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STATE BAR COURT
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PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 14-C-02141-YDR
)	
RICHARD ALAN DONGELL,)	DECISION
)	
Member No. 128083,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

This matter is before the court on an order of reference filed by the Review Department of the State Bar Court on January 15, 2015. This matter was referred for a hearing and decision as to whether the facts and circumstances surrounding the misdemeanor violations of Penal Code section 273a, subdivision (b) (child endangerment) and Vehicle Code section 23152, subdivision (b) (driving with blood alcohol level of .08% or more) of which **Richard Alan Dongell** (“Respondent”) was convicted, involved moral turpitude or other misconduct warranting discipline, and, if so found, a recommendation as to the discipline to be imposed.

For the reasons stated below, the court finds that the facts and circumstances surrounding Respondent’s commission of the offenses do not involve moral turpitude, but do constitute other misconduct warranting discipline. Based on the facts and circumstances, as well as the applicable mitigating and aggravating factors, the court recommends, among other things, a one-year period of stayed suspension.



¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Significant Procedural History

On June 4, 2014, Respondent pled nolo contendere to misdemeanor violations of California Penal Code section 273a, subdivision (b) [child endangerment] and California Vehicle Code section 23152, subdivision (b) [driving with blood alcohol level of .08% or more].

On December 1, 2014, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) transmitted evidence of finality of Respondent's conviction to the Review Department. On January 15, 2015, the Review Department referred the matter to the Hearing Department for a hearing and decision recommending the discipline to be imposed in the event that the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline.

On May 15, 2015, the parties filed a partial stipulation regarding facts and the admission of documents. The parties supplemented this stipulation with additional facts and exhibits on May 21 and June 11, 2015.

In accordance with the Review Department's referral order, this case proceeded to trial in the Hearing Department of the State Bar Court on May 21, 2015. The State Bar was represented by Deputy Trial Counsel Nina Sarraf-Yazdi. Respondent was represented by attorney Ellen Pansky. The court took this matter under submission for decision on June 16, 2015.

Findings of Fact and Conclusions of Law

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crimes of which he was convicted. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423; and *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.) However, "[w]hether 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.” (*Id.* at p. 589, fn. 6.)

On August 31, 2013, while driving in the City of Santa Monica with his two minor children as passengers in his vehicle, Respondent was intoxicated and driving under the influence of alcohol.

Jurisdiction

Respondent was admitted to the practice of law in California on June 17, 1987, and has been a member of the State Bar of California at all times since that date.

Case No. 14-C-02141 – The Conviction Matter

Facts

The following facts are derived from the parties’ supplemented stipulation, as well as the exhibits admitted into evidence.

On or about August 31, 2013, Respondent was involved in a traffic collision in the City of Santa Monica. Respondent’s two minor children were passengers in his vehicle at the time of the accident.

Respondent was making a right turn from southbound Lincoln Boulevard to westbound Pico Boulevard. The other vehicle was stopped at a red light in the left-turn lane of traffic on eastbound Pico Boulevard. Respondent collided into the left front side of the other vehicle. Respondent’s vehicle sustained moderate damage to front left bumper and fender, and the other vehicle sustained minor damage, also to the front left bumper and fender. There were no injuries reported by any of the parties involved.

Officer R. Elias and Officer H. McGee were flagged down by a pedestrian who reported the traffic collision. Officers Elias and McGee responded. Officer McGee observed two vehicles parked in front of the Shell gas station next to each other. One vehicle was a black

Mercedes SUV. The second vehicle was a gray Audi A7, belonging to Respondent. Respondent was standing outside of his vehicle with his 13-year-old children. During the officers' conversation with Respondent, the officers noticed the slight odor of alcohol on Respondent's breath and person, as well as his bloodshot watery eyes and slurred speech. Respondent was swaying from side to side and stumbled when he walked. Respondent also had a difficult time giving the officers his license, registration, and insurance.

Officer McGee asked Respondent if he drank any alcoholic beverages that day. Respondent replied, "No, Nothing." Based on the objective signs of intoxication, the officers asked Respondent to allow them to conduct a series of field sobriety test (FSTs). It is undisputed that Respondent failed each field sobriety test administered by the officers, including the preliminary alcohol screening device test.²

Based on Respondent's failure of each FST, the officers formed the opinion that Respondent had been driving his vehicle while under the influence of an alcoholic beverage.

Officer Elias spoke with Respondent's two 13-year-old children. They stated that the three of them ate at Geoffrey's in Malibu and that Respondent drank wine with his meal. After the meal at Geoffrey's, Respondent and his children then went to Paradise Cove in Malibu where Respondent socialized with people at a beachfront café. The people at the café invited Respondent to share some wine, which Respondent drank while his children played nearby, within his eyesight.

² Officer J. Meixner arrived on the scene and administered a preliminary alcohol screening device test. Respondent's blood alcohol level was 0.222%.

Respondent was prescribed Xanax by his treating physician to treat the anxiety and stress caused by his divorce and mother's health problems. Respondent had been taking Xanax, as prescribed, twice a day every day for at least one week prior to and including the day of his arrest on August 31, 2013. The prescription Xanax container and the package insert provided to Respondent, contained a warning label advising against the use of alcohol while taking Xanax.

Respondent's wife, with whom Respondent was in the process of obtaining a divorce, received a call from their daughter prior to the children getting in the car with Respondent. During the call, Respondent's daughter expressed concern about Respondent's possible impairment. The children's mother told the daughter not to get in the car and that she would be right there to pick them up. The children got in the car anyway.³

On June 4, 2014, Respondent pled nolo contendere to misdemeanor violations of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol content of 0.08% or higher, and to a violation of Penal Code section 273a, subdivision (b), child endangerment. Respondent was sentenced to 36 months of probation, 6 months of parenting classes, 15 days of community service, and the 9-month first offender alcohol and other drug education and counseling program administered by the Department of Motor Vehicles.

Respondent had a prior alcohol-related conviction nearly 20 years ago, in September 1996. Respondent's blood-alcohol content during that incident was a 0.10%. Respondent was ultimately convicted of violating Vehicle Code section 23101, within the meaning of Vehicle Code section 23103.5, commonly known as a "wet reckless," a lesser offense than driving under the influence.

As part of Respondent's criminal probation in the present matter, he was to enroll in a nine-month substance abuse program. On June 24, 2014, Respondent timely enrolled in the Korean Community Services program (KCS), a nine-month substance abuse program under the purview of the Los Angeles Superior Court.

Following nine unexcused absences, KCS terminated Respondent for noncompliance. KCS reported Respondent's noncompliance and termination to the Los Angeles Superior Court.

³ According to a Department of Children and Family Services investigation report, both of Respondent's children expressed that they feel safe with their father.

On September 12, 2014, Respondent's probation was revoked for not complying with the terms of his probation. The Los Angeles Superior Court issued reinstatement papers so that Respondent could enroll in another nine-month substance abuse program. The Los Angeles Superior Court set a hearing date on the issue of Respondent's probation violation as a result of his termination from KCS.

On October 8, 2014, Respondent enrolled in ADAPT Programs (ADAPT), another nine-month substance abuse program under the purview of the Los Angeles Superior Court. On October 24, 2014, Respondent provided proof of enrollment in ADAPT to the Los Angeles Superior Court.

On January 30, 2015, the district attorney and Respondent stipulated to a probation violation for noncompliance with the nine-month substance abuse program at KCS. The Los Angeles Superior Court accepted the stipulation and found that Respondent had violated the terms of his criminal probation. Immediately thereafter, the Los Angeles Superior Court reinstated Respondent's probation on virtually the same terms and conditions. The case was continued to February 27, 2015, for a progress report on the nine-month substance abuse program and parenting classes.

On February 27, 2015, Respondent provided the Los Angeles Superior Court with a progress report showing that he was in compliance with ADAPT's nine-month substance abuse program. On May 7, 2015, Respondent also successfully completed a 17-day residential rehabilitation treatment program.

Conclusions

An attorney's conviction of driving under the influence of alcohol, even with prior convictions of that offense, does not per se establish moral turpitude. (*In re Kelley* (1990) 52 Cal.3d 487, 494.) Here, the court finds that the facts and circumstances surrounding

Respondent's conviction for driving under the influence of alcohol and child endangerment do not involve moral turpitude, but do involve other misconduct warranting discipline. (See *In re Carr* (1988) 46 Cal.3d 1089, and *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208.)

Aggravation⁴

Harm to Client/Public/Administration of Justice (Std. 1.5(f).)

The State Bar argues that Respondent's misconduct involved significant harm to his children and the other driver. The court agrees and assigns this factor some consideration in aggravation. Clearly, Respondent's misconduct could have resulted in catastrophic harm. He is fortunate that the actual harm caused by his driving under the influence with his children in the car was fairly limited.

Mitigation

No Prior Record of Discipline (Std. 1.6(a).)

Respondent was admitted to practice law in California in 1987 and has no prior record of discipline. His over 22 years of discipline-free conduct prior to the present misconduct warrant significant consideration in mitigation.

Extreme Emotional Difficulties (Std. 1.6(d).)

At the time of the misconduct, Respondent was experiencing extreme emotional difficulties associated with his marital separation, which ultimately resulted in divorce. In addition, Respondent's mother was in poor health and one of his older children was experiencing

⁴ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Effective July 1, 2015, the standards were amended. As this case was submitted prior to the amending of the standards, we apply the standards that were in effect at the time of submission.

drug-related problems at this same time. The court affords these factors some weight in mitigation.

Good Character Evidence (Std. 1.6(f).)

Respondent presented eight letters from friends, colleagues, and family attesting to his good character. Respondent's ex-wife's and children's statements were emails written approximately 18 months ago. They are extremely brief and didn't specifically address the criminal or present charges. Further, Respondent's children's declarations both indicate that they never felt unsafe with their father, somewhat in contradiction to the stipulated fact that Respondent's daughter called her mother on the night of the incident, expressing her concern about Respondent's intoxication.

Respondent's other character letters vaguely referred to Respondent making a mistake or experiencing a momentary lack of judgment. Although it's implied that the authors have some understanding of the present charges, none of the character witnesses specifically addressed Respondent's criminal conviction or the facts and circumstances involved in the present proceeding. Consequently, the court is unable to accurately assess the extent of each witness's understanding of the misconduct.

Due to the issues illustrated above, Respondent's evidence of good character warrants nominal weight in mitigation.

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent entered into an extensive stipulation of facts and admission of documents. Respondent's candor and cooperation with the State Bar warrant some consideration in mitigation.

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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. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.1.) 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 Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) However, the standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 2.12(b) provides that suspension or reproof is appropriate for a final misdemeanor conviction not involving moral turpitude, but involving other misconduct warranting discipline.

The State Bar argued that Respondent’s misconduct warrants discipline including a 30-day period of actual suspension. The State Bar, however, did not cite any relevant case law in support of its 30-day suspension recommendation.⁵ Respondent, on the other hand, argued that he should receive no greater discipline than a public reproof.

⁵ The State Bar cited and distinguished various cases, one of which being an unpublished Review Department decision from 2014.

The State Bar's discipline recommendation was based, in-part, on its assertion that this matter involved moral turpitude. However, the present facts and existing case law do not support such a finding.⁶ In determining the appropriate level of discipline, this court found *In re Kelley*, *supra*, 52 Cal.3d 487, and *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, to be instructive.

In *Kelley*, the Supreme Court publicly reprovved an attorney and placed her on disciplinary probation for a period of three years subject to conditions which included her referral to the State Bar's Program on Alcohol Abuse. The attorney was convicted of driving under the influence of alcohol on two occasions over a 31-month period. The second incident constituted a violation of her criminal probation in the first case. The attorney's blood alcohol level in the second case was between 0.16% and 0.17%. The attorney participated in the disciplinary proceeding and presented evidence in mitigation, including the absence of a prior disciplinary record, extensive community service, compliance with all criminal probation conditions since her second conviction, and cooperation in the disciplinary proceedings.

In *Anderson*, an attorney was convicted, among other things, of four separate counts of driving under the influence of alcohol over a six-year period.⁷ The Review Department found that the attorney's misconduct did not constitute moral turpitude, but did demonstrate conduct warranting discipline. In aggravation, the attorney was uncooperative and aggressive towards the arresting officers and had been twice disciplined in the past.⁸ In mitigation, the attorney

⁶ Intentional misrepresentations often result in a finding of moral turpitude. Here, however, Respondent was highly intoxicated, having a blood-alcohol level nearly three times the legal limit. This court declines to find that Respondent's inebriated misstatement rose to the level of moral turpitude.

⁷ There is no indication that any of these convictions resulted in a felony conviction.

⁸ The attorney's prior record of discipline consisted of a private reprovval for failing to perform services for a client and a public reprovval for failing to communicate with his clients,

presented “impressive character evidence.” (*Id.* at 213.) The Review Department recommended a one-year stayed suspension, a three-year probation, and a 60-day actual suspension.

The court finds the facts and circumstances involved in the present matter to be closer to *Kelley* than *Anderson*. That being said, Respondent’s accompanying child endangerment conviction is a significant distinguishing factor. Similar to *Kelley*, Respondent has no prior record of discipline and considerable mitigation. Balancing all relevant factors, the court concludes that the present case warrants a level of discipline greater than *Kelley*, but substantially less than *Anderson*. Accordingly, the court recommends, among other things, a one-year period of stayed suspension.

Recommendations

It is recommended that respondent **Richard Alan Dongell**, State Bar Number 128083, be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that Respondent be placed on probation⁹ for a period of two years subject to the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of Respondent’s probation.
2. 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 Respondent’s current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, Respondent must report such change in writing to the Membership Records Office and the State Bar’s Office of Probation.
3. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of

failing to use reasonable diligence on their behalf, and failing to promptly return his clients’ files following his withdrawal.

⁹ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

Respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

4. Subject to the assertion of applicable privileges, Respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to Respondent personally or in writing, relating to whether Respondent is complying or has complied with Respondent's probation conditions.
5. Within 30 days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.
6. Respondent must comply with all conditions of Respondent's criminal probation and must so declare under penalty of perjury in any quarterly report required to be filed with the Office of Probation. If Respondent has completed probation in the underlying criminal matter, or completes it during the period of his disciplinary probation, Respondent 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, Respondent will be deemed to have fully satisfied this probation condition.
7. Within one year after the effective date of the discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

At the expiration of the probation period, if Respondent has complied with all conditions of probation, Respondent will be relieved of the stayed suspension.

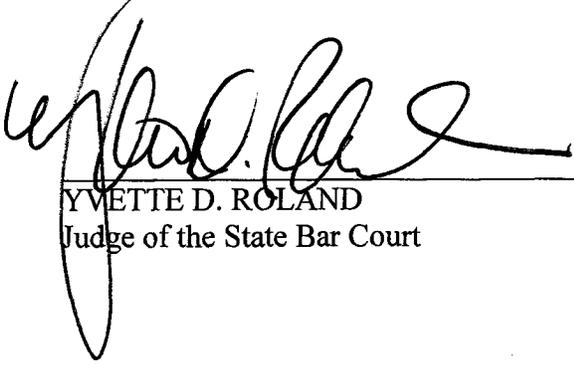
Multistate Professional Responsibility Examination

It is recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: September 10, 2015



YVETTE D. ROLAND
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); 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 Los Angeles, on September 10, 2015, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

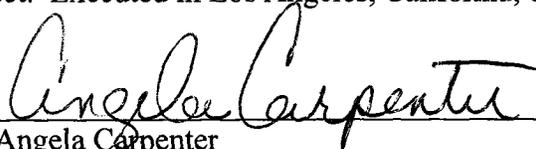
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

ELLEN ANNE PANSKY
PANSKY MARKLE HAM LLP
1010 SYCAMORE AVE UNIT 308
SOUTH PASADENA, CA 91030

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

Nina Sarraf-Yazdi, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 10, 2015.



Angela Carpenter
Case Administrator
State Bar Court