STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT I

A Member of the State Bar

No. 91-C-00638

Filed January 21, 1993

SUMMARY

While respondent was residing outside California and not practicing law, he was convicted twice of drunk driving. The State Bar examiner stipulated that the offenses did not involve moral turpitude, but sought suspension based on respondent's delay in completing his criminal sentence and other asserted aggravating circumstances. The hearing judge found that no nexus had been established between the offenses and the practice of law, and dismissed the disciplinary proceeding. (Hon. Christopher W. Smith, Hearing Judge.)

On review, the State Bar examiner conceded that no nexus had been established, but asserted that respondent should be given a reproval because he had not established rehabilitation and still posed a danger to the public. After reviewing case law in California and other jurisdictions regarding professional discipline for criminal misconduct generally and for drunk driving in particular, the review department concluded that no professional discipline was warranted based on the misconduct underlying the convictions, because respondent had neither acted violently nor showed disrespect for the legal system, had been found to have rehabilitated himself, and had not posed a danger to clients, courts or the public upon his return to law practice. Accordingly, the review department affirmed the dismissal of the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Teresa M. Garcia

For Respondent: Jeffrey S. Benice

HEADNOTES

[1] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
The California Supreme Court has classified driving under the influence of alcohol as a crime which may or may not involve moral turpitude, and which may, at least under certain circumstances, result in professional discipline.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2 a-d] **191 Effect/Relationship of Other Proceedings**
199 General Issues—Miscellaneous
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1699 Conviction Cases—Miscellaneous Issues

In 1990, the majority of the California Supreme Court expressly declined to determine whether a nexus between criminal conduct and the practice of law is required in order to impose professional discipline based on a criminal conviction. The Court unanimously agreed, however, that it would be unreasonable to hold attorneys to such a high standard of conduct that every violation of law, however minor, would constitute a ground for professional discipline. Thus, the integrity of the profession does not require professional discipline in addition to criminal sanctions for every violation of law by an attorney.

[3 a-d] **1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found**

Where respondent's two convictions for drunk driving occurred while respondent was living outside California and not practicing law, and respondent did not act violently or show disrespect for the legal system in connection with such convictions, and respondent had been rehabilitated and did not pose a danger to clients, courts or the public, respondent was not culpable of misconduct warranting discipline.

[4] **139 Procedure—Miscellaneous**
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1699 Conviction Cases—Miscellaneous Issues

Where an attorney is convicted of a crime which does not inherently involve moral turpitude, the attorney's conviction is referred to the State Bar Court Hearing Department for a determination whether the facts and circumstances surrounding the crime involved moral turpitude or other misconduct warranting discipline, and to determine the appropriate disposition. Upon a referral of that type, the appropriate disposition can include dismissal of the proceedings if the hearing judge finds that the particular misconduct did not warrant professional discipline.

[5] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**

The general policy of the State Bar is not to refer an attorney for a State Bar disciplinary hearing following the attorney's first misdemeanor conviction for driving under the influence of alcohol. First offense convictions are automatically referred when they involve a felony and may be referred if aggravating circumstances are apparent from the record of a misdemeanor conviction.

[6] **169 Standard of Proof or Review—Miscellaneous**
192 Due Process/Procedural Rights
204.90 Culpability—General Substantive Issues
1699 Conviction Cases—Miscellaneous Issues

In addressing the constitutionality of imposing professional discipline for criminal conduct not involving moral turpitude, the State Bar Court must endeavor to interpret the "other misconduct warranting discipline" standard to render its application in the particular case constitutional.

[7] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
204.90 Culpability—General Substantive Issues
1699 Conviction Cases—Miscellaneous Issues

A due process challenge to a discipline proceeding based on vagueness is appropriate where the misconduct involved is not clearly within the scope of a disciplinary standard and the standard is so broad that people of common intelligence must necessarily guess at its meaning and differ as to its application.

[8] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1699 Conviction Cases—Miscellaneous Issues

Where respondent clearly was on notice that drinking and driving could result in criminal penalties, and it was established law that any vehicular homicide or felony conviction resulting from drunk driving could result in professional discipline, respondent apparently had sufficient notice that criminal behavior of driving under the influence could, depending on circumstances, result in professional discipline. However, review department declined to decide notice issue where disciplinary proceeding was dismissed on another ground.

[9] **1513 Conviction Matters—Nature of Conviction—Violent Crimes**
1516 Conviction Matters—Nature of Conviction—Tax Laws
1519 Conviction Matters—Nature of Conviction—Other
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

Under California case law interpreting the California Supreme Court's inherent authority, professional discipline can be imposed based on a criminal conviction for violent behavior not involving moral turpitude, wilful failure to file a tax return, or repeated minor violations evincing indifference to legal obligations.

[10] **196 ABA Model Code/Rules**
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found

Under both ABA model ethics rules and California law, lawyers convicted simply of a single misdemeanor offense of driving under the influence may receive a disciplinary reprimand, but for the most part are treated like under citizens and sanctioned under the criminal law. Their suitability to practice law is called into question, however, where the incident is compounded by serious injury or death or is coupled with other aggravating behavior.

[11] **204.90 Culpability—General Substantive Issues**
750.10 Mitigation—Rehabilitation—Found
802.63 Standards—Appropriate Sanction—Effect of Mitigation
1699 Substantive Issues re Discipline—Miscellaneous

Evidence that an attorney has taken steps to deal with an alcohol problem is mitigating evidence that may properly be taken into account in determining the degree and nature of discipline, but does not eliminate the initial misconduct as an appropriate basis for discipline.

[12] **802.63 Standards—Appropriate Sanction—Effect of Mitigation**
1699 Conviction Cases—Miscellaneous Issues

Where compelling mitigation is present, a case which involves a misdemeanor conviction that otherwise would be an appropriate basis for discipline may result in dismissal in the interests of justice.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P. J.:

This case focuses on the threshold issue of the point at which drunk driving—a serious societal problem with potentially tragic results—becomes a matter subject to professional discipline against a lawyer's license. **[1]** The California Supreme Court has classified driving under the influence of alcohol as a crime which "may or may not involve moral turpitude" and which may, at least under certain circumstances, result in professional discipline.

It is stipulated that respondent did not commit any act of moral turpitude and the hearing judge found that no nexus had been established between the practice of law and respondent's two drunk driving convictions, which occurred while respondent was residing in another state and engaged in a different profession. **[2a]** In *In re Kelley* (1990) 52 Cal.3d 487, a divided Supreme Court imposed a public reproval on an active member of the State Bar after two drunk driving convictions not involving moral turpitude. The majority did not determine whether a nexus between criminal conduct and the practice of law was required in all cases, but expressly found that the facts and circumstances on the record before it demonstrated more than one such nexus. Two concurring justices also found a nexus, but would have limited discipline in all cases to misconduct that impairs or is likely to impair the attorney's performance of his or her professional duties. The dissent found no nexus and would have dismissed the proceeding.

Here, although the examiner concedes that no nexus has been established, due to delay in completion of respondent's jail sentence and other perceived aggravating circumstances surrounding the second Arizona conviction, the Office of Trials sought suspension of respondent in the hearing below and, on request for review of an order dismissing the proceedings, has modified its position to request that respondent be reproved.

Respondent argues that the current state of the law leaves a practitioner vulnerable to unwarranted prosecution and urges us to take this opportunity to formulate a uniform standard which will protect the public policy concerns of the State Bar while providing attorneys with fair notice of the actions which will lead to discipline so that they can govern themselves accordingly. In order to address the concerns raised by respondent it is necessary that we review the existing disciplinary case law with respect to drunk driving convictions.

Over 25 years ago in *In re Alkow* (1966) 64 Cal.2d 838, the California Supreme Court held that the facts surrounding a vehicular manslaughter conviction of an attorney demonstrated moral turpitude because of the attorney's repeated acts in complete disregard of the law, the conditions of a prior criminal probation order and the safety of others. In *In the Matter of Anderson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 39, same cause (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208 (review after remand), we considered whether the abusive behavior of a former criminal prosecutor in connection with several drunk driving convictions demonstrated moral turpitude. We decided that the case was closer to *In re* Kelley than *In re Alkow* and upheld the finding of no moral turpitude, but in light of prior discipline recommended two months suspension.

[3a] This proceeding raises an issue at the other end of the spectrum. It is established that respondent neither acted violently, nor at any time showed disrespect for the legal system. He also has been found to have rehabilitated himself from his prior criminal conduct which occurred at a time when he was not practicing law and, upon resumption of the practice of law, to pose no danger to his clients, the courts and the public, which was a central concern of the Court in *In re Kelley*. For the reasons discussed below, we affirm the hearing judge's determination that respondent is not culpable of misconduct warranting any professional discipline.

THE FACTS

Respondent was admitted to the California bar in 1978. He went on voluntary inactive status in 1981. He thereafter moved to Arizona and became employed as a stockbroker. On two occasions in 1986 and 1987 respondent was convicted of driving under the influence of alcohol in that state.

The 1986 Incident

The incident leading to the 1986 arrest began late one night when a police officer saw respondent's car stop abruptly past a crosswalk at a red light. The officer followed the car and observed it weave and twice cross over into the adjoining lane while travelling at 35 miles per hour in a 50-mile-per-hour zone. When the officer pulled respondent over, he noticed a strong smell of alcohol on respondent's breath and that his eyes were watery and bloodshot.

Respondent failed all field sobriety tests administered, slurred his speech almost beyond comprehension, and staggered when he walked. The officer arrested him for driving under the influence of alcohol (hereafter "DUI") and for driving with a blood alcohol level of .10 or above. In addition, the officer cited him for failing to drive in a single lane of traffic. No other parties were involved in the incident. Respondent remained cooperative throughout his arrest and subsequent visit to the police station. His blood alcohol concentration tested as .146. Respondent pled "no contest" to the DUI charge and his sentence consisted of 30 days suspension of his Arizona driver's license, followed by a 60-day work-home restriction on his license, a $373 fine, and a 6-hour alcohol education program. Respondent had completed his sentence in the first proceeding at the time of the second arrest.

The 1987 Incident

The 1987 incident involved a rear-end collision with another car which caused no serious injuries. Respondent was returning from a social function in the middle of the night when he skidded and hit the car ahead of his. He sustained the only injury in the accident, a bloodied lip. The police officer who arrived at the scene to investigate the accident noticed that respondent's breath smelled strongly of alcohol and his eyes appeared watery and bloodshot. He also noticed respondent's fat lip, his extremely slurred speech, and his trouble maintaining balance. Respondent was unable to perform any field sobriety tests, yet remained polite. After citing respondent for failing to drive in a single lane and failing to control his speed to avoid a collision, the police officer arrested respondent for DUI and took him to the police station where his blood alcohol level was tested twice. The first test result was .21 and the second was .26. The officer then added the charge of driving with a blood alcohol concentration of .10 or above.

A municipal court jury convicted respondent on both charges, and the judge sentenced him to 60 days in jail, with a work release provision allowing him to work during the day while remaining incarcerated at night. Respondent appealed that conviction.

Respondent quit drinking the day after his second arrest and within one week of that arrest began a program of intense psychotherapy which continued for more than 18 months. In July of 1990, respondent accepted a job with a federal agency in California and reactivated his California bar membership. When the unsuccessful appeal attempts of his Arizona conviction ended, respondent sought to serve his work release sentence in California in order to avoid losing his newfound legal position with the federal agency. The Arizona judge and prosecutor's office were amenable to this possibility. Respondent then began looking for a suitable California facility which met with the judge's and prosecutor's approval. He found one which met with the judge's approval and the preliminary approval of the deputy district attorney but it was ultimately rejected by the district attorney. Meanwhile, the execution of the sentence was continued several times on respondent's motion. Ultimately, the prosecutor, the Arizona judge and respondent's attorney agreed that respondent would fail to appear at the court-ordered January 18, 1991 sentence execution, thereby triggering a bench warrant for his arrest were he to appear in Arizona without immediately appearing in court. As the Arizona sentencing judge later attested, this was a procedural device used to forego the necessity of further appearances by both respondent's counsel and the prosecutor until respondent could provide the court with proof of California incarceration fulfilling the Arizona sentence.

THE HEARING BELOW

The record of the second conviction was sent to the State Bar in the spring of 1991. **[4]** Since the crime was not one inherently involving moral turpi-

tude,[1] it was referred by this review department to the hearing department for determination whether the facts and circumstances involved "moral turpitude or other misconduct warranting discipline" and to determine the appropriate disposition. (Cf. *In the Matter of Anderson*, *supra*, 1 Cal. State Bar Ct. Rptr. 39, 2 Cal. State Bar Ct. Rptr. 208.) Upon a referral order of that type, the appropriate disposition could include dismissal of the proceedings if the hearing judge found that the particular misconduct did not warrant professional discipline. (See, e.g., *In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 761, 764.) At the hearing, the parties stipulated that the facts and circumstances surrounding respondent's conviction did not involve moral turpitude and proceeded to litigate the remaining issue whether respondent was culpable of "other misconduct warranting discipline."

Prior to the hearing below, respondent finally arranged to serve his Arizona sentence at a city jail in California at a cost of $4,230.[2] In October of 1991, respondent appeared in Arizona before the sentencing judge who then quashed the bench warrant and also made a finding that respondent's failure to appear at the January hearing was not "wilful or contemptuous to the court." Respondent also took and passed an alcohol screening in Arizona. Based on the testimony by telephone of the Arizona sentencing judge and respondent's testimony in court, the State Bar Court hearing judge found that neither respondent's failure to appear at the Arizona hearing which led to the bench warrant, nor the lengthy delay in completing the sentence evidenced a lack of respect for the legal system.[3]

The hearing judge also found no nexus between respondent's misconduct and the practice of law since respondent had been on inactive status for several years prior to his arrest; was not on probation or otherwise in violation of a court order when arrested; had been cooperative with the arresting officer; and was found not to have had any alcohol since the date of his second arrest in March of 1987, to have obtained immediate professional treatment, and to be rehabilitated from the problem of abusing alcohol. He also was found to be performing his job as a government attorney in an excellent manner, which resulted in his promotion to a job with the same agency with greater responsibility, and to pose no danger to his clients, the courts and the public.

In his decision filed in May of 1992 the hearing judge distinguished *In re Kelley*, *supra*, and concluded that the facts and circumstances surrounding respondent's conviction did not amount to other misconduct warranting discipline. He therefore determined that the proceeding should be dismissed with costs awarded to respondent pursuant to Business and Professions Code section 6086.10.

On review, the examiner does not dispute that the relevant facts and circumstances include respondent's activities since the incidents in question, but disputes several of the factual findings and urges that discipline is still necessary because respondent is not yet rehabilitated and poses "an extreme risk of serious danger to the public." In particular, the examiner challenges the findings of the hearing judge on rehabilitation, arguing that the hearing judge improperly considered expert testimony of-

1. The California Supreme Court's determination that drunk driving does not inherently involve moral turpitude is in accord with other jurisdictions that have addressed the issue. (See, e.g., *In the Matter of Oliver* (Ind. 1986) 493 N.E.2d 1237, 1240-1241, and cases cited therein.)

2. Respondent testified that this arrangement was negotiated by a private criminal justice consultant after the same facility had rejected respondent's application on two prior occasions.

3. In her brief on review, the examiner asked us to reverse the hearing judge's determination on this issue and to revisit the Arizona sentencing judge's finding that respondent's failure to appear in response to the Arizona bench warrant was not wilful. She also asked us to find that respondent did not act with diligence to serve his sentence. She abandoned these contentions at oral argument. The evidence below was uncontradicted and the findings of the hearing judge in this regard were unassailable. The State Bar bore the burden of proof by clear and convincing evidence on issues in aggravation. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 933.) It submitted no evidence to contradict the testimony of the sentencing judge and respondent upon which the hearing judge based his findings.

fered only in mitigation as evidence affecting culpability; that the majority of respondent's therapy did not address alcohol abuse;[4] and that his participation in Alcoholics Anonymous ("AA") was not meaningful or of sufficient duration to demonstrate rehabilitation.[5] Respondent defends the findings below and the dismissal on a number of grounds including that the standard for imposing discipline for "other misconduct" is unconstitutionally ambiguous as applied to him and violates due process.

DISCUSSION

Both parties agree with the hearing judge that the most relevant Supreme Court precedent is *In re Kelley, supra*, 52 Cal.3d 487. In that case the volunteer review department recommended that Kelley be publicly reproved and placed on disciplinary probation for three years on several conditions including abstinence from the use of intoxicants and referral to the State Bar program on alcohol abuse. Kelley contended before the Supreme Court that no professional discipline was warranted because her misconduct which resulted in two drunk driving convictions[6] **[5 - see fn. 6]** was unrelated to her practice of law and not specifically proscribed by any disciplinary rule or statute. Alternatively, she argued that the ground for discipline was unconstitutionally vague, and that the discipline was excessive and violated her constitutional right to privacy.

The principal case supporting her position was *In re Fahey* (1973) 8 Cal.3d 842, 853 wherein the Supreme Court stated that "Offenses that do not involve moral turpitude or affect professional performance should not be a basis for professional discipline simply because they fall short of the highest standards of professional ethics or may in some way impair the public image of the profession." A major question raised in *In re Kelley* was what remained of the policy stated in *In re Fahey* after the high court's later decision in *In re Rohan* (1978) 21 Cal.3d 195. There, the Supreme Court decided to impose suspension for a conviction of an attorney for wilful failure to file a federal income tax return. While the justices were in complete agreement on the discipline to be meted out, neither a majority nor a plurality could agree on the rationale. Justice Clark wrote the opinion of the Court which was joined only by Justice Richardson. (*Id.* at p. 198.) Justice Tobriner wrote a concurrence joined by Justice Mosk (*id.* at p. 204), and a separate concurrence was filed by retired Justice Sullivan joined by retired Chief Justice Wright, both sitting under assignment by the Acting Chairperson of the Judicial Council. (*Id.* at p. 206.)

The opinion of the Court recited the duty of every attorney "to 'support the Constitution and laws of the United States and of this State'" (*id.* at p. 201, quoting Bus. & Prof. Code, § 6068 (a)) and observed that "An attorney as an officer of the court and counselor at law occupies a unique position in society. His refusal to obey the law, and the bar's failure to discipline him for such refusal, will not only demean the integrity of the profession but will encourage disrespect for and further violations of the law." (*Id.* at p. 203.) Nonetheless, the opinion noted that "It is manifest that particular violations of the

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4. The therapy initially addressed both his alcohol abuse and the underlying problems which led to his excessive drinking. Because he had already ceased drinking, the focus soon became the underlying problems rather than alcohol abuse and therapy continued on a reduced basis until the time of the State Bar Court hearing.

5. The court below found that respondent attended AA meetings three times a week for approximately a year, which the examiner challenges as unsupported by the evidence. We modify that finding (finding no. 19) to reflect respondent's testimony that he joined AA in August of 1990 shortly after he came to California and had on his own already ceased drinking any alcohol for three years. His primary purpose for attending AA was to meet people and make friends who also had overcome alcohol abuse. He initially attended AA meetings three or four times per month for three or four months and sporadically thereafter for several months through July 1991.

6. **[5]** Traditionally, the State Bar has not referred first offense misdemeanor drunk driving convictions to the Supreme Court for recommendation of discipline, but has generally done so only following notice of a second conviction. The examiner in this case indicated that it was still the general policy of her office not to refer an attorney for a State Bar hearing following notice of a first misdemeanor conviction for driving under the influence. First offense convictions are automatically referred when they involve a felony and may be referred if there are aggravating circumstances surrounding a misdemeanor conviction apparent from the record of conviction itself.

law by an attorney, even certain violations for willful failures to file income tax returns, may not warrant the imposition of discipline for an oath violation." (*Id.* at p. 204.) It concluded that the particular facts and circumstances warranted discipline, pointing out that there were no mitigating circumstances excusing Rohan's conduct.

In his separate concurrence, Acting Chief Justice Tobriner criticized the vagueness of the Court's opinion and focused instead upon the relationship of the offense to the practice of law as the crucial element justifying the imposition of discipline. He would have applied the test of a specific nexus between the attorney's conduct and the practice of law and specifically urged that such a test not be evaded by the assertion that the lawyer's misconduct demeans the integrity of the legal profession or that the lawyer's conduct might encourage others to violate the law. (*Id.* at p. 205 (conc. opn.).) In so arguing he relied upon frequent statements of the Court "as a constitutional principle that a person can be barred from the practice of his profession only for reasons related to his fitness or competence to practice that profession [citation] . . . ." (*Id.* at p. 206, citing *Newland* v. *Board of Governors* (1977) 19 Cal.3d 705, 711.) He then opined that "to allow discipline for unrelated conduct on the ground that it demeans the integrity of the profession would detract from that fundamental principle." (*In re Rohan, supra,* 21 Cal.3d at p. 206 (conc. opn.).) Nevertheless, on the facts he concluded that Rohan's conduct reflected on his fitness to practice law because "The maintenance of clear and accurate financial records and the preparation and filing of timely tax returns closely parallel the duties of a practicing attorney." (*Ibid.*)

Retired Justice Sullivan concurred in the order imposing discipline based on the particular facts and circumstances, but, like Justice Tobriner, also expressly took issue with the attempt to reassess *In re Fahey* and to formulate general bases for discipline couched in vague language. (*In re Rohan, supra,* 21 Cal.3d at pp. 206-207 (conc. opn.).) Nonetheless, he parted company with Justice Tobriner on the test to be applied.

In re Rohan was followed by *In re Morales* (1983) 35 Cal.3d 1. There, the petitioner had been convicted of 27 misdemeanor offenses involving the failure to withhold or pay certain payroll taxes and unemployment insurance contributions. (Rev. & Tax Code, § 19409; Unemp. Ins. Code, §§ 2108, 2110, 2110.5.) He also had a prior record of private reproval for gross negligence in failing to keep complete records of clients' trust funds, and failing to maintain sufficient funds in one such account.

The volunteer hearing panel had found moral turpitude and recommended 18 months stayed suspension upon specified conditions of probation. Morales challenged the finding that he committed acts of moral turpitude and challenged the degree of discipline, but did not contend that his misconduct did not constitute "other misconduct warranting discipline." (35 Cal.3d at pp. 4, 8.) The volunteer review department adopted the disciplinary recommendation, but declined to find moral turpitude. It determined that the facts and circumstances surrounding Morales's conviction constituted "other misconduct warranting discipline." In approving the review department's analysis, the majority of the Supreme Court recapitulated the various opinions in *In re Rohan* and concluded that Morales's failure to meet similar tax obligations fully warranted the recommended discipline. The majority also noted that: "It is reasonably foreseeable that petitioner's legal advice could be solicited by clients in similar circumstances, and we have grave doubts whether the advice he would offer would be sound in view of petitioner's apparent failure even now to recognize that what he did was not justified . . . ." (*In re Morales, supra,* 35 Cal.3d at p. 6.)

In her concurrence joined by Justice Grodin, Chief Justice Bird agreed with the discipline recommendation but would have held that Morales was culpable of acts of moral turpitude and would have taken the opportunity to reaffirm the standard unanimously adopted in *Fahey* limiting discipline for criminal conduct outside the practice of law to crimes involving moral turpitude. (*Id.* at pp. 8-9 (conc. opn.).)

In re Morales presented a case that, like *In the Matter of Anderson, supra,* 1 Cal. State Bar Ct. Rptr. 39, involved conduct bordering on acts of moral turpitude. *In re Morales* contained the last extended

discussion of the issue prior to *In re Kelley*, which also generated three opinions. Between the two, however, the high court unanimously imposed discipline in *In re Titus* (1989) 47 Cal.3d 1105 (public reproval), *In re Otto* (1989) 48 Cal.3d 970 (six months actual suspension) and *In re Hickey* (1990) 50 Cal.3d 571 (30 days actual suspension) for crimes not involving moral turpitude.

In re Titus was a one-page opinion imposing discipline for Titus's conviction for carrying a concealed firearm (Pen. Code, § 12025, subd. (b)) and, on another occasion, carrying a loaded firearm (Pen. Code, § 12031) and reckless driving (Veh. Code, § 23103).

In *In re Otto* an inactive attorney and former police officer was convicted of violating Penal Code sections 245, subdivision (a) (assault by means likely to produce great bodily injury) and 273.5 (infliction of corporal punishment on a cohabitant of the opposite sex resulting in a traumatic condition) after engaging in acts of physical violence while under the influence of alcohol. *In re Hickey*, *supra*, similarly involved an inebriated attorney's violent behavior toward his wife and others leading to his conviction under Penal Code section 12025, subdivision (b) (carrying a concealed weapon). Both respondents argued that their misconduct was unrelated to their practice of law. The high court refused to let such arguments stand in the way of professional discipline, noting in *Hickey* that when an attorney engages in violent criminal conduct as a result of uncontrolled consumption of alcohol, the disciplinary system "need not wait until the attorney injures a client or neglects his legal duties" before imposing discipline. (*Id.* at p. 579.)

No specific nexus was spelled out in *In re Titus*, *In re Otto* or *In re Hickey*. **[2b]** When the issue of a nexus was raised again in *In re Kelley*, the majority of the high court expressly declined to resolve the issue whether a nexus to the practice of law was required to impose discipline for misconduct under the Court's inherent authority. (*In re Kelley*, *supra*, 52 Cal.3d at p. 495.) Resolution of the issue was unnecessary because, as it pointed out, a nexus to the practice of law did exist—Kelley's second conviction was in violation of the terms of probation of her first conviction and thus involved disobedience of a court order.[7] Another nexus found by the majority was that even though no actual interference with her practice of law had been demonstrated, Kelley's untreated problem with alcohol and lack of rehabilitation posed a continuing risk to her clients, the courts and the public. (*Id.* at pp. 495-496, citing *In re Hickey*, *supra*, 50 Cal.3d 571, 579.)[8]

The *Kelley* majority also noted that it had previously ordered discipline based on two convictions of drunk driving when no moral turpitude was found. (*In re Kelley*, *supra*, 52 Cal.3d at p. 496, citing *In re Carr* (1988) 46 Cal.3d 1089.) In *In re Carr*, however, the respondent had previously been convicted of a federal felony drug offense which resulted in lengthy disciplinary suspension. That suspension was still in force at the time of the drunk driving convictions. No Supreme Court case prior to Kelley's ever involved an attorney with an otherwise unblemished record who was subject to disciplinary proceedings solely for drunk driving convictions. **[2c]** The majority stated its agreement with Kelley's counsel that "it would be unreasonable to hold attorneys to such a high standard of conduct that every violation of law, however minor, would constitute a ground for professional discipline." (*In re Kelley*, *supra*, 52 Cal.3d at p. 496.) The majority then noted that that was not the case with Kelley whose "behavior evidences both a lack of respect for the legal system and an alcohol abuse problem. Both problems, if not checked, may spill over into petitioner's professional practice and adversely affect her representation of clients and

7. The Court had also noted earlier in its opinion that Kelley was uncooperative with the police officer who stopped her and that he summoned a second officer for assistance. (52 Cal.3d at p. 491.)

8. In *Hickey*, however, the respondent had argued that he had recovered from the alcoholism which caused his misconduct and resolved the marital difficulties to which it was related. (50 Cal.3d at p. 578.) The Court in that case characterized such evidence as mitigating evidence which did not "eliminate the initial misconduct as an appropriate basis for discipline." (*Id.* at p. 579.) We discuss the impact of respondent's longer period of rehabilitation below.

her practice of law. . . . [I]t is our responsibility to impose a discipline that will protect the public from this potential harm." (*Ibid.*)

In response to the argument that the standard for discipline for other misconduct is unconstitutionally vague, the majority acknowledged that prior case law lent support to the argument that "if a disciplinary standard is so vague that no reasonable consensus may be formed as to its proper meaning, its application is constitutionally suspect." (*Id.* at p. 496, citing *Morrison* v. *State Board of Education* (1969) 1 Cal.3d 214, 231-233.) However, the Court noted that one to whose conduct a statute clearly applies may not successfully challenge the statute for vagueness. (*In re Kelly*, *supra*, 52 Cal.3d at p. 497.) The Court concluded that its application of the challenged standard to the facts of the *Kelley* case was constitutional because of the focus on the "repeated failure [of attorneys] to conform their conduct to the requirements of the criminal law and court orders specially imposed on them." (*Ibid.*) This echoed the majority's earlier emphasis upon the fact that Kelley's "repeated criminal conduct call[ed] into question her judgment and fitness to practice law in the absence of disciplinary conditions designed to prevent recurrence of such conduct." (*Id.* at pp. 490-491.)

In a separate concurrence, Justice Mosk, joined by Justice Broussard, pointed out the need for lawyers to know what conduct other than moral turpitude may jeopardize their license to practice law; that the bar authorities needed a clearly articulated standard to administer the disciplinary system and the Court needed a clearly articulated standard to reach consistent and fair decisions on a "facially amorphous" ground of discipline. (*In re Kelley*, *supra*, 52 Cal.3d at p. 499 (conc. opn.).) He would have limited the application of discipline for other misconduct to "misconduct that impairs or is likely to impair the attorney's performance of his or her professional duties." (*Id.* at p. 500.) If this standard were not met he would expect the Court to "leave the matter to the sanction of the criminal law or public opprobrium." (*Ibid.*)

In his lone dissent, Justice Panelli agreed with Justice Mosk's analysis that a nexus must exist between the attorney's misconduct and the attorney's fitness to practice law, but would limit the standard to "attorney misconduct which impairs the attorney's performance of his or her duties." (*In re Kelley*, *supra*, 52 Cal.3d at p. 500 (dis. opn.).) He took issue with the majority's imposition of discipline for Kelley's law violations and "'the *indications* of a problem of alcohol abuse'" which had not yet affected her practice of law. (*Ibid.*, quoting maj. opn., 53 Cal.3d at p. 495, emphasis supplied by dis. opn.) He criticized the imposition of discipline for conduct which "may affect [the] future performance" of an attorney's duties as a "dangerous journey" and would have left the consequences of Kelley's serious violations of drinking and driving laws to the Legislature and the executive branch. (*Id.* at p. 500 (dis. opn.).)

[6] As in *In re Kelley*, respondent here asks us to address the constitutionality of imposing professional discipline. In addressing this issue, we must endeavor to interpret the "other misconduct warranting discipline standard" to render its application to respondent constitutional. (Cf. *Association for Retarded Citizens* v. *Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394; *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433.)

[7] Respondent argues that imposing professional discipline would violate due process because he was provided no advance notice of the grounds on which discipline might be imposed. The high court has indicated that a vagueness challenge is appropriate where the misconduct is not clearly within the scope of a disciplinary standard and the standard "is so broad that people 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" (*In re Kelley*, *supra*, 52 Cal.3d at p. 497, quoting *Connally* v. *General Constr. Co.* (1926) 269 U.S. 385, 391.)

At the time of respondent's two drunk driving convictions, the California Supreme Court had decided neither *In re Carr*, *supra*, 46 Cal.3d 1089, nor *In re Kelley*. There was no specific test established for "other misconduct warranting discipline" and no published precedent for disciplining any member of the California State Bar for driving under the influence under circumstances that did not involve moral turpitude. Respondent had been an inactive member

of the California State Bar for several years residing in a different state and following a different profession. Respondent has a stronger argument than did Kelley that he was not in any meaningful way put on notice that if he drank and drove on social occasions in Arizona he would be subject to professional discipline in California.

[8] Nonetheless, respondent was clearly put on notice that drinking and driving could result in criminal penalties which arguably was sufficient to alert him that such behavior might subject him to professional discipline.[9] Had he had the misfortune of causing a serious accident in his inebriated condition he could have been convicted of vehicular homicide which has long since been held an appropriate basis for professional discipline. (*In re Alkow*, *supra*, 64 Cal.2d 838; cf. *In the Matter of Morris* (1964) 74 N.M. 679, 397 P.2d 475 [indefinite suspension for a minimum of one year for felony involuntary manslaughter resulting from DUI].) Indeed, effective in 1986 any felony conviction under the laws of the United States is by itself justification for interim suspension of members of the California State Bar pursuant to Business and Professions Code section 6102 (a). It would therefore appear that respondent was put on sufficient notice that his criminal behavior could, depending on the circumstances, result in professional discipline in California. However, we need not decide this issue because of our determination to uphold dismissal of the proceeding on another ground.

Other states' disciplinary systems have recently grappled with the issue of discipline for misconduct not in the practice of law and, in particular, the impact of lawyers' drunk driving convictions as public opprobrium has caused greater focus on this dangerous behavior. The American Bar Association's Model Code of Professional Responsibility, DR 1-102(A), which is still applicable in a number of jurisdictions, states that a lawyer shall not "(3) Engage in illegal conduct involving moral turpitude [or] . . . [¶] (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

The ABA's Model Rule 8.4(b), which in many states has replaced DR 1-102(A)(6), defines as professional misconduct a lawyer's commission of a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The official comment to rule 8.4 explains: "Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude.' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."

[9] The comment to Model Rule 8.4 is consistent with California case law interpreting the California Supreme Court's inherent authority. Thus, violent behavior not involving moral turpitude can result in professional discipline. (See *In re Otto*, *supra*, 48

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9. The Washington Supreme Court rejected a similar argument of unconstitutional vagueness made by a member of the Washington State Bar in *In the Matter of Curran* (1990) 115 Wash.2d 747, 801 P.2d 962, cited to us by the examiner. In that case, the Washington Supreme Court upheld a state disciplinary rule forbidding "any act reflecting a disregard for the rule of law" as constitutional when construed only to permit discipline of lawyers for violations of the criminal law. (*Id.*, 801 P.2d at p. 967.) The lawyer in that case had been convicted of two counts of vehicular homicide and sentenced to 26 months in jail. In the disciplinary case, he received a six-month prospective suspension following eighteen months interim suspension. However, the Washington Supreme Court noted that it imposed the suspension because of the deaths and its desire for consistency with other vehicular homicide cases, citing, inter alia, *In re Alkow*, *supra*. (*Curran*, *supra*, 801 P.2d at p. 974.) Focusing on the conduct of the attorney in driving while intoxicated, it noted that "whether [the] acts merit discipline and if so, what sort of discipline, are very difficult and close questions." (*Id.*, 801 P.2d at p. 966.)

Cal.3d 970.) Wilful failure to file a tax return can result in discipline (*In re Rohan*, *supra*, 21 Cal.3d 195) as can repeated minor violations evincing indifference to legal obligations. (*In re Kelley*, *supra*, 52 Cal.3d 487.)

[10] A common thread runs through all of the reported DUI cases resulting in similar treatment under the Model Code, the Model Rules and California case law. Lawyers who are convicted simply of a single misdemeanor DUI may receive a reprimand, but for the most part appear to be treated like other citizens who have violated those criminal laws and receive appropriate criminal sanctions designed to discourage repetition of their misconduct.[10] Their suitability to practice law is called into question, however, where the incident is compounded by serious injury or death or is coupled with other aggravating behavior (a high-speed chase, lack of cooperation with police, probation violation, possession of illegal drugs, etc.). (See, e.g., *In re Curran*, *supra*, 801 P.2d 462; *Attorney Grievance Comm. of Md.* v. *Shaffer* (1986) 305 Md. 190, 502 A.2d 502 [indefinite suspension ordered for three DUI convictions, passing bad checks, and client-related misconduct associated with alcoholism]; *In re Murray* (1985) 147 Ariz. 173, 709 P.2d 530 [disbarment ordered for various offenses against clients as well as conviction arising from arrest for DUI and possession of cocaine and remaining a fugitive after second arrest for DUI and possession of cocaine]; *Comm. on Prof. Ethics and Conduct of Iowa State Bar* v. *Williams* (Iowa 1991) 473 N.W.2d 203 [minimum six-month indefinite suspension for misconduct including offering money to arresting officer after DUI arrest]; *In re Eddingfield*, *supra*, 572 N.E.2d 1293 [30-day suspension for DUI arrest preceded by high-speed chase; marijuana found in car].)

[2d] The California Supreme Court has provided similar guidance which enables us to dispose of the instant case. While no majority of the high court has ever agreed upon the threshold for imposing discipline for "other misconduct," the Supreme Court has been unanimous in its adherence to the view that not every violation of law by an attorney constitutes misconduct warranting discipline against his or her license to practice law. (See *In re Kelley*, *supra*, 52 Cal.3d at pp. 496 (maj. opn.), 499-500 (conc. opn. of Mosk, J.), 500 (dis. opn. of Panelli, J.).) It necessarily follows that the integrity of the profession cannot require professional discipline in addition to criminal sanctions for every violation of law as an example to others.

[11] In analyzing respondent's culpability, respondent's subsequent steps to deal with his alcohol problem are not dispositive of the issue of whether discipline is warranted. The Supreme Court has held that "evidence that the attorney has taken steps to deal with his alcohol problem is mitigating evidence that may properly be taken into account in determining the degree and nature of the discipline that should be imposed, [but] such evidence does not eliminate the initial misconduct as an appropriate basis for discipline." (*In re Hickey*, *supra*, 50 Cal.3d at p. 579.)[11] **[12 - see fn. 11]** We must therefore examine carefully the justification for imposing discipline in this instance.

The examiner argues that respondent's misconduct evidenced a risk to the safety of the public and that the integrity of the legal profession, protection of the public, courts and the profession, maintenance of high professional standards and preservation of public confidence in the profession all warrant a finding that respondent is culpable of "other misconduct warranting discipline."

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10. One state supreme court has expressly concluded that "the sole act of operating a vehicle while intoxicated did not affect [an active lawyer's] practice or lead to any reasonable question about his suitability as a practitioner." (*In the Matter of Eddingfield* (Ind. 1991) 572 N.E.2d 1293, 1296 [referring to its earlier holding in *In re Oliver*, *supra*, 493 N.E.2d 1237].) Another state disciplinary system, that of Colorado, apparently has a policy of generally treating DUI convictions as at most warranting a cautionary letter. (See *People* v. *Senn* (Colo. 1992) 824 P.2d 822, 824; cf. *In the Matter of Curran*, *supra*, 801 P.2d 962, 974 [holding that in most cases violation of the criminal law resulting in a charge of disregard for the rule of law "should result only in a reprimand or censure"].)

11. **[12]** However, where compelling mitigation is present, a case which involves a misdemeanor conviction that otherwise would be an appropriate basis for discipline may result in dismissal in the interests of justice. (See, e.g., *In re Eliceche*, orders filed March 2, 1988 and Oct. 24, 1990 (BM 5665); *In re Eliceche*, orders filed July 20, 1988 and Oct. 24, 1990 (BM 5837).)

[3b] On these facts, we find all of these proffered justifications for professional discipline extraordinarily attenuated. The California State Bar itself does not generally consider a single misdemeanor conviction for drunk driving by an active member of the bar to warrant referral for consideration of professional discipline. It therefore cannot argue that conviction of an attorney for this crime inherently demeans the integrity of the bar. While respondent did commit the offense twice, there was no evidence and no finding as there was in *In re Kelley* that respondent demonstrated "disrespect for the legal system." (*In re Kelley, supra*, 52 Cal.3d at p. 495.) Indeed, the hearing judge made the opposite finding. Also, unlike Kelley, respondent was not in violation of probation or any specially imposed court order—a factor upon which the Supreme Court specifically relied in *In re Kelley* in justifying the constitutionality of Kelley's discipline. (*Id.* at p. 497.)

[3c] Here, the misconduct was not only unrelated to the practice of law, but occurred out of state during a time when the respondent had been inactive for several years. While an attorney may be subject to discipline for violent conduct not directly related to the practice of law (*In re Otto, supra*, 48 Cal.3d 970; *In re Hickey, supra*, 50 Cal.3d 571), we can find no precedent for disciplining respondent for two out-of-state occurrences of nonviolent misconduct unrelated to the practice of law in order to maintain high professional standards or to preserve public confidence in the California Bar. Indeed, it is difficult to see how any member of the public who became aware of the circumstances of respondent's DUI convictions could reasonably consider them a poor reflection upon the California State Bar as opposed to the dangerous behavior of an Arizona resident that was duly prosecuted as a misdemeanor under Arizona criminal laws. The examiner herself called our attention to *In the Matter of Curran, supra*, 801 P.2d 962, in which the Washington Supreme Court pointed out that "the criminal justice system bears the primary responsibility for enforcing the criminal code" and that "vigilant protection of the public from the dishonest and the incompetent will do more to enhance public confidence in the bar than enforcement of [disciplinary] rules having a more tangential relationship to practice." (*Id.* at pp. 973, 974.)

[3d] Continuing need for public protection cannot forcefully be argued as a rationale for imposing professional discipline on the facts before us here. Unlike the situations in *In re Kelley, supra*, 52 Cal.3d 487 and *In re Hickey, supra*, 50 Cal.3d 571, the record discloses that five years have passed since respondent last consumed any alcohol. During that length of time, respondent has demonstrated that he has rehabilitated himself without any State Bar intervention. Under California law, even a disbarred attorney is permitted to apply for unconditional reinstatement after five years. Common sense dictates that public protection requires no greater period of rehabilitation from the instant misconduct than has already been demonstrated.

CONCLUSION

As a result of respondent's alcohol abuse, respondent committed two serious violations of Arizona law which luckily did not injure others. Society has made him pay for those violations in jail time, fines and other conditions of his criminal conviction designed to protect the public. Respondent has taken those sanctions to heart and rehabilitated himself.

We can find no justification on this record for supplementing the criminal penalties by imposing discipline against respondent's license to practice law in California. The order of dismissal is affirmed as is the hearing judge's determination that respondent is entitled to reimbursement of reasonable expenses pursuant to section 6086.10 (d) of the Business and Professions Code.

We concur:

STOVITZ, J.
NORIAN, J.