

**STATE BAR COURT  
REVIEW DEPARTMENT**

In the Matter of

**RESPONDENT O**

A Member of the State Bar

No. 90-C-17469

Filed November 17, 1993

**SUMMARY**

Respondent was convicted in 1991 of one felony count of assault with a firearm, with an enhancement charge that he discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another. The conviction was referred to the hearing department for a hearing and decision as to whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline, and if so found, the recommended discipline to be imposed. After a hearing, the hearing judge found neither moral turpitude nor other misconduct warranting discipline and granted respondent's motion to dismiss the matter. (Hon. Jennifer Gee, Hearing Judge.)

The Office of Trial Counsel requested review, arguing that the facts and circumstances of respondent's conviction involved moral turpitude or at the very least, other misconduct warranting discipline, and that respondent should be disciplined. The review department rejected respondent's claim of self-defense as inconsistent with the conclusive effect of his conviction, but considered his testimony regarding his honest belief that he acted in self-defense as part of the facts and circumstances surrounding the conviction. The review department concluded that the elements of the crime for which respondent was convicted and the facts and circumstances surrounding the criminal conduct demonstrated that respondent did not commit an act of moral turpitude, but was culpable of other misconduct warranting discipline. The review department also concluded that the record was not complete for purposes of imposing or recommending the imposition of discipline and therefore remanded the matter to the hearing judge for further proceedings on the degree of discipline. (Stovitz, J., filed a concurring opinion.)

**COUNSEL FOR PARTIES**

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Tom Low

## HEADNOTES

- [1]      **148      Evidence—Witnesses**  
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There are numerous factors to consider in assessing witness credibility beyond observing the witness while testifying. The hearing judge, as the trier of fact in State Bar proceedings, is to determine the credibility of witnesses and hearsay declarants. The fact that some witnesses testified at the State Bar hearing by way of a transcript of the witnesses' criminal court testimony, which is expressly authorized by statute in State Bar proceedings, is not reason to discount their testimony or find it less credible than live witness testimony.
- [2 a, b]   **147      Evidence—Presumptions**  
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Respondent's conviction of assault conclusively established that he did not act in self-defense, i.e., that he did not have an honest *and* reasonable belief that he was about to suffer bodily injury. Hearing judge could not reach conclusions, even based on credible evidence, that were inconsistent with such conclusive effect. Thus, where hearing judge found that respondent honestly believed he was about to be assaulted, review department rejected any finding that such belief was reasonable as being inconsistent with the conviction.
- [3]      **147      Evidence—Presumptions**  
          **191      Effect/Relationship of Other Proceedings**  
          **1691     Conviction Cases—Record in Criminal Proceeding**  
In attorney discipline proceedings arising from a criminal conviction, the record of the attorney's conviction is conclusive evidence of the attorney's guilt of the crime for which the attorney was convicted. This conclusive presumption of guilt applies whether the convicted attorney seeks to reassert his or her innocence or merely to relitigate a claim of procedural error. The convicted attorney is conclusively presumed to have committed all of the elements of the crime.
- [4]      **147      Evidence—Presumptions**  
A conclusive presumption is an assumption of fact that the law requires to be made from the finding of the existence of another underlying fact. A conclusive presumption is in reality a rule of substantive law, not a rule of evidence, and no evidence may be received to contradict it.
- [5]      **147      Evidence—Presumptions**  
          **1691     Conviction Cases—Record in Criminal Proceeding**  
The conclusive presumption of guilt in attorney conviction matters does not apply only for crimes involving moral turpitude. The presumption also applies where the crime for which the attorney was convicted did not involve moral turpitude per se.
- [6]      **147      Evidence—Presumptions**  
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The conclusive effect of an attorney's criminal conviction merely establishes for State Bar purposes that the attorney committed the acts necessary to constitute the offense. Whether those

acts amount to professional misconduct, in the context of a crime that does not necessarily involve moral turpitude, is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction.

- [7]        **147        Evidence—Presumptions**  
             **191        Effect/Relationship of Other Proceedings**  
             **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**  
             **1691        Conviction Cases—Record in Criminal Proceeding**

An attorney's conviction for assault with a firearm is conclusive proof that the attorney committed the elements for that crime, i. e., that a person was assaulted and that the assault was committed with a firearm. An assault is defined as an unlawful attempt to apply physical force upon the person of another at a time when the accused had the present ability to apply such physical force. An attempt to apply physical force is not unlawful when done in lawful self-defense. An attorney's conviction of this crime therefore conclusively established that the attorney unlawfully attempted to apply physical force upon the victim. As the assault was by definition unlawful, the review department concluded that it was not done in self-defense.

- [8 a-c]    **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**

**1527        Conviction Matters—Moral Turpitude—Not Found**

The crime of assault with a firearm does not in and of itself constitute a crime of moral turpitude for attorney discipline purposes. If moral turpitude exists for this crime, it must be based on the particular circumstances surrounding the conviction. Criminal convictions have been determined to involve moral turpitude where the surrounding circumstances indicate a flagrant disregard for human life. However, where respondent's crime occurred while he had an honest belief that he had been shot or shot at and was in immediate danger of being shot at again; respondent considered his escape options before using his firearm, and fired only once as safely as he could from a moving vehicle; and there was no evidence that respondent intended to injure the victim, the review department concluded that respondent's conviction did not demonstrate moral turpitude or render respondent unfit to practice law.

- [9]        **1528        Conviction Matters—Moral Turpitude—Definition**

Moral turpitude has been defined in many ways, including as an act contrary to honesty and good morals. The foremost purpose of the moral turpitude standard is not to punish attorneys but to protect the public, courts, and the profession against unsuitable practitioners. Finding that an attorney's conduct involved moral turpitude characterizes the attorney as unsuitable to practice law.

- [10]       **1527        Conviction Matters—Moral Turpitude—Not Found**

**1699        Conviction Cases—Miscellaneous Issues**

Where the crime for which an attorney has been convicted does not inherently involve moral turpitude, a review of comparable case law and an examination of the particular facts and circumstances of the criminal conduct must be made in order to determine if cause for professional discipline exists.

- [11 a, b] **196        ABA Model Code/Rules**

**1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**

**1527        Conviction Matters—Moral Turpitude—Not Found**

**1531        Conviction Matters—Other Misconduct Warranting Discipline—Found**

Violent criminal behavior that does not rise to the level of moral turpitude may result in the imposition of discipline under both California case law and the ABA model ethics rules.

**[12 a-c] 1513.10 Conviction Matters—Nature of Conviction—Violent Crimes****1531 Conviction Matters—Other Misconduct Warranting Discipline—Found**

Where the circumstances of respondent's conviction for assault with a firearm indicated that respondent engaged in a confrontation on a crowded freeway with another motorist which put innocent third parties at great risk and ultimately resulted in serious injury, the acts which were conclusively established by respondent's conviction, and the circumstances surrounding the conviction, including respondent's status as a trained and experienced reserve law enforcement officer, demonstrated a reckless disregard for the safety of others and therefore involved other misconduct warranting discipline.

**[13 a, b] 130 Procedure—Procedure on Review****159 Evidence—Miscellaneous****165 Adequacy of Hearing Decision**

Where, as a result of a hearing judge's dismissal of a disciplinary proceeding, the hearing judge did not make findings regarding aggravation/mitigation and concluded there was no need to rule on the admissibility of certain exhibits, thus foreclosing respondent's opportunity to substitute other evidence if the exhibits were not admitted, the review department concluded, when the dismissal was overturned, that it was appropriate to remand the matter to the hearing judge for further proceedings on the degree of discipline.

**ADDITIONAL ANALYSIS**

[None.]

## OPINION

NORIAN, J.:

We review a hearing judge's dismissal of this disciplinary proceeding against respondent.<sup>1</sup> Respondent was convicted in 1991 of one felony count of assault with a firearm. (Pen. Code, § 245, subd. (a)(2).) The conviction was referred to the Hearing Department of the State Bar Court for a hearing and decision as to whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline, and if so found, the discipline to be imposed.

After a hearing, the hearing judge found neither moral turpitude nor other misconduct warranting discipline and granted respondent's motion to dismiss the matter. The Office of Trial Counsel seeks review of that decision, arguing that the facts and circumstances of respondent's conviction involved moral turpitude (or at the very least, other misconduct warranting discipline), and respondent should be suspended from the practice of law for four years, stayed, with three years actual suspension and four years probation.

Based upon our independent review of the record, we conclude that the elements of the crime for which respondent was convicted and the facts and circumstances surrounding the criminal conduct demonstrate that respondent is culpable of other misconduct warranting discipline. We also conclude that the record is not complete for purposes of imposing or recommending the imposition of discipline and therefore we remand this matter to the hearing judge for further proceedings on the degree of discipline.

## BACKGROUND

In June 1991, respondent was charged with two felony counts: shooting at an occupied motor vehicle

(Pen. Code, § 246), with the allegation that he intended to inflict great bodily injury upon a person not an accomplice (Pen. Code, § 12022.7); and assault with a firearm (Pen. Code, § 245, subd. (a)(2)), with the allegation that he discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another (Pen. Code, § 12022.5, subd. (b)). After a preliminary hearing, respondent was held to answer on both counts.

In September 1991, respondent entered a plea of no contest to violating Penal Code section 245, subdivision (a)(2), and admitted the Penal Code section 12022.5, subdivision (b) enhancement.<sup>2</sup> Respondent was placed on three years of formal probation, on conditions including one year of county jail (which was recommended to be served in a work furlough program), restitution, and psychological counseling. The remaining charge and its enhancement were dismissed.

## FACTS AND FINDINGS

The hearing judge's findings of fact and the record indicate the following. Respondent was admitted to the practice of law in California in June 1983, and has been a member of the State Bar since that time. Respondent served as a reserve police officer with the Town of Los Gatos, California from June 1981 through April 1987. In April 1987, he became a reserve police officer with the City of East Palo Alto, California. Respondent has never been a full-time police officer. However, while with the Los Gatos department, he sometimes filled the position of "vacation relief" for the regular police staff. The vacation relief position required essentially full-time work as a police officer for certain periods of time.

Between 1980 and 1981, and prior to beginning service as a reserve police officer with Los Gatos, respondent undertook approximately 480 hours of classroom training at San Jose City College, which

1. Because we do not reach the issue of the appropriate discipline, we do not affirmatively publicize respondent's name in this published opinion. (*In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1.) However, the underlying disciplinary proceeding remains public.

2. Penal Code section 12022.5, subdivision (b), does not define a crime or offense. Rather, it provides for enhanced punishment for crimes under certain circumstances. (*People v. Henry* (1970) 14 Cal.App.3d 89, 92.)

included classroom and field training in the use of firearms, including, specifically, training in the use of force, "shoot/don't shoot" situations, use and care of firearms, and gun range training. In addition, respondent attended advanced officer training while at Los Gatos. He also attended reserve peace officer conferences, which included formal training, and was involved in putting on reserve peace officer conferences.

As a reserve police officer, respondent was required to qualify at the gun range in the use of firearms. At Los Gatos, he was required to qualify every six months initially, and eventually, every three months. At East Palo Alto, he was required to qualify every six months. Also while a reserve police officer, respondent attended "Hogan's Alley," an advanced police training gun range operated by the Los Angeles Police Department, and went through a "FATS" training system session, which simulates the use of firearms in various situations.

In June 1990, after making a court appearance in his capacity as a reserve police officer (wearing civilian clothes) for East Palo Alto, respondent had dinner with another officer. At approximately 10 p.m., he drove his civilian car toward his home.<sup>3</sup> After entering the freeway, respondent merged in front of a white Mazda which flashed its high beams at him. The Mazda was being driven by Patricia Philips, with Maine Jennings in the front passenger seat and fifteen-year-old Karen Phillips in the left rear passenger seat. The Mazda had tinted windows. Respondent was able to see that there were a driver and a passenger in the front of the Mazda, but he was unable to see the Mazda's rear seat and did not know that Karen Phillips was seated there.

After the Mazda flashed its high beams at him, respondent stepped on his brakes causing the Mazda to brake. During the course of his drive, respondent changed lanes two more times in front of the Mazda and the Mazda flashed its high beams at him. At one point, while respondent's vehicle was in the number one lane (counting from the left), the Mazda pulled

over to the paved median on the left to try to pass respondent's vehicle. Respondent testified that he edged over towards the median to prevent the Mazda from passing him because he knew that the center median narrowed ahead and that the Mazda would not be able to get around him.

As respondent neared his exit, he moved to the far right, the exit-only number three lane. While driving in that lane, respondent observed the Mazda in his mirror. The Mazda was coming up behind him in the number two lane, slightly behind and to the left of respondent's vehicle. At that time, respondent observed a long, silver, slender, cylindrical object being stuck out the right front passenger window of the Mazda. He also saw part of a head sticking out of the window. Respondent believed that the cylindrical object could be a rifle or a shotgun. The Mazda also entered respondent's lane, so respondent tried to stay to the far right of his lane.

The traffic in the exit-only lane began to slow. Respondent lost sight of the cylindrical object and the head sticking out of the window when the Mazda came up on his vehicle's blind spot. He then heard a popping sound, and his driver's door window shattered, scattering glass into the car and over his arm and neck. Respondent felt a burning sensation in his left shoulder, and his neck was bleeding. Respondent believed that he had either been shot or shot at by the passenger in the Mazda. Maine Jennings had in fact shattered respondent's car window with a silver baseball bat that had been on the Mazda's rear floorboard.

The Mazda moved ahead of respondent's car in the number two lane. Respondent then noticed the Mazda's brake lights go on, that the Mazda was slowing down, and that the distance between his car and the Mazda was decreasing. Respondent saw a head sticking out of the Mazda's passenger window, looking back at him. In addition, as the Mazda was moving back towards respondent's car, the Mazda partially entered respondent's traffic lane. Respondent believed that because of the traffic conditions he

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3. Respondent's car was equipped with a cellular telephone, but apparently not with a two-way police radio.

could not take evasive action. Respondent removed from his glove compartment a nine-millimeter semi-automatic handgun, which he was allowed to carry, and rested it on his left wrist, pointing it at the Mazda as it slowed and moved closer to him. Respondent believed that he was going to be shot at again. When the Mazda continued to slow down, respondent fired one shot at the right passenger door of the Mazda. At the time respondent fired his gun, the Mazda was a couple of feet away from him. Although respondent intended to hit the right passenger door of the Mazda, his bullet entered the right rear window and struck Karen Phillips in the face, severely injuring her.<sup>4</sup>

Patricia Philips then drove immediately to a hospital. Respondent tried to follow the Mazda to record its license plate number. He was unable to do so, because the Mazda reached speeds in excess of 90 miles per hour. Unable to get the Mazda's license plate number, respondent dialed 911 on his car telephone. He informed the California Highway Patrol (CHP) emergency dispatcher that he was a reserve police officer, and that he had been shot at or that someone had struck his vehicle with an object, breaking his driver's side window. He did not inform the dispatcher at that time that he had fired his weapon at the vehicle. He was instructed by the CHP dispatcher to return to his home, and that they would send someone out to see him.

After arriving home, respondent called his police department's reserve officer coordinator and told him that he had been involved in a shooting incident. He then contacted the CHP as he had been requested to do earlier by the emergency dispatcher. Respondent was informed at the time that the CHP had a report of a female having been shot on the freeway. Respondent became concerned because he did not know there was a female in the Mazda. Respondent did not know whether the reported shooting was related or not to his incident. After learning of the injury, respondent became upset and informed the CHP that he had fired his weapon.

The hearing judge found that respondent did not initiate the confrontation with the occupants of the Mazda; that he believed he had been shot or shot at and believed he was about to be shot at again; that he considered all his escape options before retrieving his weapon; that he delayed shooting until the last second; that he shot only once; and that he had not shot freehand. Although respondent's actions led to a tragic result, the hearing judge concluded that respondent's conduct did not show a total disregard for the safety of others and therefore did not involve moral turpitude. Furthermore, the hearing judge concluded there was no nexus between the circumstances of respondent's criminal conduct and the practice of law, and that respondent's actions did not demean the integrity of the legal profession or breach his responsibility to society. As a result, the hearing judge concluded that the conviction did not involve other misconduct warranting discipline.

#### DISCUSSION

As indicated above, the Office of Trial Counsel requested review, arguing that the facts and circumstances of respondent's conviction involved moral turpitude or at the very least, other misconduct warranting discipline. In reply, respondent asserts that we should adopt the hearing judge's dismissal because "A lawyer should not be disciplined when he took reasonable and considered steps to preserve his own life."

At oral argument we requested supplemental briefing from the parties on the effect of Business and Professions Code section 6101 on respondent's claim of self-defense.<sup>5</sup> That section provides in relevant part that in attorney disciplinary proceedings, the record of the attorney's conviction "shall be conclusive evidence of guilt of the crime of which he or she has been convicted." The Office of Trial Counsel argues that section 6101 precludes the use of a self-defense claim to defeat culpability, but that such evidence may be considered on the issue of the degree of discipline. Respondent asserts in his supple-

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4. The bullet entered the right side of her face and exited the left side. She lost several teeth and part of her gum.

5. All further references to sections are to the Business and Professions Code unless otherwise indicated.

mental brief that the section only applies to crimes that inherently involve moral turpitude, which respondent's crime does not, and that any contrary interpretation of the statute would be unconstitutional.

#### A. Disputed Factual Findings

Before we turn to the effect of the statute on this proceeding, we address the Office of Trial Counsel's argument that we should reject some of the hearing judge's factual findings. All three occupants of the Mazda testified at respondent's preliminary hearing in the criminal proceeding. At the State Bar hearing, a transcript of the three witnesses' preliminary hearing testimony was introduced instead of their live testimony. (See § 6102 (f).) All three occupants of the Mazda testified similarly as to the events and their testimony differed significantly from respondent's version of the events. According to the people in the Mazda, respondent initiated the confrontation and was the aggressor throughout.

The State Bar Court hearing judge found respondent's version of the events to be the more credible version, as reflected in her findings of fact. In a footnote, the hearing judge explained that she found respondent's version more credible because she had the opportunity to observe him during his testimony and that the testimony of the other witnesses was, in some instances, implausible. The Office of Trial Counsel cites to this footnote in arguing that the hearing judge did not properly assess credibility. The Office of Trial Counsel contends that we should reassess the credibility of the witnesses and find that the occupants of the Mazda told the more credible version.

[1] We agree with the Office of Trial Counsel that there are numerous factors to consider in assessing witness credibility beyond observing the witness while testifying. (See Evid. Code, § 780.) We also note that the hearing judge, as the trier of fact in State Bar proceedings, is to determine the credibility of witnesses and hearsay declarants. (Evid. Code, § 312.) Thus, all applicable factors used to determine witness credibility should have been considered when the relative credibility of respondent and the three

people in the Mazda was assessed. The fact that the occupants of the Mazda testified by way of their preliminary hearing transcript, which is expressly authorized in State Bar proceedings by section 6102 (f), is not reason to discount their testimony or find it less credible than live witness testimony.

Contrary to the Office of Trial Counsel's assertion, however, we find nothing in the record to indicate that the hearing judge failed to consider all appropriate factors in determining the credibility of all witnesses. The cited footnote is at best, ambiguous. It does not indicate that the hearing judge did not apply other factors in determining credibility. On the contrary, the footnote indicates that the hearing judge considered more than respondent's demeanor while testifying. Viewing the record as a whole, we find no support for the Office of Trial Counsel's assertion that the hearing judge did not apply all appropriate factors in assessing the credibility of the witnesses in this matter. [2a] Nevertheless, we conclude that the hearing judge may not reach conclusions, even if based on evidence found to be credible, that are inconsistent with the conclusive effect of respondent's conviction.

#### B. Conclusive Effect of Conviction

[3] As indicated above, the record of respondent's felony conviction is conclusive evidence of his guilt of the crime for which he was convicted. (*In re Crooks* (1990) 51 Cal.3d 1090, 1097.) "[T]he conclusive presumption of guilt applies whether the convicted attorney seeks to 'reassert his innocence' or merely to relitigate a claim of procedural error." (*In re Prantil* (1989) 48 Cal.3d 227, 232.) The convicted attorney is conclusively presumed to have committed all of the elements of the crime. (See *In re Duggan* (1976) 17 Cal.3d 416, 423.)

[4] A conclusive presumption is an assumption of fact that the law requires to be made from the finding of the existence of another underlying fact. (Evid. Code, § 600.) A conclusive presumption is in reality a rule of substantive law, not a rule of evidence, and no evidence may be received to contradict it. (1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, § 277, p. 237.)

[5] We do not find persuasive respondent's argument that the conclusive presumption applies only for crimes involving moral turpitude. The Supreme Court has applied the same presumption where the crime for which the attorney was convicted did not involve moral turpitude per se (*In re Crooks, supra*, 51 Cal.3d at p. 1097; *In re Larkin* (1989) 48 Cal.3d 236, 244), and we have done the same. (*In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 204.) The Supreme Court has inherent authority to extend the same conclusive presumption to other criminal convictions. In addition, the difference in the standards of proof between the State Bar Court and the criminal courts presents a strong policy consideration that weighs in favor of the presumption in all discipline proceedings that result from criminal convictions. Without the presumption, matters would be litigated in the State Bar Court under a clear and convincing standard of proof that had already been adjudicated in the criminal courts beyond a reasonable doubt.

We also find respondent's constitutional argument unpersuasive, having been resolved by the Supreme Court in *In re Gross* (1983) 33 Cal.3d 561, 567, which held that neither constitutional nor policy reasons preclude applying a conclusive presumption for disciplinary purposes based on a criminal conviction. Further, we note that *In re Larkin, supra*, 48 Cal.3d 236, provided ample notice to respondent that the presumption would be applied for crimes that did not involve moral turpitude per se.<sup>6</sup> [6 - see fn. 6] We also perceive no unfairness to respondent in applying the conclusive presumption. He had well over a year to reflect on his conduct and the consequences of a criminal conviction on his license to practice law before he entered his plea.

[7] Thus, respondent is conclusively presumed to have committed the elements for the crime of

assault with a firearm. Those elements are that a person was assaulted and that the assault was committed with a firearm. (CALJIC No. 9.02.) An assault is defined as an unlawful attempt to apply physical force upon the person of another at a time when the accused had the present ability to apply such physical force. (CALJIC No. 9.00.) An attempt to apply physical force is not unlawful when done in lawful self-defense. (*Id.*) Respondent's conviction therefore conclusively establishes that he unlawfully attempted to apply physical force upon the victim. As the assault was by definition unlawful, it was not done in self-defense.

Our rejection of respondent's claim that he should not be disciplined on the basis of his conviction because he acted in self-defense does not foreclose inquiry into the facts and circumstances surrounding the conviction. [2b] Self-defense in the criminal context requires that the accused entertain an honest and reasonable belief that bodily injury is about to be inflicted upon the accused. (CALJIC No. 5.30; 1 Witkin & Epstein, *Cal. Criminal Law* (2d ed. 1988) Defenses, §§ 239-242, pp. 275-279.) Thus, the conclusive effect of respondent's conviction establishes that respondent did not have an honest and reasonable belief. We have no basis for disturbing the finding on this record that respondent had an honest belief that he was about to be assaulted. However, we must reject, as inconsistent with the conclusive effect of respondent's conviction, the hearing judge's findings and conclusions which indicate that respondent's actions were reasonable.

### C. Culpability

The Office of Trial Counsel contends that respondent's conduct involves moral turpitude. [8a] The crime for which respondent was convicted does not in and of itself constitute a crime of moral

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6. Respondent apparently misinterprets the effect of the conclusive presumption on the discipline proceeding. The basis of his argument seems to be that applying the presumption for crimes not involving moral turpitude per se would necessarily establish that respondent is culpable of professional misconduct, thus depriving him of a meaningful opportunity to be heard in defense. [6] However, as indicated above, the conclusive effect of respondent's conviction merely establishes for State Bar purposes that respondent committed the

acts necessary to constitute the offense. Whether those acts amount to professional misconduct, in the context of a crime that does not necessarily involve moral turpitude, is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction. (*In re Kelley* (1990) 52 Cal.3d 487, 494; see also *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260.) Respondent had every opportunity to, and in fact did, defend against that charge.

turpitude for attorney discipline purposes. (*In re Rothrock* (1940) 16 Cal.2d 449, 459.) If moral turpitude exists in this case, it must be based on the particular circumstances surrounding the conviction. (*In re Kelley, supra*, 52 Cal.3d at p. 494.) [9] Moral turpitude has been defined in many ways, including as an act contrary to honesty and good morals. (*In re Scott* (1991) 52 Cal.3d 968, 978.) The foremost purpose of the moral turpitude standard is not to punish attorneys but to protect the public, courts, and the profession against unsuitable practitioners. (*Ibid.*) Finding that an attorney's conduct involved moral turpitude characterizes the attorney as unsuitable to practice law. (*In re Strick* (1983) 34 Cal.3d 891, 902.)

[8b] Essentially, the Office of Trial Counsel argues that respondent's conviction involves moral turpitude because the surrounding circumstances demonstrate a flagrant disregard for human life. Criminal convictions not involving moral turpitude per se have been determined to involve moral turpitude where the circumstances surrounding the conviction indicate a flagrant disregard for human life. (*In re Alkow* (1966) 64 Cal.2d 838, 840-841; *In the Matter of Frascinella* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 543, 550.) On the other hand, drunk driving, while inherently dangerous to human life, has been classified as a crime which may or may not involve moral turpitude. (*In re Kelley, supra*, 52 Cal.3d at p. 494.) Even repeated convictions of driving under the influence by an attorney with experience prosecuting such crimes was characterized by the Office of Trial Counsel in another case as a crime which did not involve moral turpitude. (*In the Matter of Anderson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 39, 43.) On remand of *Anderson*, we determined that the facts and circumstances of the criminal conduct demonstrated that the misconduct approached but did not cross the moral turpitude line. (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.)

[8c] While we agree with the Office of Trial Counsel that the commission of respondent's crime on a crowded freeway is inherently dangerous to human life and that respondent's status as a police officer makes his crime more serious than otherwise might be the case, we cannot conclude that these

factors necessarily demonstrate moral turpitude, in light of the other facts and circumstances found by the hearing judge. Respondent was found to have honestly believed that he had been shot or shot at and was in immediate danger of being shot at again; he considered his escape options before using his firearm; and he fired only once as safely as he could from a moving vehicle. In addition, there is no evidence that respondent intended to injure the victim. In view of the findings below with respect to respondent's subjective beliefs, we cannot conclude that his unlawful assault of the victim renders him morally unfit to practice law.

The Office of Trial Counsel argues in the alternative that respondent's felony conviction "impugn[s] the integrity of the profession" and that the conviction together with the facts and circumstances therefore constitute other misconduct warranting discipline. We agree.

[10] Where the crime does not inherently involve moral turpitude we must review comparable case law and examine the particular facts and circumstances of the criminal conduct in order to determine if cause for professional discipline exists. [11a] The Supreme Court has repeatedly imposed discipline on attorneys for violent behavior that did not rise to the level of moral turpitude. In *In re Larkin, supra*, 48 Cal.3d 236, the Supreme Court concluded that an attorney's conviction for misdemeanor assault with a deadly weapon and conspiracy to commit the assault involved other misconduct warranting discipline. Larkin conspired with a client to assault a man who was dating Larkin's estranged wife. The victim was struck on the chin with a metal flashlight by the co-conspirator/client. The charges were filed as felonies but were thereafter reduced to misdemeanors. Larkin "assaulted the victim not in the 'heat of anger,' but in the course of a premeditated and conspiratorial plan. It was no spontaneous reaction out of anger or passion." (*Id.* at p. 245.)

In *In re Otto* (1989) 48 Cal.3d 970, the Supreme Court concluded that the attorney's felony conviction for assault by means likely to produce great bodily injury and infliction of corporal punishment on a cohabitant of the opposite sex involved other misconduct warranting discipline.

The criminal court reduced Otto's convictions to misdemeanors. The facts and circumstances surrounding the convictions are not stated in the opinion. However, the Supreme Court agreed with the State Bar that the matter involved other misconduct warranting discipline.

In *In re Hickey* (1990) 50 Cal.3d 571, the Court also found other misconduct warranting discipline. Hickey was convicted of carrying a concealed weapon, a misdemeanor, and was found culpable of violating former rule 2-111 of the Rules of Professional Conduct in a client matter. The circumstances surrounding the conviction included Hickey's repeated acts of violence toward his wife and others, which arose from his abuse of alcohol. The victims' injuries were apparently not serious.

Respondent asserts that *In re Otto* and *In re Hickey* are distinguishable because the criminal conduct in those cases involved repeated acts of violence and was at least partly attributable to alcohol abuse. We also note that *In re Larkin* involved the attorney's assault in the course of a premeditated and conspiratorial plan. Nevertheless, the convictions in *Hickey* and *Larkin* were misdemeanors and in *Otto*, the conviction was reduced to a misdemeanor. Also, the criminal conduct in these cases did not involve the discharge of a firearm or serious injury to the victim. [11b] We further note that criminal offenses involving violence are set forth in the official comment to rule 8.4 of the American Bar Association, Model Rules of Professional Conduct, as the type of crime for which a lawyer should be professionally answerable. (See discussion in *In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. at p. 270.) [12a] Finally, respondent's status as a law enforcement officer sworn to uphold the law makes his crime particularly egregious. (Cf. *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933.)

[12b] At the time of his criminal conduct, respondent had been a reserve police officer for approximately nine years and had extensive training in the use of firearms. The tragic incident in this matter began with an altercation between two motorists on a crowded freeway. Despite respondent's contrary testimony, our review of the record indicates that respondent was not blameless in the

confrontation with the Mazda. Upon initial contact with the Mazda, respondent refused to allow the Mazda to pass him even though he had ample opportunity to do so. Thereafter, instead of slowing down and allowing the Mazda to pass, he pulled over onto the paved center median to prevent the Mazda from passing him.

Despite his training and experience as a police officer, respondent did not use his car telephone to inform the CHP about the erratic and illegal driving by the Mazda. Despite his training and experience as a police officer, he participated in a dangerous confrontation with another automobile on a crowded freeway, endangering not only himself and the occupants of the Mazda, but innocent third party motorists. This confrontation precipitated the even more dangerous altercation that resulted in respondent unlawfully firing his weapon from his automobile at an occupied automobile while both cars were traveling on a crowded freeway at night.

[12c] That death or more serious injury to human life did not occur is indeed fortuitous. The occupants of the Mazda clearly were not blameless in these events. Nevertheless, respondent, a trained and experienced reserve police officer, engaged in a confrontation that put innocent third parties at great risk of injury and ultimately resulted in serious injury to Karen Phillips. We find that the acts which are conclusively established by respondent's conviction and the circumstances surrounding the conviction, demonstrate a reckless disregard for the safety of others and warrant professional discipline. (See *In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. at p. 270.) We therefore conclude that respondent's conviction involved other misconduct warranting discipline.

#### DISPOSITION

Respondent asserted at oral argument that he should be allowed to present evidence in mitigation if the review department found culpability. The deputy trial counsel opposed the request. [13a] The record reveals that at least part of the aggravation/mitigation phase of the trial occurred before the hearing judge. However, respondent offered several character letters in mitigation and the deputy trial

counsel requested an opportunity to speak to the authors before he decided whether to object to their introduction. The hearing judge deferred ruling on the admissibility of those letters and gave the deputy trial counsel a period of time to file objections. No discussion followed regarding what would happen in the event the deputy trial counsel objected to some or all of the letters and the hearing judge sustained the objections. The deputy trial counsel objected to the introduction of the letters in his initial brief on review.

[13b] Because of the dismissal, the hearing judge did not make findings regarding aggravation/mitigation and concluded there was no need to rule on the admissibility of the exhibits. Had the hearing judge ruled at trial that the letters were inadmissible, respondent may have decided to present the evidence in admissible form. In light of the foregoing, we deem it appropriate to remand this matter to the hearing judge for further proceedings on the degree of discipline. (See *In the Matter of Respondent N* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 502, 504 [hearing on remand may be limited to newly-offered evidence and argument].) We express no opinion on what that discipline should be.

I concur:

PEARLMAN, P.J.

STOVITZ, J., concurring:

I agree fully with the reasoning and disposition of this court's opinion. I merely wish to emphasize that the facts of this conviction referral proceeding support so strongly the Supreme Court's consistent application to attorney disciplinary matters of the principle that an attorney's conviction of any crime is conclusive evidence of guilt of the elements of that crime. (E.g., *In re Crooks* (1990) 51 Cal.3d 1090, 1097, cited in this court's opinion.)

In the face of this settled principle of law, respondent has asked us to disregard his no contest

plea to a firearm felony and instead to consider justified his shooting at another car on a freeway, which all concede ended in tragic injury to a passenger. This court's opinion addresses correctly the legal reasons why we do not and cannot accede to respondent's request. I emphasize that even if the law were not settled, we have no factual basis for relieving him from the consequences of his felony conviction.

Although the entire freeway incident in June 1990 happened in somewhat compressed time, respondent had a year and three months to reflect on it before entering his plea, for he was not charged with assault until June 1991 and did not enter his plea until September 1991.

A criminal defendant may plead nolo contendere or guilty for a variety of reasons. I assume that respondent weighed many factors before entering his plea. But respondent was not the usual criminal defendant. He had been a member of the State Bar for eight years at the time of his plea. Even more significantly, he had served very actively as a reserve police officer for ten years, completing hundreds of hours of basic and advanced police training, including in firearm "shoot/don't shoot" situations involving even more compressed time spans than he experienced in the June 1990 freeway incident. This record shows that respondent's police work was very important to him as measured by the number of hours he devoted to service and training. Given the drastic consequences as to future police service which any peace officer can assume will flow from a felony firearm assault conviction, I cannot deem respondent's felony plea to be anything other than a purposeful acknowledgment of his guilt. (See Pen. Code, § 1016, subd. 3; 4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2140, pp. 2508-2509.) For that reason alone, I must assume that whatever other interests his plea may have served, it is exactly the type of deliberate act which tells us why the law, as applied by the court, calls on us to reject in this proceeding any theory of culpability defense inconsistent with the elements of his crime.