

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

**RESPONDENT M**

A Member of the State Bar

No. 93-C-11180

Filed July 12, 1993

**SUMMARY**

The State Bar Court ordered respondent placed on interim suspension because of a felony conviction for drunk driving. Respondent filed a petition to set aside the order.

The review department held that whether interim suspension is warranted prior to a hearing on the merits of a felony conviction depends, among other things, on the nature of the crime, its relationship to the practice of law, the undisputed surrounding factual circumstances, and the likely range of final discipline. Respondent had practiced law for 22 years with no prior disciplinary record and had been convicted of drunk driving twice. Although his current misconduct resulted in serious injury to another person, it did not involve violent behavior, clients, or the practice of law. The final disciplinary order was likely to impose a sanction far less severe than would result from the interim suspension order. Also, the Office of the Chief Trial Counsel pointed to no indication of any adverse effect of the misconduct on respondent's practice, no indication of any violation of respondent's criminal sentence, and no particular danger posed to respondent's clients from vacating the interim suspension order. Accordingly, the review department found good cause to vacate the order.

**COUNSEL FOR PARTIES**

For Office of Trials: Rachelle M. Bin

For Respondent: Arthur Margolis

**HEADNOTES**

- [1]      130      **Procedure—Procedure on Review**  
          199      **General Issues—Miscellaneous**  
          1549     **Conviction Matters—Interim Suspension—Miscellaneous**  
          1699     **Conviction Cases—Miscellaneous Issues**

Normally, no published opinion results from a petition to set aside an interim suspension order based on a criminal conviction. Where final discipline had not been entered and might not be warranted, the review department could not determine whether it was appropriate to publicize

respondent's name in connection with opinion and order vacating interim suspension. Opinion therefore did not name respondent, although proceeding remained public.

- [2]     **101     Procedure—Jurisdiction**  
**1549     Conviction Matters—Interim Suspension—Miscellaneous**  
The Supreme Court has delegated to the State Bar Court its statutory power to place on interim suspension attorneys who have been convicted of crimes.
- [3]     **1511     Conviction Matters—Nature of Conviction—Driving Under the Influence**  
The general policy of the State Bar is not to refer a first offense misdemeanor drunk driving conviction to the Supreme Court for discipline.
- [4]     **1549     Conviction Matters—Interim Suspension—Miscellaneous**  
The purpose of interim suspension is to protect the public, courts, and legal profession until all facts relevant to a final disciplinary order are before the State Bar Court.
- [5]     **162.90   Quantum of Proof—Miscellaneous**  
**191       Effect/Relationship of Other Proceedings**  
**1549     Conviction Matters—Interim Suspension—Miscellaneous**  
Interim suspension is imposed on an attorney who commits a crime of moral turpitude or a felony, unless an exception is appropriate in the interest of justice, with due regard to maintaining the integrity of, and confidence in, the legal profession. Whether interim suspension is warranted prior to a hearing on the merits of a felony conviction depends, among other things, on the nature of the crime, its relationship to the practice of law, the undisputed surrounding factual circumstances, and the likely range of final discipline.
- [6 a, b] **1511     Conviction Matters—Nature of Conviction—Driving Under the Influence**  
**1543     Conviction Matters—Interim Suspension—Vacated**  
**1699     Conviction Cases—Miscellaneous Issues**  
Although drunk driving is a serious societal problem, it may or may not become a matter subject to professional discipline. Where an interim suspension order would impose a degree of discipline far more severe than the probable final discipline, the range of final discipline is dispositive of the good cause requirement for vacating the order.
- [7 a, b] **1541.10 Conviction Matters—Interim Suspension—Ordered**  
**1543     Conviction Matters—Interim Suspension—Vacated**  
**1549     Conviction Matters—Interim Suspension—Miscellaneous**  
The existence of express statutory authority to grant exceptions to interim suspension constitutes a legislative determination that public confidence will not necessarily be undermined by vacating the interim suspension of a convicted felon. On a sufficient showing, the Supreme Court has set aside interim suspensions for crimes involving moral turpitude per se, indicating that such relief is also available for felonies which may or may not involve moral turpitude.
- [8 a-c] **191       Effect/Relationship of Other Proceedings**  
**1541.10 Conviction Matters—Interim Suspension—Ordered**  
**1543     Conviction Matters—Interim Suspension—Vacated**  
**1549     Conviction Matters—Interim Suspension—Miscellaneous**  
**1691     Conviction Cases—Record in Criminal Proceeding**  
Where a felony could have been charged as a misdemeanor, the reduction of the felony conviction to a misdemeanor in postconviction proceedings does not affect the characterization of the crime

as a felony for the purpose of interim suspension, but it may be taken into account in determining whether good cause exists for vacating an interim suspension order. If the reduction were ignored, arbitrary results might follow based on the discretionary charging practices of different prosecutors.

- [9]       **1512     Conviction Matters—Moral Turpitude—Per Se**  
          **1541.20 Conviction Matters—Interim Suspension—Ordered**

**1549     Conviction Matters—Interim Suspension—Miscellaneous**

The Legislature has determined that public protection and integrity and confidence in the State Bar warrant interim suspension of attorneys convicted of misdemeanors only where there is probable cause to believe that the misdemeanor involves moral turpitude per se, and even in such cases good cause may justify not imposing interim suspension, as in the case of shoplifting.

- [10 a-e] **1511     Conviction Matters—Nature of Conviction—Driving Under the Influence**  
          **1543     Conviction Matters—Interim Suspension—Vacated**

Whether good cause exists for vacating or not imposing an interim suspension order depends on the facts that are not genuinely in dispute in each case. Good cause existed for vacating an interim suspension order following a felony drunk driving conviction where respondent had practiced law for 22 years with no prior disciplinary record; respondent had been convicted of drunk driving twice; respondent's conviction involved serious injury to another person, but did not involve violent behavior, clients, or the practice of law; where the final disciplinary order was likely to impose a sanction far less severe than would result from the interim suspension order; and where there was no indication of any adverse effect of the misconduct on respondent's practice, of any violation of respondent's criminal sentence, or of any particular danger to respondent's clients.

- [11]       **139       Procedure—Miscellaneous**  
          **151       Evidence—Stipulations**  
          **802.30 Standards—Purposes of Sanctions**  
          **1099     Substantive Issues re Discipline—Miscellaneous**  
          **1699     Conviction Cases—Miscellaneous Issues**

A stipulated disciplinary order does not constitute precedent, but does represent a determination by the Office of the Chief Trial Counsel and the hearing judge that the degree of discipline ordered satisfies the need to protect the public, the courts, and the legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession.

- [12]       **179       Discipline Conditions—Miscellaneous**  
          **1099     Substantive Issues re Discipline—Miscellaneous**  
          **1549     Conviction Matters—Interim Suspension—Miscellaneous**

From the point of view of a suspended attorney, the effect of a suspension is the same regardless of whether it is called interim or actual: the attorney is denied the right to practice law for the duration of the suspension.

ADDITIONAL ANALYSIS

[None.]

## OPINION

PEARLMAN, P.J.:

Respondent<sup>1</sup> [1 - see fn. 1] was admitted to the practice of law in California on January 5, 1972, and has no prior record of discipline. On March 18, 1993, respondent was convicted of violating section 23153, subdivision (a) of the Vehicle Code, driving under the influence causing injury, a felony.

[2] Effective December 1, 1990, the Supreme Court delegated to the State Bar Court its "statutory powers pursuant to Business and Professions Code sections 6101 and 6012 with respect to the discipline of attorneys convicted of crimes . . . [including] . . . the power to place attorneys on interim suspension as authorized by subdivision (a) and (b) of section 6102 . . . ." (Cal. Rules of Court, rule 951(a).)

On May 4, 1993, solely on account of his felony conviction, this court ordered respondent placed on interim suspension pursuant to section 6102 (a) of the Business and Professions Code, effective June 8, 1993.<sup>2</sup> On May 19, 1993, he filed a petition to set aside the order for interim suspension. Thereafter, we temporarily postponed the effective suspension date pending receipt of opposing papers from the Office of the Chief Trial Counsel, oral argument before this review department and issuance of an opinion on this petition.

In respondent's petition his counsel asserts that good cause exists not to order interim suspension on

six grounds: "(a) Precedent shows that the crime does not involve moral turpitude; (b) It is likely that an interim suspension would impose a degree of discipline far more harsh and disastrous to Petitioner than the degree of discipline that will be found to ultimately be warranted; (c) The offense was wholly unrelated to the practice of law; (d) Petitioner, who has no prior discipline in his practice of about 22 years, has an outstanding career; (e) The crime does not reflect adversely upon Petitioner as an attorney. The integrity of and confidence in the legal process would not be undermined by vacating the interim suspension order in this case; (f) An interim suspension would destructively cause professional misfortune and chaos for Petitioner, when it would not be in the interest of justice to do so."

Respondent's brief is supported by his declaration under penalty of perjury, as well as that of his counsel, together with numerous exhibits. The supporting papers describe the underlying incident as one in which respondent, while driving under the influence of alcohol in the early evening of December 13, 1992, made a left turn at an intersection in front of a motorcycle officer, resulting in a collision injuring the officer.<sup>3</sup>

On March 18, 1993, respondent pled no contest to and was convicted of one count of violating Vehicle Code section 23153, subdivision (a). Respondent was placed on summary probation for three years with certain conditions, including that he attend a first-offender,<sup>4</sup> [3 - see fn. 4] three-month alcohol awareness program, that he attend five griev-

1. [1] Normally, no published opinion would result from a petition to set aside an order for interim suspension. Also, since no final discipline has been entered in the case of this conviction, which may or may not show a basis for discipline, we cannot determine at this stage whether it would be appropriate to publicize respondent's name in connection therewith. (See, e.g., *In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 258, fn. 2.) At respondent's counsel's request, therefore, despite the objection of the deputy trial counsel, this opinion does not designate the name of the respondent. The proceeding remains public.

2. Unless otherwise noted, all references to sections are to the Business and Professions Code.

3. We are not in a position to make findings with respect to the circumstances at this time, but the deputy trial counsel indi-

cated at oral argument that the recited basic facts are not disputed. According to the respondent, two breathalyzer tests resulted in readings of 0.19 percent and his urine samples showed 0.17 percent blood alcohol. The Office of the Chief Trial Counsel has not yet undertaken discovery and we in no way intend to limit additional facts which may be developed at the hearing below on the merits.

4. [3] The documents provided by respondent also reflect that respondent has one previous conviction for drunk driving in 1978 which was not referred for discipline. This appears to have been pursuant to the general policy of the State Bar not to refer first offense misdemeanor drunk driving convictions to the Supreme Court for recommendation of discipline. (See *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 266, fn. 6.)

ing sessions of Mothers Against Drunk Driving, that he perform thirty days of volunteer work at a facility operated by the California Youth Authority, that his driving privilege be suspended for one year, and that he pay a fine and assessments totaling \$2,736. In a supplement to his petition to set aside interim suspension, respondent attached a copy of the court record showing that, on May 26, 1993, his felony conviction was reduced to a misdemeanor. He also attached a copy of favorable progress reports on the court-ordered service to the California Youth Authority and on his compliance to date with requirements of the court-ordered rehabilitation program.

In its opposition to respondent's motion, filed May 24, 1993, the Office of the Chief Trial Counsel relies principally on our prior decision in *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608, denying a motion to vacate interim suspension following Meza's conviction of a felony for engaging in multiple sexual acts with a child under age 14. The Office of the Chief Trial Counsel also points out that the crime of which respondent was convicted caused bodily injury, requiring a stronger showing of good cause to set aside the interim suspension, citing *In re Strick* (1987) 43 Cal.3d 644, 656. The Office of the Chief Trial Counsel further notes that information has not been provided as to prejudice to specific clients and contends that it is unclear how justice would be served or public confidence in the legal profession maintained by setting aside the interim suspension order and allowing respondent to continue practicing law.

#### DISCUSSION

[4] In *In the Matter of Meza, supra*, 1 Cal. State Bar Ct. Rptr. 608, we ordered interim suspension of an attorney convicted of a crime inherently involving moral turpitude, noting that "the purpose of interim suspension is to protect the public, the courts and the legal profession until all facts relevant to a final disciplinary order are before the court." (*Id.* at p. 613, citing *In re Bogart* (1973) 9 Cal.3d 743, 748; *Shafer v. State Bar* (1932) 215 Cal. 706, 708.) "An attorney convicted of a felony involving moral turpitude [commits a crime] the nature of which is calculated to injure his reputation for the performance of the important duties which the law enjoins." (*In re*

*Jacobsen* (1927) 202 Cal. 289, 290.) Interim suspension is the measure invoked by the court to suspend an attorney "whose acts indicate he or she may be unfit to practice law." (*In re Strick* (1983) 34 Cal.3d 891, 898.)

[5] Until 1985, interim suspension was limited to crimes of moral turpitude. Section 6102 (a) was amended in 1985 to its present wording which adds as an alternative to a crime of moral turpitude "or is a felony under the laws of California or the United States." The statute allows exceptions to interim suspension "in the interest of justice . . . , with due regard . . . to maintaining the integrity of and confidence in the profession." Whether interim suspension is warranted prior to a hearing on the merits of a felony conviction depends, among other things, on the nature of the crime, its relationship to the practice of law, the undisputed surrounding circumstances and the likely range of final discipline.

[6a] The Office of the Chief Trial Counsel does not address respondent's basic contention that interim suspension would impose a degree of discipline far more severe than the final discipline in this case is likely to be in light of precedent. While drunk driving is a serious societal problem with potentially tragic results, it may or may not become a matter subject to professional discipline against a lawyer's license. (*In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. at p. 263.) The primary public protection against such crimes is the criminal justice system. If we were to order interim suspension, even if the proceeding were expedited, respondent would likely be suspended for a year before a contested hearing and review could be completed. (Cf. rule 799.7, Trans. Rules Proc. of State Bar [expedited disciplinary proceedings following order of involuntary inactive enrollment].) No California precedent has been cited for one year of actual suspension for an offense of this type. Nor when questioned at oral argument was the deputy trial counsel even able to cite any case ordering more than six months suspension.

[6b] If respondent were placed on interim suspension, respondent might successfully move to vacate the interim suspension order after a favorable result at hearing, as happened in a recent case. Nonetheless, the deputy trial counsel concedes that

the decision in the hearing department is likely not to issue until after a minimum of seven months. If we put respondent on interim suspension, he would therefore be unable to practice law for at least seven months prior to obtaining a decision on the merits. Respondent points out that similar convictions have sometimes resulted only in reproof. For the reasons stated below, we consider the range of final discipline against respondent's license dispositive of the good cause requirement to vacate the order of interim suspension.

[7a] The Office of the Chief Trial Counsel contends that public confidence would necessarily be undermined if this court granted a motion to vacate an interim suspension order of any convicted felon, albeit one whose crime was since reduced to a misdemeanor. The Legislature has determined to the contrary, adopting a statute which, as already noted, expressly permits motions for relief to be granted under section 6102 (a) "when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of and confidence in the profession." In *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 743, we noted that the Supreme Court had set aside its order of interim suspension of DeMassa for harboring a felon, a federal crime involving moral turpitude per se. DeMassa's motion was made on the grounds that he had no prior disciplinary record, seven years had elapsed since his offense, and he posed no danger of future misconduct. His petition was accompanied by numerous exhibits, including an excerpt from the transcript of his sentencing hearing and character letters addressed to the sentencing judge on his behalf. An interim suspension order was also set aside by the Supreme Court in *In re Kristovich* (1976) 18 Cal.3d 468 for another crime involving moral turpitude per se—perjury and preparation of false documentary evidence.

[7b] If interim suspension can be set aside on sufficient showing, despite conviction of a felony involving moral turpitude per se, obviously it is also available for felonies which may or may not involve moral turpitude. As the Supreme Court stated in *In re Rothrock* (1940) 16 Cal.2d 449, 458-459 (declining to intermily suspend an attorney convicted of assault with a deadly weapon), "The commission of such

lesser offenses by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law." No more recent Supreme Court pronouncement to the contrary has been cited by the Office of the Chief Trial Counsel. We must therefore examine the showing made here and determine whether it demonstrates good cause to vacate our interim suspension order.

Meza's crime was clearly far more serious than the instant crime. It involved moral turpitude per se and similar crimes had resulted in a wide range of discipline, including disbarment. (See, e.g., *In re Duggan* (1976) 17 Cal.3d 416.) Meza also had another conviction referral pending at the time his interim suspension was ordered. [8a] Here, the offense was a "wobbler"—a felony that could have originally been charged as a misdemeanor under Penal Code section 17, subdivision (b)(4), in which event the deputy trial counsel concedes that it would not have resulted in an interim suspension order by this court. (See § 6102 (a).) [9] The Legislature has determined that public protection and integrity and confidence in the State Bar only warrant interim suspension of misdemeanant attorneys when there is probable cause to believe that the misdemeanor involves moral turpitude per se, and even in such cases "good cause" may justify the court in not imposing interim suspension. Pursuant thereto, both the Supreme Court and this court have in several instances declined to impose interim suspension for shoplifting convictions.

[8b] As pointed out by the Office of the Chief Trial Counsel, the subsequent reduction of the crime to a misdemeanor in post-conviction proceedings does not affect the characterization of the crime as a felony for purposes of this court initially placing respondent on interim suspension. (See § 6102 (b).) Nonetheless, the fact that the crime has now been reduced to a misdemeanor is a factor which we can take into account in determining whether good cause exists for vacating the order of interim suspension. We recently did so in an order vacating an order of interim suspension with respect to a conviction for felony assault with a deadly weapon which was later reduced to a misdemeanor based on the prosecutor's

declaration that the charges should have been amended to charge a misdemeanor before the plea was accepted.

[8c] We note that prosecutors in the criminal justice system have discretion either to amend charges before accepting a plea or to consent to the conversion of a felony to a misdemeanor by court order in post-conviction proceedings. In either event, the seriousness of the crime is diminished from a felony to a misdemeanor, a factor we cannot ignore in analyzing good cause for vacating an interim suspension order when one characterization (felony) has vastly different consequences than the other (misdemeanor) on a member's ability to practice law prior to a hearing on the merits and receipt of a final disciplinary order. Otherwise, arbitrary results might follow merely from disparate charging practices of district attorneys' offices throughout the state.

[10a] It is the job of this court to determine in each case, based on the facts before it, whether good cause exists to vacate an order of interim suspension or to decline to impose interim suspension. At this juncture, we cannot resolve genuinely disputed factual issues. (See *In the Matter of Meza, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 612-613.) However, it is undisputed that this case involves a second conviction for drunk driving; that the conviction did not involve clients or the practice of law; and that the convicted attorney is a member of the State Bar with no record of discipline in his 22 years of practice.

In *In re Kelley* (1990) 52 Cal.3d 487, a divided Supreme Court imposed a public reproof on an active member of the State Bar after two drunk driving convictions not involving moral turpitude occurring two years apart. A dissenting justice found no nexus to the practice of law and would have dismissed the proceeding. Although here respondent's conduct did involve a felony conviction and serious injury, the State Bar may or may not be able to

develop facts showing lack of respect for the legal system as was found to be the nexus to the practice of law in *In re Kelley*.<sup>5</sup> It also appears somewhat fortuitous that Kelley's erratic driving did not result in any injuries,<sup>6</sup> but we do note that this factor has been taken into account in determining whether to impose discipline, and to what degree, in prior drunk driving cases both in California and elsewhere. (See discussion in *In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. at p. 271.) Nonetheless, even serious injury requiring hospitalization has not necessarily resulted in a final order involving actual suspension in prior unappealed California drunk driving cases cited by the respondent.

While serious resulting injury is a factor to be considered, we also note that in *In re Hickey* (1990) 50 Cal.3d 571, an inebriated attorney's violent behavior toward his wife and others leading to his conviction under Penal Code section 12025, subdivision (b) resulted only in 30 days actual suspension. Two felony convictions subsequently reduced to misdemeanors for violent conduct which occurred under the influence of alcohol resulted in six months actual suspension in *In re Otto* (1989) 48 Cal.3d 970. [10b] Here, there is no indication in the conviction record itself of violent behavior and the fact of serious injury alone would not indicate other misconduct warranting similar discipline in this case as in *In re Hickey* or *In re Otto*. Moreover, as previously noted, an interim suspension order could likely subject respondent to seven months to a year's suspension prior to imposition of final discipline, even if the matter was handled as expeditiously as possible in hearing and review.

[10c] In view of the range of discipline in prior drunk driving cases from dismissal in *In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. 260 to two months actual suspension in *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208 for four convictions of that offense, we

5. Unlike the fourteen years that separated respondent's two convictions, Kelley's second offense occurred during the probationary period for the first offense in violation of the criminal sentence. Kelley also became agitated at the arresting officer who summoned the assistance of a second officer to complete the arrest. (*In re Kelley, supra*, 52 Cal.3d at p. 491.)

We cannot comment at this stage of the proceedings on respondent's cooperation and remorse, but merely note respondent's offer of proof on these issues.

6. In 1984, Kelley was arrested and convicted after driving her car into an embankment. (*Ibid.*)

note the substantial likelihood that the final disciplinary order in the instant proceeding would involve a far lesser sanction than would occur should we order interim suspension here. [11] While stipulated disciplinary orders do not constitute precedent, the reprovls ordered pursuant to stipulation in prior drunk driving cases cited by respondent do represent a determination by the Office of the Chief Trial Counsel as well as the hearing judge in each cited instance that the degree of discipline ordered therein satisfied the need to protect the public, the courts and the legal profession; to maintain high professional standards by attorneys and to preserve public confidence in the legal profession.

[10d] Under the circumstances, substantial injustice would be done to respondent if he were "interimly suspended" pending final disposition of his case for a greater period than the maximum discipline the deputy trial counsel could reasonably expect to obtain if she succeeded at the hearing. Far greater injustice would be done if respondent were to prevail at the hearing only to have the final outcome result in no actual disciplinary suspension or far less suspension than already endured on an "interim" basis. [12] From the point of view of the suspended attorney, "Whether a suspension be called interim or actual . . . the effect on the attorney is the same—he is denied the right to practice his profession for the duration of the suspension." (*In re Leardo* (1991) 53 Cal.3d 1, 18.)

[10e] The Office of the Chief Trial Counsel has pointed to no indication of any adverse impact from respondent's misconduct on respondent's law practice before or since his conviction, no indication of violation of his criminal sentence which includes suspension of his driver's license for one year and no particular danger posed to his clients by his continued ability to practice law pending a hearing in the State Bar Court on the merits of this conviction referral. We conclude that appropriate discipline fashioned on the full record after a hearing ought to protect the public adequately, satisfy the interests of justice and preserve the integrity of the profession and public confidence in the profession.

For the reasons stated above, we find good cause to vacate our prior order of interim suspension. Since respondent's conviction is now final, our earlier referral order is hereby augmented to include a hearing and decision recommending the discipline to be imposed. Nothing contained herein is intended to express any opinion as to the outcome of the hearing below.

We concur:

NORIAN, J.  
STOVITZ, J.