

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

KENNETH LAWRENCE CARR

A Member of the State Bar

Nos. 86-C-19520, 86-C-19521, 87-C-15714

Filed June 5, 1992

SUMMARY

A hearing panel of the former, volunteer State Bar Court found that respondent's convictions of several Vehicle Code violations relating to driving a vehicle without a valid license did not involve moral turpitude but did involve other misconduct warranting discipline. The panel recommended that respondent be suspended from the practice of law for two years, concurrent with any existing suspension, with the execution of the suspension stayed and with two years probation on conditions. (Merritt L. Weisinger, Diane Karpman, Walter Rochette, Hearing Referees.)

A different hearing panel found that respondent's separate conviction for being under the influence of phencyclidine did not involve moral turpitude but did involve other misconduct warranting discipline. The panel recommended that respondent be suspended from the practice of law for two years, concurrent with the suspension in the Vehicle Code cases, with the execution of the suspension stayed, and with probation concurrent with and on the same terms and conditions as the probation in the Vehicle Code cases except that respondent be actually suspended for six months. (Jay C. Miller, Irving Willing, Patrick E. Hughes, Hearing Referees.)

The review department consolidated the matters for purposes of a single aggregate disciplinary recommendation to the Supreme Court. It held that respondent's history of substance abuse and his violations of his earlier criminal probation constituted a sufficient nexus with the practice of law to warrant discipline for the misconduct underlying the convictions. It concluded that the hearing panels' decisions and disciplinary recommendations were supported by the record and, with modifications to the conditions of probation and other incidents of discipline, adopted them as its recommendation.

COUNSEL FOR PARTIES

For Office Of Trials: William F. Stralka

For Respondent: Kenneth L. Carr, in pro. per.

HEADNOTES

- [1 a, b] **130 Procedure—Procedure on Review**
Failure to file an opening brief by the party requesting review may result in dismissal of the request for review or in the requesting party not being permitted to participate at oral argument.
- [2] **130 Procedure—Procedure on Review**
142 Evidence—Hearsay
146 Evidence—Judicial Notice
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding
Record of respondent's criminal conviction, which had been judicially noticed by hearing department, was admitted into evidence by review department in order to make it part of record in disciplinary proceeding for Supreme Court review, but was considered solely for purpose of establishing criminal complaint, charges, plea, and conviction.
- [3] **130 Procedure—Procedure on Review**
141 Evidence—Relevance
169 Standard of Proof or Review—Miscellaneous
204.90 Culpability—General Substantive Issues
Hearing department findings that were based on evidence admitted in discipline phase of trial were considered by review department solely with respect to discipline and not culpability.
- [4] **162.11 Proof—State Bar's Burden—Clear and Convincing**
565 Aggravation—Uncharged Violations—Declined to Find
Where no evidence was introduced establishing that respondent knew his out-of-state driver's license was not valid at the time he presented it to police, and where respondent's explanation of his failure to disclose all of his driving under the influence convictions on his application for such license was un rebutted and not inherently incredible, examiner failed to establish by clear and convincing evidence that respondent's use or obtaining of the license were aggravating factors.
- [5 a, b] **1519 Conviction Matters—Nature of Conviction—Other**
1527 Conviction Matters—Moral Turpitude—Not Found
An attorney's convictions of several Vehicle Code violations relating to driving a vehicle without a valid license did not per se establish moral turpitude and the review department concluded that the surrounding circumstances did not establish moral turpitude. Although the convictions involved driving, and the potential for harm was significant given the attorney's operation of a motor vehicle while intoxicated, no actual harm had occurred, and the paucity of facts presented did not permit the review department to conclude that moral turpitude was involved. Furthermore, insufficient facts were presented to conclude that the attorney's violation of his prior criminal probation orders was in either subjective or objective bad faith.
- [6 a-d] **1519 Conviction Matters—Nature of Conviction—Other**
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found
Convictions of several Vehicle Code violations relating to driving a vehicle without a valid license, though not involving moral turpitude, did involve other misconduct warranting discipline. The respondent's failure to conform his conduct to the requirements of the criminal law and of the court orders imposed on him in connection with his previous criminal probation called into question his integrity as an officer of the court and his fitness to represent clients and thereby established a nexus

between the practice of law and the misconduct. Moreover, respondent's conviction of two substance abuse related crimes within a relatively short period of time of his arrest for the Vehicle Code violations indicated a problem with substance abuse that was clearly affecting the attorney's private life, which also established a nexus between the practice of law and the misconduct.

- [7] **159 Evidence—Miscellaneous**
 191 Effect/Relationship of Other Proceedings
 1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes
 1519 Conviction Matters—Nature of Conviction—Other
 1691 Conviction Cases—Record in Criminal Proceeding

It is appropriate for disciplinary purposes to consider any criminal charges that were dismissed as well as the charges for which the attorney was actually convicted. Thus, where the criminal complaint in a Vehicle Code violation matter charged respondent with being under the influence of phencyclidine, and clear and convincing evidence was presented establishing that respondent was under the influence of phencyclidine, that circumstance could be considered in the disciplinary proceeding even though respondent was not convicted of being under the influence of phencyclidine.

- [8 a-c] **1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes**
 1527 Conviction Matters—Moral Turpitude—Not Found
 1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

A conviction of being under the influence of phencyclidine did not per se establish moral turpitude and the review department concluded that the sparse facts presented regarding the surrounding circumstances did not establish moral turpitude. No actual harm occurred to anyone and insufficient facts were presented to conclude that respondent's violation of his prior criminal probation was in either subjective or objective bad faith. However, the conviction did involve other misconduct warranting discipline, because respondent's failure to conform his conduct to the requirements of the criminal law and the court orders imposed on him in connection with his criminal probation called into question his integrity as an officer of the court and his fitness to represent clients and thereby established a nexus between the practice of law and the misconduct. In addition, respondent's conviction of a total of four substance abuse offenses within a relatively short period of time indicated a problem with substance abuse that was clearly affecting respondent's private life, which also established a nexus between the practice of law and the misconduct.

- [9] **172.11 Discipline—Probation Monitor—Appointed**
 172.20 Discipline—Drug Testing/Treatment
 176 Discipline—Standard 1.4(c)(ii)
 584.50 Aggravation—Harm to Public—Declined to Find
 720.10 Mitigation—Lack of Harm—Found
 750.10 Mitigation—Rehabilitation—Found
 806.59 Standards—Disbarment After Two Priors
 1554.10 Conviction Matters—Standards—No Moral Turpitude

The Standards for Attorney Sanctions for Professional Misconduct provide that the appropriate discipline for culpability for professional misconduct where the member has a record of two prior impositions of discipline is disbarment unless the most compelling circumstances clearly predominate. Application of this standard was not appropriate where the attorney's criminal convictions and prior discipline, which were caused by an extensive history of drug and alcohol abuse, did not directly involve clients or the practice of law, and did not cause specific harm to the public or courts, and where the attorney had taken steps to address the underlying substance abuse problem, and had already been under suspension for five years as a result of previous discipline. Continued probation monitoring with substance abuse conditions, and a requirement that the attorney demonstrate

rehabilitation and fitness to practice, would ensure that the substance abuse was controlled prior to the attorney's resuming the practice of law.

[10] **1554.10 Conviction Matters—Standards—No Moral Turpitude**

Under the Standards for Attorney Sanctions for Professional Misconduct, the discipline for conviction of a crime which does not involve moral turpitude but does involve other misconduct warranting discipline should be that which is appropriate to the nature and extent of the misconduct.

[11] **176 Discipline—Standard 1.4(c)(ii)**

Where respondent had not yet complied with a prior discipline order to demonstrate rehabilitation and present fitness to practice before being relieved of the actual suspension in that prior proceeding, no useful purpose would be served by requiring respondent to comply with this requirement twice; one showing would satisfy the requirement as to both the prior and subsequent proceedings.

[12] **172.20 Discipline—Drug Testing/Treatment**

172.30 Discipline—Alcohol Testing/Treatment

A requirement that a respondent with a drug and alcohol abuse history submit to warrantless searches by police and to blood, breath or urine testing was not an appropriate condition of probation, and the review department replaced it with the State Bar Court's standard substance abuse probation conditions.

[13] **175 Discipline—Rule 955**

Where respondent had been continuously suspended from the practice of law for several years as a result of previous discipline, it was not appropriate to recommend that respondent be required to comply with rule 955, California Rules of Court as part of the recommended discipline in a subsequent matter.

[14] **173 Discipline—Ethics Exam/Ethics School**

Where respondent had timely complied with the requirement in a previous disciplinary matter that respondent take and pass the Professional Responsibility Examination, by passing the exam less than three years earlier, the review department declined to recommend that respondent be required to take and pass the exam again in connection with subsequent discipline.

ADDITIONAL ANALYSIS

Aggravation

Found

511 Prior Record

Discipline

1613.08 Stayed Suspension—2 Years

1615.04 Actual Suspension—6 Months

1617.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed

1023.10 Testing/Treatment—Alcohol

1023.20 Testing/Treatment—Drugs

1630 Standard 1.4(c)(ii)

Other

110 Procedure—Consolidation/Severance

OPINION

NORIAN, J.:

In this matter we review three cases involving respondent, Kenneth Lawrence Carr, which arose from several criminal convictions. Respondent was admitted to the practice of law in California in 1976. State Bar Court trials in all three cases were before hearing panels of the former volunteer State Bar Court.

Case numbers 86-C-19520 (Bar Misc. 5262) and 86-C-19521 (Bar Misc. 5282) (the Vehicle Code cases) were consolidated prior to trial. The hearing panel found that respondent's convictions of several Vehicle Code violations relating to driving a vehicle without a valid license did not involve moral turpitude but did involve other misconduct warranting discipline, and recommended that respondent be suspended from the practice of law for two years concurrent with any existing suspension, with the execution of the suspension stayed and with two years probation on conditions. In case number 87-C-15714 (Bar Misc. 5347) (the PCP case), the hearing panel found respondent's conviction for being under the influence of phencyclidine (PCP) did not involve moral turpitude but did involve other misconduct warranting discipline, and recommended that respondent be suspended from the practice of law for two years, concurrent with the suspension in the Vehicle Code cases, with the execution of the suspension stayed, and with probation concurrent with and on the same terms and conditions as the probation in the Vehicle Code cases except that respondent be actually suspended for six months.¹

We have independently reviewed the records in these matters, have consolidated them for decision,

and have concluded that the hearing panels' decisions and disciplinary recommendations are supported by the record. With the modifications discussed below we adopt them as our own.

BACKGROUND

[1a] Respondent's initial requests for review of the hearing panels' decisions in the Vehicle Code cases and the PCP case were dismissed because he failed to file opening briefs. Thereafter, we notified the parties that we had reviewed the records *ex parte* (rule 452, Trans. Rules Proc. of State Bar) and had determined that respondent was culpable of other misconduct warranting discipline in both matters and, absent a further request for review, we intended to consolidate the matters and remand them to the hearing department for a trial *de novo* on the issue of the appropriate aggregate discipline to recommend. Respondent again requested review, objecting to consolidation and remand of the matters and indicating that he believed the hearing panels' recommendations as to discipline were fair.

We thereafter invited the parties to brief certain issues, including the issue of whether the within cases should be consolidated for purposes of a single aggregate recommendation to the Supreme Court.² [1b - see fn. 2] Respondent stated at oral argument before this department that he was not opposed to consolidation of the cases as long as the recommended discipline did not depart from the hearing panels' recommendations that the discipline be concurrent. The examiner indicated at oral argument that he also was not opposed to consolidation. In light of our disposition of these matters, we hereby consolidate case numbers 86-C-19520 and 86-C-19521 (the Vehicle Code cases) with case number 87-C-15714 (the PCP case).³

1. The hearing panel in the PCP case concluded after the culpability phase of the trial that the misconduct involved moral turpitude. (R.T. Aug. 29, 1989, pp. 39-40.) However, without explanation, the panel's written decision concluded that the conduct did not involve moral turpitude but did involve other misconduct warranting discipline. As indicated below, after our review of the record, we conclude that the conduct did not involve moral turpitude but did involve other misconduct warranting discipline.

2. [1b] Respondent did not file his opening brief again and as a result was not permitted to participate at oral argument, although he was present and did answer questions posed by the review department.

3. Although we consolidate these cases for purposes of a single aggregate recommendation to the Supreme Court, we shall discuss the individual cases separately for ease of reference.

In the Vehicle Code cases, the hearing panel made no findings of fact in its decision other than a recitation of the convictions themselves and of the evidence submitted regarding mitigation and aggravation. In the PCP case, the hearing panel's findings of fact are sparse because the only evidence introduced on the issue of culpability was the records of the various convictions alleged in the criminal matter. We augment the hearing panels' findings as set forth below based on the record. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 571.)

FACTS

First Vehicle Code Case (No. 86-C-19520)

Respondent was arrested by California Highway Patrol officers in November 1984. Respondent's vehicle was travelling around 30-35 miles per hour on a freeway in Los Angeles. (R.T. Apr. 21, 1987, pp. 38-39.) The officers activated the patrol car's red light and respondent eventually came to a stop partially blocking the slow lane on the freeway. (*Ibid.*) One officer used his public address system in an effort to get respondent to move to the shoulder. (R.T. Apr. 21, 1987, p. 40.) When that was unsuccessful, one of the officers got out of the patrol car and went to the car respondent was driving in an effort to get respondent to pull onto the shoulder. (*Ibid.*) Respondent moved the vehicle, but remained partially in the slow lane. (R.T. Apr. 21, 1987, p. 41.) The officer had to return to respondent's car to get him to move completely onto the shoulder, which he finally did. (*Ibid.*)

At an officer's direction, respondent got out of the car and when he did so, he was extremely unbalanced. Respondent worked his way to the front of the car, using his hand on the car for balance. (R.T. Apr. 21, 1987, pp. 42-43.) The officer had a very difficult time speaking with respondent because respondent's speech was very slurred, sluggish and very hard to

understand. (R.T. Apr. 21, 1987, p. 44.) The officer concluded that respondent was under the influence of PCP because of respondent's uncoordinated and unbalanced condition, his bloodshot and watery eyes, his slurred and thick speech, his fumbling through his wallet looking for his driver's license, and the extreme chemical odor of his breath. (R.T. Apr. 21, 1987, pp. 46, 59.) Respondent was arrested, and because of his unbalanced condition an officer had to help respondent back to the patrol car for transport to the police station. (R.T. Apr. 21, 1987, pp. 59-60.) A breath test revealed that respondent's blood alcohol level was .03 percent. (R.T. Apr. 21, 1987, p. 61.)

In May 1985, a four-count misdemeanor complaint was filed charging respondent with violating Vehicle Code section 23152, subdivision (a) (driving under the influence (DUI))⁴; Health and Safety Code section 11550, subdivision (b) (being under the influence of PCP); and Vehicle Code sections 14601.2 and 14601.1, relating to driving in knowing violation of a license suspension, revocation or restriction. (Exh. 2.) Counts one and two (driving under the influence and being under the influence of PCP, respectively) were dismissed on respondent's motion on the ground of delay. (*Ibid.*) The complaint was subsequently amended and the case was submitted to the jury alleging violations of Vehicle Code sections 14601.2, subdivision (a) and 14601.2, subdivision (b). In August 1985, the jury found respondent guilty on the subdivision (a) charge (driving while license suspended or revoked on account of prior DUI conviction with knowledge of the suspension or revocation), and was unable to reach a verdict on the subdivision (b) charge, which was thereafter dismissed. (*Ibid.*)

Second Vehicle Code Case (No. 86-C-19521)

Respondent appeared as a defendant in a Los Angeles court in April 1986. (R.T. Apr. 21, 1987, p. 78.) During the course of that proceeding, the judge advised respondent that respondent's driver's license had previously been suspended and he was not

4. The term "driving under the influence" is used throughout this opinion in the generic sense for convenience. Vehicle Code section 23152 has two subdivisions relevant to this

opinion. Subdivision (a) prohibits driving under the influence of alcohol and/or drugs. Subdivision (b) prohibits driving with a specified blood alcohol content.

to drive. (R.T. Apr. 21, 1987, p. 80.)⁵ After the proceeding ended, respondent left the courthouse, followed by the bailiff from the courtroom in which respondent had appeared. (*Ibid.*) The bailiff followed respondent for approximately three blocks at which time respondent entered a vehicle and drove away. (*Ibid.*) The bailiff followed respondent and placed him under arrest. (*Ibid.*)

Sometime thereafter a misdemeanor complaint was filed against respondent alleging violations of Vehicle Code sections 14601.2, subdivision (a), 14601.1, subdivision (a), and 14601, subdivision (a), all relating to driving in knowing violation of a license suspension, revocation, or restriction, and 12500, subdivision (a), relating to driving without a valid license. In August 1986, respondent pled guilty to the complaint as charged. (Exh. 3.)⁶ [2 - see fn. 6]

The PCP Case (No. 87-C-15714)

The hearing panel found that respondent was arrested late at night in July 1984 in Los Angeles by the California Highway Patrol for driving under the influence, and use of, or being under the influence of, PCP. (Decision, p. 2.) At the time of arrest, respondent had been convicted of three prior DUI offenses (1982, 1983 and 1984), and was on criminal probation as a result of the 1984 conviction. (*Ibid.*) One of the conditions of that probation was that respondent obey all laws. (*Ibid.*) Also at the time of his arrest, respondent had stipulated to State Bar discipline which included probation conditions that prohibited his use of drugs, and had been convicted in 1982 in federal court of possession and transpor-

tation of a controlled substance relating to the manufacture of PCP.⁷ [3 - see fn. 7] (Decision, pp. 2-3.) Although the above facts are the extent of the panel's findings that we adopt, the record discloses additional information.

The police found a vial containing a brown powder in the car. (Exh. 1, respondent's notice of motion to dismiss, signed by respondent in October 1984, p. 2.) The vial was tested by the prosecution and no restricted drugs were identified.⁸ (Exh. 1, superior court appellate department memorandum of judgment, p. 3.) Respondent was given a breath test which indicated no alcohol in his blood. (*Id.* at p. 2.) At the time of respondent's arrest, a police officer smelled an odor which he associated with the odor of ether emitting from the car in which respondent was riding. (Exh. 1, appellant's reply brief, p. 5.) Respondent also exhibited signs of being under the influence of a controlled substance at the time of his arrest. (*Ibid.*)

In or about October 1984, a two-count misdemeanor criminal complaint was filed alleging that respondent violated Vehicle Code section 23152, subdivisions (a) and (b) (driving under the influence), with allegations of three prior convictions for the same offense in May 1981, May 1982 and December 1983 (count one); and of violating Health and Safety Code section 11550, subdivision (b) (being under the influence of PCP) (count two). (Exh. 1.) Count one was dismissed on motion of the prosecuting attorney. (*Ibid.*) On January 9, 1986, a jury found respondent guilty of being under the influence of PCP. (*Ibid.*)⁹

5. The judge's statement to respondent was admitted for the limited purpose of showing respondent's knowledge of the suspension. (R.T. Apr. 21, 1987, pp. 79-80.)

6. [2] Exhibit 3, the criminal court record of respondent's conviction in the second Vehicle Code case (no. 86-C-19521), was marked for identification but was not introduced into evidence. Instead, the record was judicially noticed by the hearing panel. (R.T. Apr. 21, 1987, p. 76; R.T. Mar. 8, 1989, pp. 9-10.) In order to make the exhibit part of the record for the Supreme Court's review, we admit exhibit 3 into evidence. However, we consider it solely for the purpose of establishing the criminal complaint, the charges therein, respondent's plea and the resulting conviction.

7. [3] We consider the hearing panel's findings regarding the State Bar probation and the 1982 federal conviction solely with respect to discipline and not culpability as the evidence establishing these findings (exhs. 4(a), 4(b)) was introduced in the discipline phase of the trial.

8. We delete the hearing panel's finding that a small quantity of PCP was found in the car. (Decision, p. 2.)

9. The jury actually found unlawful use *or* being under the influence of PCP. This finding was an issue in respondent's criminal appeal, and the appellate court held that the evidence only supported a finding of being under the influence. (Exh. 1.)

Aggravation/Mitigation

Respondent has a record of prior discipline. (Exhs. 6 and 7 in the Vehicle Code cases and exhs. 4(a) and 4(b) in the PCP case.) In July 1984, the Supreme Court suspended respondent for two years, with the execution of the suspension stayed, and two years probation on conditions, including 60 days actual suspension, as a result of his April 1981 conviction for possession of PCP (Health & Saf. Code, § 11377, subd. (a)), and March 1982 conviction for knowingly and intentionally possessing approximately one gallon of piperidine, which he knew and had reasonable cause to believe would be used in the unlawful manufacture of PCP (21 U.S.C. § 841(d)(2)). (Bar Misc. 4426, 4575, State Bar case nos. 81-C-17 LA, 83-C-2 LA.) Respondent agreed that the above two convictions involved moral turpitude in a stipulation to facts and discipline.

In December 1986, the Supreme Court revoked respondent's State Bar probation and suspended him for the full two years of the above stayed suspension as a result of his failure to cooperate with, and answer questions from, his State Bar probation monitor. (State Bar case no. 85-P-04 LA.)

In October 1988, the Supreme Court suspended respondent for two years, execution of which was stayed, with five years probation on conditions including six months actual suspension as a result of his convictions in 1983 and 1984 of separate counts of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)). (*In re Carr* (1988) 46 Cal.3d 1089, 1091.) The Supreme Court concluded that the facts and circumstances surrounding the convictions did not involve moral turpitude but did involve other misconduct warranting discipline. The Court also ordered that before respondent was to be relieved of his actual suspension he show satisfactory proof of his rehabilitation, fitness to practice, and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, Transitional Rules of Procedure of the State Bar, division V (standard[s]). (*Ibid.*) State Bar records indicate that no hearing has been held pursuant to standard 1.4(c)(ii) to date. Accordingly, respondent remains on the actual suspension imposed in *In re Carr, supra*.

In an attempt to present further aggravating circumstances in the Vehicle Code cases, the examiner elicited evidence regarding a Nevada driver's license respondent presented to the police at the time of his arrest and the circumstances under which respondent obtained that license. A Nevada driver's license inquiry printout and respondent's application for the Nevada license were introduced in evidence. (Exh. 5.) The inquiry printout indicates that respondent's Nevada license had been withdrawn on September 13, 1984, which was prior to the time he presented the license to the police in the first Vehicle Code case (November 15, 1984). Respondent testified that he had a valid California license when he moved to Nevada. After he obtained the Nevada license, California revoked his license and Nevada then withdrew the Nevada license based on "comity." (R.T. May 8, 1989, pp. 106-107.) Respondent also testified he had not been notified of the Nevada withdrawal at the time of his arrest in November 1984. (*Ibid.*) Respondent's testimony was not rebutted.

The examiner also attempted to establish that respondent obtained the Nevada license under false pretenses by not listing all his DUI convictions. The Nevada application asked for the names and locations of DUI convictions and respondent listed one, in May 1982 (exh. 5), when he had four at that time (R.T. May 8, 1989, p. 64). Respondent testified that he told the clerk at the time he prepared the application that he had more convictions, but there was not enough space on the form. (R.T. May 8, 1989, pp. 71-72.) According to respondent, the clerk told him he could put down one conviction and they would run it through the computer and any other convictions would be identified. (*Ibid.*) Respondent's explanation was not rebutted.

[4] We conclude that the examiner failed to establish by clear and convincing evidence that respondent's use of the Nevada driver's license at the time of his arrest in November 1984 or the circumstances under which he obtained that license are aggravating factors. No evidence was introduced establishing that respondent knew his Nevada license was not valid at the time he presented it to the police in the first Vehicle Code case. The application instructs the applicants to answer the questions completely and

fully but does not indicate what should be done if more space is needed. (Exh. 5.) It is not improbable for respondent to have asked the clerk for direction. While respondent's explanation may be subject to doubt, it is not so incredible, in our view, that it requires rejection in the absence of rebuttal evidence.

In mitigation, from the time of his arrest in the second Vehicle Code case (April 1986) until the time of the State Bar trial (May 1989), respondent had "not had so much as a speeding ticket, no arrest, no traffic tickets" (R.T. May 8, 1989, p. 90); he had a valid California license at the time of the trial (*id.*); he had completed a 120-day inpatient chemical dependency program in 1988, for which he was given credit against his criminal sentence (R.T. May 8, 1989, pp. 91-92; see also exh. A); he was attending one to two meetings per week of Alcoholics Anonymous (AA) pursuant to the terms of his existing State Bar probation (R.T. May 8, 1989, pp. 93-95); and he had not consumed any alcohol since 1986 and had not had any drugs since May 1987 (R.T. May 8, 1989, p. 96). The record also reveals that there was no harm to a client or other person. (Standard 1.2(e)(iii).)¹⁰

DISCUSSION

The Vehicle Code Cases

[5a] As the Supreme Court's orders referring the Vehicle Code cases indicate, respondent's convictions do not per se establish moral turpitude and we conclude that the sparse facts presented regarding the surrounding circumstances do not establish moral turpitude. Although the current convictions involved driving, no actual harm occurred to anyone. Thus, the present case is distinguishable from *In re Alkow* (1966) 64 Cal.2d 838. We recognize that the potential for harm was significant given respondent's operation of a motor vehicle while intoxicated, but the paucity of facts presented does not permit us to

conclude that respondent's "conduct showed a complete disregard for the conditions of his probation, the law, and the safety of the public." (*Id.* at p. 841.)

[5b] Respondent was ordered to obey all laws as a condition of his separate criminal probations in January 1984 (exh. 4) and August 1985 (exh. 2). His convictions herein indicate that he did not comply with those orders and that conduct could involve moral turpitude. Nevertheless, insufficient facts were presented to conclude that the court orders were violated in either subjective or objective bad faith. (Cf. *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951 [bad faith is established if no plausible ground for noncompliance exists or the attorney did not believe he had plausible grounds for noncompliance, even if such grounds arguably existed].)

[6a] We do, however, conclude that the convictions involve other misconduct warranting discipline under *In re Kelley* (1990) 52 Cal.3d 487. Kelley had been convicted of driving under the influence (Veh. Code, § 23152, subd. (b)), with a prior conviction for the same offense, and of violating the terms of her probation imposed in the first conviction (Pen. Code, § 1203.2). (*Id.* at pp. 491-492.) The prior conviction occurred some 31 months before the second conviction. (*Id.* at 492.) The Supreme Court noted that it had previously disagreed about the application of the "other misconduct warranting discipline" standard, but that disagreement had focused on whether a nexus was required between the misconduct and the practice of law. (*Id.* at p. 495.) The Court concluded that resolution of that issue was unnecessary in *Kelley* because a nexus had been established in two ways. (*Ibid.*)

First, the Court concluded that Kelley violated a court order when she violated the conditions of her probation. (*Ibid.*) "Disobedience of a court order, whether as a legal representative or as a party, demonstrates a lapse of character and a disrespect for

10. Respondent's attempt to present mitigating evidence in the PCP case, which apparently dealt with a rehabilitative program, was rejected by the hearing panel. (R.T. Aug. 29, 1989, pp. 36-55.) We notified respondent that we had tentatively determined that he had been denied a fair hearing in the discipline phase of his trial as a result of the hearing panel's

failure to allow him to present mitigating evidence. (Notice of intent to remand, filed October 9, 1991.) Respondent thereafter waived this error because he believed the recommended discipline was fair. (Respondent's request for review, filed November 13, 1991.)

the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court." (*Ibid.*) As indicated above, Kelley had been found by the criminal court to be in violation of the conditions of her probation. Our record in the present proceeding contains no such finding. [6b] Even so, respondent was ordered to obey all laws and he did not. His failure to conform his conduct to the requirements of the criminal law and the court orders imposed on him calls into question his integrity as an officer of the court and his fitness to represent clients.

The second way a nexus was established in *Kelley* was the Court's conclusion that Kelley's two driving under the influence convictions within a 31-month period indicated problems with alcohol abuse. (*Ibid.*) "Her repeated criminal conduct, and the circumstances surrounding it, are indications of alcohol abuse that is adversely affecting petitioner's private life. We cannot and should not sit back and wait until petitioner's alcohol abuse problem begins to affect her practice of law." (*Ibid.*)

[7] Although the convictions herein do not directly involve substance abuse, it is appropriate for disciplinary purposes to consider any criminal charges that were dismissed as well as the charges for which respondent was actually convicted. (*In re Langford* (1966) 64 Cal.2d 489; see also *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 102.) The criminal complaint charged respondent with being under the influence of PCP and clear and convincing evidence was presented establishing that respondent was under the influence of PCP at the time of his arrest in the first Vehicle Code case. The police officer's conclusion that respondent was under the influence of PCP was credible and was not rebutted by credible evidence. In January 1984 respondent was convicted of driving under the influence with a prior conviction for the same offense in May 1982. (Exh. 4.) [6c] Thus, respondent had been convicted of two substance abuse related crimes within a relatively short period of time of his arrest in the first Vehicle Code case. In our view, the facts and circumstances of the present convictions indicate a problem with substance abuse that is clearly affecting respondent's private life.

[6d] For the above reasons, we find that a nexus is established between respondent's criminal conduct

and the practice of law under *In re Kelley, supra*. Accordingly, we conclude the Vehicle Code convictions involved other misconduct warranting discipline.

The PCP Case

[8a] As in the Vehicle Code cases, the Supreme Court referral order in the PCP case demonstrates that respondent's conviction for being under the influence of PCP does not per se establish moral turpitude. Also as in the Vehicle Code cases, the PCP case is distinguishable from *In re Alkow, supra*, because no actual harm resulted, and insufficient facts were presented to conclude that the court order was violated in either subjective or objective bad faith. Thus, we conclude that the facts and circumstances surrounding respondent's conviction in the PCP case do not involve moral turpitude.

[8b] We also conclude that the record supports the conclusion that this conviction involved other misconduct warranting discipline under *In re Kelley, supra*. As a result of the January 1984 DUI conviction, respondent was placed on three years probation on conditions, which included a court order that he obey all laws. Six months later respondent was under the influence of PCP in violation of the Health and Safety Code and in violation of the criminal court order imposing probation. Respondent's failure to conform his conduct to the requirements of the criminal law and the court order again calls into question his fitness to represent clients. (*In re Kelley, supra*, 52 Cal.3d at p. 497.)

[8c] At the time of the criminal offense, respondent had been convicted of three prior substance abuse offenses (1982, 1983, 1984). Clearly, respondent's substance abuse is adversely affecting his private life and we cannot and should not wait until the substance abuse problems affect his practice of law. (*In re Kelley, supra*, 52 Cal.3d at p. 495.)

DISPOSITION

[9a] Respondent is before us with an extensive history of drug and alcohol abuse which has directly or indirectly led to several criminal convictions and the imposition of professional discipline. Although respondent's record is lengthy, none of the offenses directly involved clients or the practice of law. It

seems clear that respondent has substance abuse problems, but those problems have apparently not, as yet, affected any clients. The additional mitigating evidence indicates that respondent has made some efforts at addressing his substance abuse by completing the inpatient chemical dependency program, attending AA meetings, and abstaining from the use of alcohol and drugs.

The standards provide guidance in making a disciplinary recommendation, although we are not compelled to follow them in every case. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) [10] Standard 3.4 provides that for conviction of a crime involving other misconduct warranting discipline, the discipline should be appropriate to the nature and extent of the misconduct. [9b] Standard 1.7 provides that for culpability for professional misconduct where the member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding shall be disbarment unless the most compelling circumstances clearly predominate. The nature of the present offenses and the facts and circumstances surrounding them indicate that application of standard 1.7 would not be appropriate.

As noted above, *In re Kelley*, *supra*, 52 Cal.3d 487, involved a second conviction for DUI, which constituted a violation of the conditions of the criminal probation imposed in the first DUI conviction. The Supreme Court concluded that relatively minimal discipline was warranted because the convictions and the violation of the court order did not cause specific harm to the public and courts and because several mitigating factors were present, including a lack of prior discipline. (*Id.* at p. 498.) The Court imposed a public reproof with conditions. (*Id.* at p. 499.) *In re Carr*, *supra*, 46 Cal.3d 1089, similarly involved two DUI convictions which did not cause specific harm to the public and courts, but Carr had been previously disciplined twice. As indicated above, the Court imposed a stayed suspension of two years with five years probation on conditions, including six months actual suspension and a requirement that Carr comply with standard 1.4(c)(ii) before being relieved of his actual suspension. (*Id.* at p. 1091.)

[9c] Although the present convictions are not minor and involved the threat of harm to the public,

they also did not cause specific harm to the public or courts. Respondent's convictions, both current and past, and his State Bar discipline all appear to be the direct or indirect result of respondent's substance abuse. Respondent has been under continuous suspension for approximately five years as a result of his prior discipline. We take his current status into account. Continued probation monitoring that includes compliance with substance abuse conditions of probation coupled with the requirement that respondent demonstrate his rehabilitation and present fitness to practice pursuant to standard 1.4(c)(ii) before being relieved of his actual suspension will, in our view, ensure that respondent's substance abuse is sufficiently controlled prior to his return to the practice of law. The hearing panel recommendations in the present matters provide for both requirements.

[11] We note, however, that respondent has not yet complied with standard 1.4(c)(ii) as ordered in *In re Carr*, *supra*, 46 Cal.3d 1089. No useful purpose would be served by requiring him to comply twice with this standard. Therefore, we recommend to the Supreme Court that respondent be required to comply with standard 1.4(c)(ii) only once in satisfaction of the requirement in both the prior matter and the current proceeding.

In addition, the hearing panels did not have our standard conditions of probation available at the time they made the disciplinary recommendations in the present matters. Consequently, the recommended conditions vary from our standard conditions and we modify the recommended conditions by substituting our corresponding standard conditions. [12] In particular, the hearing panels recommended as a condition of probation that respondent be required to submit his person to search by any duly authorized police officer at any time of day or night, with or without a warrant, and to submit his person to blood, breath or urine testing as indicated by any police officer. We do not find this requirement an appropriate condition of disciplinary probation and instead, we recommend that respondent be required to comply with our standard substance abuse probation conditions as set forth below.

Finally, the hearing panels recommended that respondent comply with rule 955, California Rules

of Court, and that he take and pass the Professional Responsibility Examination (PRE) as conditions of probation. [13] As respondent has been continuously suspended from the practice of law since November 1988, we delete the recommendation that he comply with rule 955. [14] We also delete the PRE requirement because respondent timely complied with the PRE requirement ordered in *In re Carr, supra*, by passing the examination in August 1989.

RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that as aggregate discipline in case numbers 86-C-19520, 86-C-19521 and 87-C-15714, respondent, Kenneth Lawrence Carr, be suspended from the practice of law in this state for a period of two (2) years; that execution of said suspension be stayed; and respondent be placed on probation for a period of two (2) years prospective to the effective date of the Supreme Court order in the present matter and concurrent with the existing probation ordered in *In re Carr* (1988) 46 Cal.3d 1089 on the following conditions:

1. That during the first six (6) months of said period of probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4 (c)(ii), Standards for Attorney Sanctions for Professional Misconduct, respondent shall be suspended from the practice of law in the State of California, provided, however, that respondent's compliance with standard 1.4(c)(ii) as ordered in *In re Carr* (1988) 46 Cal.3d 1089, shall satisfy the requirement that he comply with the standard as set forth in this paragraph. The period of actual suspension shall be prospective to the effective date of the Supreme Court order in the present matter. If at the time of the effective date of the Supreme Court order in the present matter respondent is still suspended pursuant to the Supreme Court's order in *In re Carr, supra*, the period of actual suspension in this paragraph shall be concurrent with the existing suspension ordered in *In re Carr, supra*;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and

Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

5. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor

referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

6. That respondent shall promptly report, and in no event in more than ten days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

7. That respondent shall abstain from use of any alcoholic beverages, and shall not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription. A prescription shall be presumed invalid unless prescribed by a licensed physician who attests in writing that he/she has read this opinion and that the prescription was appropriate at the time it was given;

8. That respondent shall attend meetings of Alcohol Anonymous at least two (2) meetings per week for a period of six (6) months and at least one (1) meeting per week for an additional six (6) months. Respondent shall provide satisfactory proof of attendance during each month to the Probation Department on the tenth day of the immediately following month;

9. That respondent shall participate in the State Bar's Program on Alcohol Abuse and the State Bar Alcohol Abuse consultant shall report in writing to the Office of the Clerk, State Bar Court, Los Angeles, the compliance or non-compliance of the respondent with each of the terms of said program at the time that any reports of the respondent set forth in these conditions of probation are due; provided that said consultant shall immediately so report the failure of the member to comply with any of said terms;

10. That respondent shall maintain with the Probation Department a current address and a current telephone number at which telephone number respondent can be reached and respond within 12 hours;

11. That respondent shall provide the Probation Department at respondent's expense on or before the

10th day of each month respondent is on probation with a laboratory screening report containing a laboratory analysis obtained not more than 10 days previously of respondent's blood and/or urine as may be required to show respondent has abstained from alcohol and/or drugs. The blood and/or urine sample or samples shall be furnished by respondent to the laboratory in such manner as may be specified by the laboratory to ensure specimen integrity. The screening report shall be issued by a licensed medical laboratory selected by respondent and previously determined to be satisfactory to the Probation Department. Respondent shall also provide the Probation Department with any additional screening reports the Department may in its discretion require. Urine and/or blood fluid samples for such additional reports shall be delivered to the laboratory facility making the report no later than six hours after notification of respondent by the Department that an additional screening report is required;

12. That respondent shall provide the Probation Department with medical waivers on its request and with access to all of respondent's medical records; revocation of any medical waiver is a violation of this condition. Any medical records obtained by the Probation Department shall be confidential and no information concerning them or their contents shall be given to anyone except members of the State Bar's Probation Department, Office of Investigation, Office of Trial Counsel, and State Bar Court who are directly involved with maintaining or enforcing this order of probation;

13. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

14. That at the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated.

We concur:

PEARLMAN, P.J.
STOVITZ, J.