

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 09-C-14292-DFM
)	
TERRY KENNETH WASSERMAN,)	
)	DECISION
Member No. 80805,)	
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

This contested conviction referral proceeding arises from the misdemeanor conviction of respondent **Terry Kenneth Wasserman** (Respondent) for driving under the influence of alcohol. (Veh. Code, § 23152, subd. (b).) The issues in this proceeding are whether the facts and circumstances surrounding Respondent’s conviction involved moral turpitude (§§ 6101, 6102) or other misconduct warranting discipline (see, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 494); and, if so, what the appropriate level of discipline should be.

For the reasons stated below, the court finds that the facts and circumstances surrounding Respondent’s conviction did not involve moral turpitude, but did constitute other misconduct warranting discipline. For the reasons explained more fully below, this court concludes that the necessary and appropriate discipline for that misconduct is a private reproof accompanied by conditions of reproof specified below.

PERTINENT PROCEDURAL HISTORY

On July 28, 2009, Respondent pled no contest to one count of driving while intoxicated, in violation of Vehicle Code section 21352(b). On October 30, 2009, Respondent notified the State Bar of the plea and waived finality of his conviction “in an effort to expedite State Bar proceedings.”

On November 30, 2009, the Review Department referred evidence of Respondent’s DUI conviction to the Hearing Department for further handling. On December 8, 2009, a notice of hearing on conviction was issued by this court, and a status conference was ordered for January 13, 2010. On January 15, 2010, Respondent filed his response to the criminal referral. Respondent readily admitted his culpability for driving while intoxicated, both in this proceeding and in the criminal court.

On April 26, 2010, an extensive Stipulation of Undisputed Facts was filed by the parties. It included a stipulation that the facts and circumstances surrounding the conviction did not involve an act of moral turpitude.

Trial was commenced and completed on May 6, 2010. At the request of both the parties and the court, a brief period of post-trial briefing followed. The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Deputy Trial Counsel Larry DeSha. Respondent acted as counsel for himself.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the stipulation of undisputed facts and conclusions of law previously filed by the parties and on the evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 23, 1978, and has been a member of the State Bar at all relevant times.

Case No. 09-C-14292

This proceeding results from Respondent's second conviction for driving under the influence of alcohol in less than seven years. He was first arrested for driving while intoxicated on September 26, 2002. On January 16, 2003, he was convicted of one count for violation of Vehicle Code section 21352(b). The circumstances of his second conviction are as follows.

In March of 2009, Respondent was acting as the principal caregiver for his elderly father, whose health was failing. On March 14, 2009, after spending an emotionally difficult session assisting his father, Respondent left his parents' home around 8:00 p.m. Respondent then arranged for a friend, with whom he liked to play pool, to meet him at a bar close to Respondent's law office. There, the two played pool and talked until sometime after 11:30 p.m. During that time Respondent drank 4-5 beers. Respondent then decided to leave the bar and drive to his office.

As Respondent was getting close to his office, he was stopped at 11:43 p.m. by a police officer who observed Respondent narrowly miss hitting a pedestrian in a marked crosswalk. After stopping Respondent, the police officer then observed that Respondent could not walk straight, had slurred speech, and smelled strongly of alcohol. Respondent freely admitted to the police officer that he had just left a nearby bar where he had consumed four beers between 8:30 p.m. and 11:30 p.m. Respondent was then given two breathalyzer tests, which registered .14% and .16% BAC. He was then arrested at about 12:05 a.m. on March 15, 2009, for driving under the influence of alcohol.

On July 28, 2009, Respondent pled no contest to one count of driving while intoxicated, in violation of Vehicle Code section 21352(b). He was sentenced to four days in jail (suspended), summary probation for three years, and fines and penalties totaling \$1,632. Terms of probation included completion of a licensed 18-month second-offender alcohol and drug

education and counseling program, and filing six progress reports with the court every six months starting with February 18, 2010.

Respondent timely paid the fines and penalties and is now in the eighth month of the counseling program. A report from the clinical director of the counseling program indicates that Respondent has participated both actively and successfully in the program. He has also maintained a complete abstinence from alcohol at all times since his arrest, despite having to deal with the subsequent death of his father and other personal/family crises during the last year.

The parties have stipulated, and the court finds, that (1) the facts and circumstances surrounding Respondent's misconduct do not involve an act of moral turpitude; and (2) Respondent's misconduct caused no actual harm to any person or property. However, the court also finds that Respondent's second conviction for driving under the influence of alcohol within such a short period of time constitutes conduct warranting discipline. The fact that there is no evidence that Respondent's alcohol abuse problem has ever had an actual adverse impact on his 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.)

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)¹ No effort was made by the State Bar to establish any aggravating factor here, and the court finds none.

¹ All further references to standard(s) or std. are to this source.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).) The court finds the following mitigating factors.

No Prior Disciplines

Respondent practiced law in California for nearly 31 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. This lengthy tenure of discipline-free practice is entitled to significant weight in mitigation. (Std. 1.2(e)(i).)

Lack of Harm

Respondent's misconduct caused no actual harm to any person or property. (Std. 1.2(e)(iii); *In re Kelley, supra*, 52 Cal.3d at p. 498; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.)

Cooperation

Respondent is entitled to mitigation for his cooperation with the State Bar. Among other things, he entered into a comprehensive stipulation of undisputed facts that significantly assisted the State Bar in its prosecution of this case. Indeed, the State Bar's case-in-chief consisted solely of having that stipulation be received in evidence. (*In the Matter of Gadda, supra*, 4 Cal. State Bar Ct. Rptr. at p. 443.)

Remorse/Remediation

Respondent is entitled to mitigation for his remorse and recognition of wrongdoing. At the time he was pulled over by the police, he acknowledged that he had been drinking; he entered a no contest plea to the criminal charge; he notified the State Bar of his conviction and sought to expedite the disciplinary process; and he credibly testified to his remorse and embarrassment

about his misconduct and to his resolve not to have any repetition of it. (*Toll v. State Bar* (1974) 12 Cal.3d 824, 832-833; *Bradpiece v. State Bar of California* (1974) 10 Cal. 3d 742, 748.)

Family Difficulties

Respondent's misconduct was directly related to and prompted by his emotional reaction to dealing with his ailing father, who has now died. This is a mitigating factor here. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667; *In re Mostman* (1989) 47 Cal.3d 725, 742; *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 566.) Respondent's subsequent conduct in dealing with his father's death, and the report of his guidance counselor, make clear that this past problem can be expected not to result in future misconduct.

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* (1989) 49 Cal.3d 103, 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.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Brown* (1995) 12 Cal.4th 205, 220.) Nevertheless, the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Second, the court considers 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.)

Looking to the standards, under standard 3.4, the discipline for an attorney's conviction of a crime involving misconduct warranting discipline, but not reflecting 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.)

With respect to the judicial precedents, in *Kelley*, the Supreme Court concluded that only "relatively minimal discipline" was warranted for a member who had two DUI's. In that instance, the court carved out a significant period of probation and attached it to a public reproof. The member there was still in denial of her problem with alcohol, had two recent DUI convictions, had a history of violating the terms of her criminal probation, and had been both dishonest and uncooperative with the arresting officers.

In the present situation, the court concludes that only a private reproof is necessary and appropriate under the circumstances. The mitigating factors here are significantly greater than in *Kelley*. Respondent is a long-time practitioner with no prior history of discipline. Respondent has credibly expressed his remorse for his prior conduct and has demonstrated, with both words and deeds, his commitment to making certain that such misconduct does not reoccur. He has remained sober for more than a year since his arrest, notwithstanding the emotional grief he experienced from the death of his father during that period.

The court finds that the interests of Respondent and the protection of the public will also be served by the conditions, specified below, being attached to the private reproof. The principal purpose of the discipline here is to create an ongoing oversight process to ensure that Respondent is successful in the rehabilitative process that is already underway.

DISCIPLINE

Accordingly, it is ordered that respondent **Terry Kenneth Wasserman** is hereby privately reprovved. Pursuant to the provisions of rule 270(a) of the Rules of Procedure, the reprovral shall be effective when this decision becomes final. Further, pursuant to rule 9.19 of the California Rules of Court and rule 271 of the Rules of Procedure, the court finds that the interests of Respondent and the protection of the public will be served by the conditions specified below being attached to the reprovral imposed in this matter. Failure to comply with any of the conditions attached to this reprovral may constitute cause for a separate proceeding for wilful breach of rule 1-110 of the Rules of Professional Conduct.

Respondent is hereby ordered to comply with the following conditions² attached to his private reprovral for a period of three years following the effective date of the reprovral imposed in this matter:

1. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.
2. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
3. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates).³ However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each

² See rule 271, Rules of Proc. of State Bar (motions to modify conditions attached to reprovals are governed by rules 550-554 of the Rules of Procedure).

³ To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

- (a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
 - (b) in each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period. During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.
4. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.
5. Within one year after the effective date of this order, Respondent must attend and satisfactorily complete the State Bar's Ethics School, and he must provide satisfactory proof of such completion to the State Bar's Office of Probation within that same timeframe. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)⁴
6. Respondent must comply with all terms and conditions of the sentencing order and any probation in the underlying criminal action which gave rise to this disciplinary proceeding.
7. Not later than 90 days after the effective date of this order, Respondent must obtain an examination of his mental and physical condition with respect to his alcohol abuse condition from a qualified practitioner approved by the State Bar's Office of Probation.⁵ Thereafter, Respondent must participate in and comply with any treatment/monitoring plan recommended by the examining practitioner. Respondent must pay all costs of the examination and of any recommended treatment/monitoring plan. Respondent is to begin any recommended treatment/monitoring plan as soon as practical, but no later than 30 days after his examination.

⁴ The court concludes that requiring Respondent to take and pass the MPRE is not required or appropriate here to assist Respondent to recognize his failings or to prevent any future misconduct. (*In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 180.)

⁵ Approval cannot be unreasonably denied.

With each quarterly report, Respondent must furnish to the Office of Probation sufficient evidence, as specified by the Office of Probation, that he is complying with this condition of probation. Treatment/monitoring must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final.

Respondent must promptly provide his examining practitioner and any treating practitioner with appropriate waivers authorizing the practitioner or practitioners to provide the Office of Probation and the State Bar Court with sufficient information to establish whether Respondent is complying or has complied with this reprobation condition. Respondent's revocation of any such waiver is a violation of this reprobation condition. Any medical records obtained by the Office of Probation or the State Bar Court are to be confidential documents and no information about them or their contents is to be given to anyone except members of the Office of the Chief Trial Counsel, the Office of Probation, the State Bar Court, and the Supreme Court who are directly involved with maintaining, enforcing, or adjudicating this reprobation condition.

If Respondent's examining or treating practitioner determines that there has been a substantial change in Respondent's condition, Respondent, the Office of Probation, or the Office of the Chief Trial Counsel may file a motion for modification of this probation condition in accordance with Rules of Procedure of the State Bar, rule 550, et seq. Any such motion must be supported by a written declaration executed by Respondent's examining or treating practitioner or practitioners under penalty of perjury under the laws of the State of California.

8. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and such payment is enforceable as provided under Business and Professions Code section 6140.5. (Rules Proc. of State Bar, rule 291.)
9. Respondent's probation will commence on the effective date of this order imposing discipline in this matter.

Dated: May ____, 2010.

DONALD F. MILES
Judge of the State Bar Court