal.3d 487, the Supreme Court held that Kelley's second drunk driving conviction did not involve moral turpitude, but did involve other misconduct warranting discipline because her second conviction evidenced (1) a lapse of character and a lack of respect for the legal system and (2) an alcohol abuse problem. Kelley's second drunk driving conviction evidenced a lapse of character and a lack of respect for the legal system because it violated the terms of her criminal probation that were imposed on her by a court order on her first conviction. (*Id.* at pp. 495-496.) Kelley's second drunk driving conviction evidenced an alcohol abuse problem because she committed both of her drunk driving offenses within a relatively short period of time (i.e., within a 31-month period).

Respondent here, however, did not violate a criminal probation order when she committed the offense underlying her April 26, 2010 conviction. In other words, respondent was not on probation for her first offense when she committed her second offense. Nor did respondent commit both of her offenses within a short period of time; respondent committed both of her offenses within a 55-month period. Nonetheless, the court finds that the facts and circumstances surrounding respondent's April 26, 2010 conviction involved other misconduct warranting discipline because, as noted *ante*, respondent admits that, when she committed her

second offense on January 10, 2010, she had an alcohol abuse problem (e.g., she drank to excess) and that her alcohol abuse problem was an underlying cause of her driving with a blood-alcohol level in excess of the legal limits on January 10, 2010. While respondent has made significant strides in addressing her alcohol abuse problem, she failed to clearly establish that she no longer has an alcohol abuse problem.

Moreover, the fact that there is no evidence that respondent's alcohol abuse problem has had an adverse impact on her "practice or clients is an appropriate consideration in assessing the amount of discipline warranted in a given case, but it does not preclude the imposition of discipline as a threshold matter. [Citation.]" (*In re Kelley, supra*, 52 Cal.3d at p. 496.) In short, this court "cannot and should not sit back and wait until [respondent's] alcohol abuse problem begins to affect her practice of law. [Citation.]" (*Id.* at p. 495.)

In addition, respondent failed to comply with the abstinence condition of her criminal probation. Respondent's failure to comply with that probation condition "demonstrates a lapse of character and disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court. [Citation.]" (*In re Kelley, supra*, 52 Cal.3d at p. 495.) The fact that respondent failure to comply with her abstinence probation condition occurred after her April 26, 2010 conviction (and not before), does not preclude this court from considering it as evidence of other misconduct warranting discipline.

C. Aggravation⁵

The State Bar did not establish any aggravating circumstances by clear and convincing evidence.

///

⁵ All references to standards (or stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

///

D. Mitigation

No Prior Record (Std. 1.2(e)(i))

Even though respondent has no prior record of discipline, she had been admitted to practice for only six months at the time she engaged in the offense underlying her April 26, 2010 conviction. Accordingly, her lack of a prior record of discipline for six months is not an mitigating circumstance. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 66 [five years of misconduct free practice is insufficient for mitigation under standard 1.2(e)(i)].)

Lack of Harm (Std. 1.2(e)(iii))

Respondent's misconduct did not cause any specific harm to the public, the courts, or respondent's clients. (Std. 1.2(e)(iii); *In re Kelley, supra*, 52 Cal.3d at p. 498.)

Cooperation with the State Bar

Respondent is also entitled to mitigation for her cooperation with the State Bar by entering into a fairly comprehensive partial stipulation of facts. The stipulation assisted the State Bar in its prosecution of this case. (Cf. *In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906.)

Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii))

Respondent testified credibly that she understands that she was in denial about her drinking problem, but now knows that she had a drinking problem. She understands that DUI is dangerous and could result in harm to innocent victims. She now has a better understanding of the issues around her excessive drinking and what triggers her over drinking—her stressful job and a boyfriend who was a heavy drinker. She is no longer with the boyfriend.

In sum, respondent is entitled to mitigation for her remorse and recognition of wrongdoing. (*Toll v. State Bar* (1974) 12 Cal.3d 824, 832.)

Pro Bono Work

Respondent has represented at least 10 lifers at parole hearings on a pro bono basis since her DUI conviction. From 2008-2011, respondent conducted workshops for lifers at the state prison until the program was terminated by the California State Corrections Office. She did volunteer work with the Avatar Program. It is a program founded by an ex-convict while he was in prison. The program is for prisoners and provides counseling in the area of relapse prevention, post incarceration syndrome, and helps prepare prisoners for Parole Board hearings.

Respondent is also on the board of Timelist Program. The Timelist Program is for people in prison. Essentially, it is a self-help program for prisoners—it teaches relapse prevention and how to deal with post-incarceration syndrome.

In sum, respondent's pro bono/community service "is a mitigating factor that is entitled to 'considerable weight.'" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785, quoting *Schneider v. State Bar* (1987) 43 Cal.3d 784, 799.)

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. (Std. 1.3; *Chadwick v. State Bar, supra*, 49 Cal.3d at p. 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.)

The applicable standard is standard 3.4, which provides that the discipline for an attorney's conviction of a crime involving other misconduct warranting discipline, but not moral

turpitude, is that discipline “appropriate to the nature and extent of the misconduct.” (Std. 3.4; *In re Kelley*, *supra*, 52 Cal.3d at p. 498.)

Second, the court looks to relevant decisional law for guidance. (See *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 996; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) The court finds *In re Kelley*, *supra*, 52 Cal.3d 487 to be instructive on the level of discipline. In *Kelley*, the Supreme Court publicly reproved the attorney and placed her on three years’ disciplinary probation subject to a number of conditions, including referring the attorney to the State Bar’s alcohol abuse program with instructions to comply with all the terms and requirements of that program.

The attorney’s misconduct in *Kelley* was somewhat more egregious than the misconduct in the present case. Thus, the court concludes that the appropriate level of discipline in the present case is a private reproof with probation conditions attached for two years and abstinence conditions attached for one year.⁶

Private Reproof⁷

⁶ Even though the review department’s November 29, 2012 order referred respondent’s April 26, 2010 conviction to the hearing department for a hearing and decision *recommending the discipline to be imposed* in the event that the hearing department finds that the facts and circumstances surrounding respondent’s violation of Vehicle Code section 23152, subdivision (b) involved moral turpitude or other misconduct warranting discipline, it is clear that this court has jurisdiction to actually impose (as opposed to just recommending) a private reproof on respondent for the found misconduct. (Cal. Rules of Court, rule 9.10(a) [“...The State Bar Court must impose or recommend discipline in conviction matters as in other disciplinary proceedings...”]).

⁷ Even though the State Bar will not publish this private reproof in the California Bar Journal, the reproof is part of respondent’s official State Bar membership records (including the records available to the public on the State Bar’s website). (Rules Proc. of State Bar, rule 5.127(D).) In addition, the State Bar will disclose the reproof in response to public inquiries regarding respondent. (*Ibid.*) Moreover, the record in this proceeding is public and available for inspection upon request. Costs are not awarded to either party in a case in which the respondent attorney is privately reproved. (Bus. & Prof. Code, § 6086.10, subd. (a); Rules Proc. of State Bar, rule 5.127(D).)

The court orders that respondent **KATHARYNE GERELYN GILBERT**, State Bar number 256911, is **PRIVATELY REPROVED** for the misconduct found in this proceeding. (Cal. Rules of Court, rule 9.10(a); Bus. & Prof. Code, § 6078; Rules Proc. of State Bar, rule 5.127(A)&(D).) The reproof is effective upon the finality of this decision. (Rules Proc. of State Bar, rule 5.127(A); see also Rules Proc. of State Bar, rules 5.112-5.115, 5.151.)

The court further orders (1) that the probation conditions set forth *post* are attached to the reproof for a period of two years after the effective date of the reproof and (2) that the abstinence and testing conditions set forth *post* are attached to the reproof for a period of one year after the effective date of the reproof. (Cal. Rules of Court, rule 9.19(a); Rules Proc. of State Bar, rule 5.128.)

The court finds that the probation conditions and the abstinence and testing conditions which are set forth *post* will serve to protect the public and to further Katharyne Gerelyn Gilbert's interests. Gilbert's failure to comply with any of the conditions attached to her reproof is punishable as a willful violation of rule 1-110 of the State Bar Rules of Professional Conduct. (Cal. Rules of Court, rule 9.19(b).)

Probation Conditions Attached to Reproof

1. Katharyne Gerelyn Gilbert is to comply with the provisions of the State Bar Act, the State Bar Rules of Professional Conduct, and all of the conditions attached to this reproof.
2. Within 30 days after the effective date of this reproof, Katharyne Gerelyn Gilbert must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with her assigned probation deputy to discuss the conditions attached to this reproofs. Upon the direction of the Office of Probation, Gilbert must meet with the probation deputy or deputies either in-person or by telephone. Thereafter, Gilbert must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
3. Katharyne Gerelyn Gilbert is to submit written quarterly reports to the State Bar's Office of Probation no later than each January 10, April 10, July 10, and October 10 for two years after the effective date of her reproof. Under penalty of perjury under the laws of the State of California, Gilbert must state whether she has complied with the State Bar Act, the State Bar Rules of Professional Conduct, and all conditions attached to her reproof during the preceding calendar quarter. If the first report will cover less than 30

days, then the first report must be submitted on the next following quarter date and cover the extended period.

In addition to all quarterly reports, Gilbert is to submit a final report containing the same foregoing information during the last 20 days of the two-year period after the effective date of her reproval.

4. Subject to the assertion of any applicable privilege, Katharyne Gerelyn Gilbert is to fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to either of them, whether orally or in writing, relating to whether she is complying or has complied with the conditions attached to her reproval.
5. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including her current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, Katharyne Gerelyn Gilbert must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
6. Katharyne Gerelyn Gilbert must comply with all conditions of her criminal probation and must so declare under penalty of perjury in each quarterly report required to be filed with the Office of Probation. If Gilbert has completed probation in the underlying criminal matter, or completes it during the two-year period after the effective date of her reproval, she must provide to the Office of Probation satisfactory documentary evidence of the successful completion of the criminal probation in the quarterly report due after such completion. If such satisfactory evidence is provided, Gilbert will be deemed to have fully satisfied this probation condition.

Abstinence and Testing Conditions Attached to Reproval

1. Katharyne Gerelyn Gilbert must abstain from using or possessing alcoholic beverages for one year after the effective date of her reproval.
2. Katharyne Gerelyn Gilbert must select a licensed medical laboratory approved by the Office of Probation. Gilbert must arrange to have the laboratory perform, on a monthly basis and at Gilbert's expense, an ethyl glucuronide test. The tests must be performed by the laboratory pursuant to Department of Transportation guidelines and testing must be observed. Gilbert must comply with all of the laboratory's requirements regarding specimen collection and the integrity of specimens. For one year after the effective date of Gilbert's reproval, Gilbert must be tested within the first three days of each month and must cause the laboratory to provide to the Office of Probation, within one week of testing and at Gilbert's expense, the results or screening reports from each test.
3. Katharyne Gerelyn Gilbert must maintain, with the Office of Probation, a current telephone number at which she can be reached. Gilbert must return any call from the Office of Probation concerning alcohol testing within 12 hours. For one year after the

///

///

effective date of Gilbert's reproof, the Office of Probation is directed to randomly require Gilbert to have additional ethyl glucuronide tests performed by the laboratory no later than six hours after actual notice to Gilbert that the Office of Probation requires additional tests or screening reports.

Dated: July ____, 2013.

Pat McElroy
Judge of the State Bar Court