

Filed May 19, 2021

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	SBC-19-C-30587
)	
EMIL WALTER HERICH,)	OPINION AND ORDER
)	[As Modified on July 2, 2021]
State Bar No. 116783.)	
_____)	

On January 22, 2019, Emil Walter Herich pleaded nolo contendere to violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or more); he also admitted a prior conviction for violating Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol (DUI)). After his conviction was transmitted to us, we referred the case to the Hearing Department to determine if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline.

The hearing judge determined the facts and circumstances did not include moral turpitude but did constitute other misconduct warranting discipline. The judge ordered Herich to be publicly reprovved based on his two misdemeanor DUI convictions. Herich appeals, arguing his case should be dismissed because discipline is neither required to protect the public nor authorized by applicable law. In the alternative, Herich argues he should receive only an admonition or a private reprovval. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and requests we affirm the judge’s decision.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find the facts and circumstances surrounding Herich’s conviction involve other misconduct warranting discipline. We affirm the hearing judge’s order for a public reprovval.

I. FACTUAL BACKGROUND¹

Herich was admitted to practice law in California on December 4, 1984, and has no prior disciplinary record. He has been convicted of DUI violations for incidents in 2010 and 2018.

A. First DUI Conviction

Shortly after midnight on December 11, 2010, Herich was driving while under the influence of alcohol. Two Burbank police officers pulled him over and conducted a DUI investigation. Herich was arrested and charged in two counts: (1) DUI, in violation of Vehicle Code section 23152, subdivision (a), and (2) driving with a blood alcohol level of 0.08 percent or more, in violation of Vehicle Code section 23152, subdivision (b). (*People v. Herich* (Super. Ct. L.A. County, No. 0BR03572).) In March 2012, a jury found Herich guilty of both counts.

The trial judge sentenced him in October 2012. Herich was given 36 months of probation and ordered to complete an alcohol education and counseling program. As required by Vehicle Code section 23593, the judge advised Herich that (1) being under the influence of alcohol impairs the ability to operate a motor vehicle and is extremely dangerous to human life and (2) if Herich drove while under the influence of alcohol, resulting in someone being killed, then he could be charged with murder.² Herich unsuccessfully appealed. On December 10, 2013, Herich completed the alcohol education and counseling program and his criminal probation ended in July 2016.

On August 15, 2013, OCTC sent Herich a letter, which he received, notifying him that it was aware of his conviction for two misdemeanor DUI counts and expressing concern regarding

¹ The facts are based on the parties' pretrial written stipulations, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

² This admonition derives from *People v. Watson* (1981) 30 Cal.3d 290, 300–301 (*Watson* admonition).

potential substance abuse. OCTC informed him of the Lawyer Assistance Program and indicated it was closing its investigation related to the conviction.

B. Second DUI Conviction

On October 5, 2018, shortly after 10 p.m., Herich again drove under the influence of alcohol, causing a collision with another vehicle when he crossed over into opposing traffic on Coldwater Canyon Avenue in Los Angeles. The driver of the other vehicle (aged 63) and her husband (aged 87) were injured.³ Both vehicles sustained damage: Herich's 1998 Jaguar was totaled and the other car required over \$7,000 to repair. Paramedics and police officers responded to the scene.

Herich told the paramedics he had no injuries and declined to go to the hospital. He denied that he had consumed any alcohol. At trial, Herich admitted he had been drinking at a bar in Beverly Hills, then left to drive home to Burbank via Coldwater Canyon. However, he told the police that he was driving directly home from his office. Herich also claimed that the accident occurred because he saw a shape and crossed the line to avoid hitting it.

During the police interview, the officer smelled alcohol on Herich's breath. The officer also observed Herich's eyes were bloodshot and watery, he was speaking slowly and slurring his speech, and he was stumbling and could not keep his balance. The officer began to administer a series of field sobriety tests, with her partner observing, but Herich refused to complete the tests. He repeatedly denied that he had been drinking and feeling the effects of alcohol.⁴ He said the

³ The victims were transported to the hospital for treatment. Both underwent physical therapy after the accident, and one was evaluated by a neurologist for ongoing symptoms.

⁴ The officer asked whether Herich had anything to drink that night. He responded, "no." The officer asked again, "No alcoholic beverages?" Herich again replied in the negative. The officer then asked, "You sure about that?" He said that he was. The officer pointed out that she could smell alcohol emanating from Herich's person. He replied, "Do you? Now?" After asking him if he was in pain, the officer again asked what Herich had been drinking that day. He responded, "nothing." She asked again whether he had consumed any alcoholic beverages or

officers would just “use it against [him]” and that they had already decided he had been drinking. The officers suspected intoxication and arrested Herich for DUI. At the police station, Herich agreed to provide breath samples, and his blood alcohol levels were 0.182 and 0.169 at 11:48 p.m. and 11:51 p.m., respectively.

On October 29, 2018, Herich was charged with two counts of violating Vehicle Code section 23152, subdivisions (a) (count one) and (b) (count two). (*People v. Herich* (Super. Ct. L.A. County, No. 8VV04197).) The complaint also alleged his prior 2012 DUI conviction. On January 22, 2019, Herich pleaded nolo contendere to count two and admitted the 2012 prior conviction.⁵

II. STATE BAR COURT PROCEEDINGS

On October 24, 2019, OCTC transmitted Herich’s misdemeanor conviction record to this court. We referred the matter to the Hearing Department on November 15 to determine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (Rules of Proc. of State Bar, rule 5.344.) On March 2, 2020, the parties filed a stipulation as to facts and admission of documents. On March 11, they filed an amended stipulation and a one-day trial took place on March 13. Following the disciplinary trial and posttrial briefing, the hearing judge issued his decision on May 18. The judge did not find moral turpitude but found Herich’s actions amounted to misconduct warranting discipline.

drugs, and Herich said he had not. He admitted to the officer that he had previously been convicted of a DUI.

⁵ Count one of the complaint was dismissed. Herich was sentenced to 48 months of probation, with 96 hours in jail, for which he was credited as time served. He was also ordered to pay fines and restitution, perform 10 days of community labor, attend 26 Alcoholics Anonymous (AA) meetings, and enroll in an 18-month alcohol educational program. He was again provided a *Watson* admonition by the court. At the time of the disciplinary trial, Herich had complied with the terms of his probation, completed the community service, and attended 25 AA meetings and the first 12 months of the 18-month alcohol education program.

After the decision, OCTC filed a motion for reconsideration, arguing the hearing judge erred by not finding moral turpitude and by failing to include a condition that Herich attend abstinence-based group meetings. On June 26, the judge denied the motion for reconsideration, finding Herich's misrepresentations to the officers did not rise to moral turpitude, but constituted other misconduct warranting discipline. The judge also stated, "there is no clear and convincing evidence that [Herich's] two DUI incidents in 2010 and 2018 reflect a substance abuse problem or that treatment for problems related to alcohol abuse, as a condition attached to his reproval, is required to protect the public."

III. FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION INVOLVE MISCONDUCT WARRANTING DISCIPLINE

For the purposes of attorney discipline, Herich's conviction is conclusive proof of the elements of his crime. (Bus. & Prof. Code, § 6101, subs. (a) & (e).) Thus, his misdemeanor conviction in 2019 establishes that he drove under the influence of alcohol (Veh. Code § 23152, subd. (b)) and had a prior DUI conviction in 2012. The issue before us is whether the facts and circumstances surrounding Herich's conviction involve moral turpitude or other misconduct warranting discipline. Drunk driving convictions do not establish per se moral turpitude. However, moral turpitude can be established based on the particular circumstances surrounding such convictions. (*In re Kelley* (1990) 52 Cal.3d 487, 493.)

The hearing judge did not find sufficient evidence of moral turpitude, but found other misconduct warranting discipline, which OCTC does not contest in this appeal proceeding. The judge found Herich lied to the officers when he repeatedly denied that he had been drinking alcohol and was not feeling its effects. Therefore, the judge found Herich's actions justified discipline.

We agree with the hearing judge's reasoning that Herich's lying to the police warrants discipline. However, we also find the circumstances surrounding Herich's DUI convictions are

indications of an alcohol abuse problem because (1) he was again arrested for drunk driving only two years after his criminal probation for his first DUI ended and (2) his second drunk driving violation resulted in a collision that injured two victims and caused property damage. These facts evidence an alcohol problem and are more serious due to the collision and the injuries, facts not present in *Kelley*.⁶ We affirm the finding that Herich's actions did not establish moral turpitude but did amount to other misconduct warranting discipline.

We reject Herich's argument that no nexus exists between his actions and his law practice. The Supreme Court has stated a nexus can be established if there are indications of an alcohol abuse problem connected to multiple convictions. (*In re Kelley, supra*, 52 Cal.3d at p. 495 [circumstances surrounding two DUI convictions established alcohol abuse problem warranting professional discipline].) We find the circumstances surrounding Herich's conviction are similar to those in *Kelley* and thus establish a nexus between his misconduct and the practice of law.⁷ While Herich presented evidence that his work has not suffered from his alcohol consumption, his actions have resulted in repeated criminal conduct, increasing in severity, which has affected his private life. Herich's problems with alcohol are enough to warrant discipline due to the potential for future harm. (*In re Kelley, supra*, 52 Cal.3d at p. 496 [lack of

⁶ We disagree with the hearing judge's determination that no clear and convincing evidence of an alcohol abuse problem exists here. Herich admitted he does not drive anymore so as not to risk driving under the influence. This admission provides additional evidence that Herich has a problem with alcohol. It clearly implies he does not trust himself to make the decision not to drive while impaired from drinking. It would be inconsistent to hold that Herich believes he has to abstain from driving all of the time in order to avoid driving while impaired without also holding that he has an alcohol problem.

⁷ We also reject Herich's argument that he cannot be disciplined because he, unlike *Kelley*, was not on probation at the time of his second arrest, and, therefore, did not show disrespect to the legal system. While we acknowledge *Kelley*'s disobedience of a court order was found to establish a nexus to the practice of law and similar facts are not established here, the Supreme Court explicitly stated in *Kelley* that the nexus was found in two different ways. (*In re Kelley, supra*, 52 Cal.3d at p. 495.) Therefore, while Herich did not disobey a court order, his alcohol abuse problem is sufficient in itself to warrant discipline under *Kelley*.

harm does not prohibit discipline aimed at ensuring potentially harmful misconduct does not recur].) We will not “sit back and wait” until Herich’s alcohol problems affect his law practice. (*Id.* at p. 495.) Therefore, discipline is appropriate here to protect the public from the potential harm related to his practice and to convey to Herich the seriousness of his actions.⁸

On review, Herich argues discipline cannot be imposed on him unless his criminal conduct has a “logical relationship” to the practice of law. He relies on *In re Lesansky* (2001) 25 Cal.4th 11 to support this argument, but Herich misapplies *Lesansky* to the facts of his case. *Lesansky* dealt with defining moral turpitude under Business and Professions Code section 6102, subdivision (c), which provided for summary disbarment if an attorney was convicted of a felony offense and “an element of the offense . . . involved moral turpitude.” The Supreme Court stated in *Lesansky* that “discipline may be imposed only for criminal conduct having a logical relationship to an attorney’s fitness to practice, and that the term ‘moral turpitude’ must be defined accordingly.” (*In re Lesansky, supra*, 25 Cal.4th at p. 14.) Because *Lesansky* involved determining if that attorney’s criminal conduct met the definition of moral turpitude for summary disbarment under Business and Professions Code section 6102, subdivision (c), the relevance of *Lesansky* to this case is limited. *Lesansky* addressed the definition of moral turpitude and its relation to attorney discipline, not whether an attorney can be disciplined for other misconduct not involving moral turpitude, as allowed under *Kelley*. As stated above, we find a nexus between the practice of law and Herich’s alcohol problem.

⁸ We disagree with Herich’s argument that OCTC was required to present evidence of an “impairment” in his law practice to warrant discipline. Lack of harm can be considered in “assessing the amount of discipline warranted in a given case, but it does not preclude imposition of discipline as a threshold matter.” (*In re Kelley, supra*, 52 Cal.3d at p. 496.) Likewise, we also disagree with Herich’s argument that he cannot be disciplined under *Kelley* because he had been practicing for almost 34 years at the time of his second arrest, while *Kelley* had been practicing less than four years. The length of time practicing law was not determinative in whether *Kelley* should be disciplined for her actions. Absence of a prior record of discipline over many years of practice may be considered in mitigation, which we appropriately consider *post*.

In his rebuttal brief, Herich argues his case should be dismissed based on *In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756. While at his girlfriend's residence, Carr took a Valium pill because he was upset and later took two to four Excedrin PM pills for a headache. The girlfriend then asked Carr to leave and he attempted to drive home. The police found Carr asleep in his car and he was arrested. He was convicted of driving under the influence. We found Carr did not know the medications would impair his ability to drive, and the facts and circumstances did not establish a substance abuse problem in this instance.⁹ Therefore, we did not find misconduct warranting discipline. We reject Herich's reliance on *In the Matter of Carr* because of our finding, stated above, that evidence of a substance abuse problem with a nexus to the practice of law exists here. Taking medications without knowledge of their effect is very different from ignoring the potential dangers of drinking and driving, especially with a past drunk-driving conviction involving a *Watson* admonition.

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Standards for Attorney Sanctions for Professional Misconduct¹⁰ requires OCTC to establish aggravating circumstances by clear and convincing evidence.¹¹ Standard 1.6 requires Herich to meet the same burden to prove mitigation.

⁹ Carr had been previously disciplined for driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a), with the admission of two prior DUIs. (*In re Carr* (1988) 46 Cal.3d 1089.)

¹⁰ All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

¹¹ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

A. Aggravation

Significant Harm to the Client, the Public, or the Administration of Justice (Std. 1.5(j))

The hearing judge found Herich’s misconduct caused significant harm to the public and the administration of justice because “first responders were summoned to the accident, the criminal courts dealt with the prosecution and conviction of the DUI, and there was property damage and bodily injury.” (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) The judge did not assign a weight to this circumstance. Neither Herich nor OCTC challenges this finding.

We find Herich caused significant harm to the victims of the collision. The couple suffered physical injuries and their car needed extensive repairs. The record indicates they underwent physical therapy for soft tissue injuries, but the extent of those injuries is unclear given statements the wife made to the investigating officer three days after the collision. Based on the totality of the evidence presented, we assign moderate weight in aggravation to this circumstance.¹²

B. Mitigation

1. Prior Record of Discipline (Std. 1.6(a))

Standard 1.6(a) offers mitigation where there is an “absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur.” The hearing judge assigned “highly substantial” mitigation for Herich’s 26 years of discipline-free practice before his first DUI conviction in 2010. The judge found the misconduct is not likely to recur due to Herich’s acknowledgement of his wrongdoing, his awareness of the

¹² We also note Herich admitted fault for the collision, his insurance paid for the damages to the victims’ car, and Herich is working with his insurance company to settle the personal injury claims.

dangers of driving under the influence of alcohol evidenced by his realization that greater injuries could have occurred, and his compliance with court obligations, including attending AA and alcohol education programming.

OCTC asserts the hearing judge's finding of "heightened mitigation" is unwarranted. We agree. Herich testified drinking and driving was a problem for him. He professed his need for a considerable behavioral change by declaring he does not plan to drive anymore, but nothing further. We credit him for making that decision, but we are not fully assured his misconduct is unlikely to recur. His prior DUI did not serve to rehabilitate him, he diminishes the seriousness of his actions by downplaying the consequences as a mere "traffic accident," and he has not identified any other measures that he plans to take to address his alcohol problem. For these reasons, we assign moderate mitigating weight to Herich's lengthy discipline-free practice.

2. Cooperation (Std. 1.6(e))

Under standard 1.6(e), Herich is entitled to mitigation for cooperation by entering into the stipulations as well as the admission of documents. The hearing judge assigned mitigation and found the stipulations negated the need for OCTC to call police officers, paramedics, and the victims to testify.

We agree mitigation is appropriate here because Herich admitted facts beyond his plea and the stipulations saved judicial time and resources. However, we find he is not entitled to full mitigation because he did not admit culpability—that is, he did not agree his actions amounted to other misconduct warranting discipline. Therefore, we assign moderate weight in mitigation for Herich's cooperation. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for admission of culpability and facts].)

3. Extraordinary Good Character (Std. 1.6(f))

Herich is entitled to mitigation if he establishes “extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct.” (Std. 1.6(f).) The hearing judge found Herich established good character and assigned substantial mitigating weight.

Three character witnesses, all attorneys, testified on Herich’s behalf at trial.¹³ They have each known Herich for over 30 years and they all praised his legal work and his high moral character. They were aware this disciplinary proceeding related to his second DUI offense. Testimony from attorneys is entitled to serious consideration. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys’ testimony due to their “strong interest in maintaining the honest administration of justice”].)

Four others submitted character declarations: Herich’s alcohol recovery counselor, two friends, and his mother’s caregiver. His friends have known him for a substantial length of time and stated Herich has helped them in legal matters free of charge. All of the declarants affirmed they believed Herich to be of high moral character. They asserted his misconduct was aberrational; however, none mentioned this was his second DUI. The strength of this evidence is diminished because the declarants did not state they were aware of the full extent of the misconduct. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 538-539 [lack of awareness of full extent of misconduct undermines value of character testimony].)

Herich’s good character evidence was presented from a wide range of references, including colleagues, friends, and clients. However, since most of the witnesses were unaware of the full extent of his prior actions, we assign moderate weight under standard 1.6(f). (*In re*

¹³ Another attorney submitted a declaration regarding Herich’s pro bono work, which is addressed below. The declaration did not mention Herich’s DUIs.

Aquino (1989) 49 Cal.3d 1122, 1130–1131 [seven witnesses and 20 support letters not significant mitigation because witnesses unfamiliar with details of misconduct].)

4. Pro Bono Work

Pro bono work is a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Herich presented evidence of a recent pro bono case in which he devoted hundreds of hours of work. The hearing judge recognized Herich’s dedication to the case, but only awarded limited weight in mitigation. Neither party challenges this finding.

In our independent review of the record, we find Herich’s pro bono work is entitled to more mitigating weight. Ruth Cusick, an attorney for Public Counsel Law Center, corroborated Herich’s testimony in a declaration regarding his assistance on the pro bono case. She stated Herich litigated the matter for over two years starting in 2015, worked extremely hard on the case, made many court appearances, and spent hundreds of hours on it. She praised Herich’s legal work and stated she would be pleased to work with him again. Additionally, Herich’s two friends stated he provided representation in their cases without being paid. While not much detail was provided as to these cases, they are relevant in the mitigation analysis. Herich’s pro bono efforts are commendable, but he has not shown a prolonged dedication to pro bono work, which would merit substantial mitigating weight. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].) However, we find the evidence presented is entitled to moderate mitigating weight.

5. Remorse and Recognition of Wrongdoing (Std. 1.6(g))

Standard 1.6(g) provides mitigation credit where an attorney takes “prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement.”

The hearing judge assigned some mitigation for Herich’s recognition of his wrongdoing and taking the preventive measure of using ride-sharing services instead of driving.¹⁴

We find Herich is entitled to mitigation under standard 1.6(g) for his cooperation and his admission to the insurance company that he was at fault for the collision. Also, during trial, Herich testified he was “really sorry about what happened.” He repeated this apology in his briefs on review and at oral argument. His expression of remorse, combined with his quick admission of fault in the civil matter and his level of cooperation here, is deserving of some mitigating credit. (See *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626–627, fn. 2 [expressing remorse deserves mitigation when it is combined with cooperation, accepting responsibility, and taking steps to prevent recurrence].)¹⁵

V. PUBLIC REPROVAL IS APPROPRIATE DISCIPLINE

We begin our disciplinary analysis by acknowledging that our role is not to punish Herich for his criminal conduct, but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 [aim of attorney discipline is not punishment or retribution; it is imposed to protect the public, to promote confidence in legal system, and to maintain high professional standards; std. 1.1.] We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.)

¹⁴ In discussing remorse and recognition of wrongdoing, the hearing judge found there was not clear and convincing evidence that Herich has a substance abuse problem. As discussed above, we disagree.

¹⁵ We take note of OCTC’s arguments in determining that only some mitigating weight be assigned here. The fact that Herich has made no other assurances or plans to address his alcohol problem beyond abstaining from driving is troubling and demonstrates a failure to fully recognize his wrongdoing.

For misdemeanor convictions not involving moral turpitude, but encompassing other misconduct warranting discipline, standard 2.16(b) provides for discipline ranging from reproof to suspension. Herich argues reproof is not appropriate and a lesser sanction should be imposed under standard 1.7(c) due to the mitigation outweighing the aggravation. Standard 1.7(c) deems appropriate lesser sanctions than called for under a given standard if mitigating circumstances outweigh aggravation and “where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the lawyer is willing and has the ability to conform to ethical responsibilities.” While the mitigation does outweigh the aggravation here, standard 1.7(c) does not apply because (1) Herich caused a quantifiable injury to the collision victims and (2) Herich’s statements in these proceedings do not assure us that he is able to conform to ethical responsibilities in the future. Therefore, it is not appropriate for us to recommend less than reproof, which is the minimum presumed sanction under standard 2.16(b). (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons to deviate from standards].)

In addition to the standards, we look to case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) The hearing judge relied primarily on *Kelley, supra*, 52 Cal.3d 487, and OCTC agrees with the hearing judge’s reliance on *Kelley* in establishing that a public reproof is the appropriate level of discipline here.¹⁶ In *Kelley*, the court imposed

¹⁶ OCTC also states that the hearing judge found guidance in two additional cases: *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208 and *In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402. In *Anderson*, the attorney was actually suspended for 60 days due to, among other things, his four DUI convictions over a six-year period. The misconduct in *Anderson* did not amount to moral turpitude but did constitute other misconduct warranting discipline. In *Guillory*, the attorney was actually suspended for two years. He had one DUI conviction prior to his admission to the bar and three DUI convictions after his admission and while employed as a deputy district attorney. Among other things, the attorney attempted, in the three DUI matters that occurred after his bar admission, to use his position as a prosecutor to influence the arresting officers and he was driving on a suspended license for the last two DUI arrests. We determined in *Guillory* the facts and circumstances

discipline of a public reproof with three years of probation for Kelley's misconduct that did not involve moral turpitude. Kelley had two DUI convictions and the court saw the need to protect the public from potential future harm stemming from Kelley's past problems with alcohol abuse and lack of respect for the legal system. As discussed above, we find Herich has a similar alcohol abuse problem. Kelley had no aggravating circumstances and the mitigating circumstances were similar to those found here. We agree with the judge that a similar discipline to that found in *Kelley* is warranted in this matter.

We reject Herich's argument that his case is more comparable to *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, a case involving two DUI convictions where no discipline was imposed. The convictions occurred in Arizona while the attorney was on voluntary inactive status as a California attorney. He quit drinking after his second arrest and had not consumed alcohol for five years prior to our opinion. In addition, he attended therapy to address his alcohol abuse and the underlying problems that led to it. As such, we found no need for professional discipline to protect the public as the attorney had rehabilitated himself. (*Id.* at p. 272.) Unlike the attorney in *Respondent I*, Herich has not established that he has rectified his problem with alcohol, and we find the potential for future harm to the public. Accordingly, discipline is appropriate here.¹⁷

involved moral turpitude. The judge found that Herich's facts and circumstances were not as serious as those in either *Anderson* or *Guillory* and, therefore, less discipline was warranted. We agree.

¹⁷ In his rebuttal brief, Herich calls our attention to the fact that OCTC omitted certain words when quoting *Respondent I* in its responsive brief. We disagree with him that *Respondent I* holds that attorneys can be disciplined for DUI convictions only when the attorney causes "significant injury or death." That part of the opinion describes holdings from out-of-state cases and does not describe our ultimate holding, which was there was no need for public protection due to the attorney's rehabilitation. (*In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 271–272.) We do not find OCTC's curtailed quotation as "perniciously" concealing anything about the case from us.

Herich has two DUI convictions, the second involving a serious collision resulting in injuries to two victims and property damage. The second DUI also involved false statements to the police officers about his actions. His repeated criminal conduct, which increased in severity, evidences an alcohol abuse problem.¹⁸ While his actions do not involve moral turpitude, they do amount to other misconduct warranting discipline. Herich's declared solution is to abstain from driving, which, contrary to his assertions, does not solve his alcohol problem or assure us that future misconduct will not recur. The record does not establish his law practice has been affected at this point, and we take that into consideration in determining the level of discipline. Nevertheless, we must intervene in this instance to prevent future harm to the public and to impress upon Herich the seriousness of his actions. (*In re Kelley, supra*, 52 Cal.3d at p. 495.) This is necessary as he clearly does not fully understand the significance of his alcohol problem and how it relates to his practice of law. We credit him for several mitigating circumstances including a lengthy discipline-free practice, cooperation, good character, pro bono work, and remorse, which outweigh the sole aggravating circumstance of significant harm. We also note Herich's compliance with the terms of his criminal probation. Given these findings, we find that a public reproof with conditions,¹⁹ which is at the low end of standard 2.16(b), is appropriate discipline. (See std. 1.1 [recommendation at high or low end of standard must be explained].)

¹⁸ The facts and the case law support our finding that Herich has an alcohol problem. He committed a second DUI only two years after completing probation in his first case. The second DUI was more serious than the first, resulting in a collision and injuries. He also testified that drinking and driving was a problem for him, so much so that he needs to abstain from driving. His actions depict a problem with alcohol and potential for future harm, which requires discipline under *Kelley*. He fails to fully realize this problem. Therefore, we include an additional reproof condition below that he attend an abstinence-based self-help group.

¹⁹ We reject Herich's argument on review that he should not have to complete State Bar Ethics School (Ethics School) as a condition of a reproof. It is required and, further, we find the protection of the public and Herich's interests will benefit from his attending Ethics School. (Rules Proc. of State Bar, rule 5.135(A) [Ethics School required where discipline imposed unless completed within two years prior or Supreme Court orders otherwise]; see also *In the Matter of Respondent Z* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 85, 88.)

VI. ORDER

It is ordered that Emil Walter Herich, State Bar Number 116783, is publicly reprovved.

Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, this reprovval will be effective when this opinion becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, we find the protection of the public and the interests of Herich will be served by the following conditions being attached to this reprovval. Failure to comply with any condition may constitute cause for a separate disciplinary proceeding for willful breach of rule 8.1.1 of the State Bar Rules of Professional Conduct. Herich is ordered to comply with the following conditions attached to this reprovval for one year (Reprovval Conditions Period) following the effective date of the reprovval.

- 1. Review Rules of Professional Conduct.** Within 30 days after the effective date of the order imposing discipline in this matter, Herich must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126, and (2) provide a declaration, under penalty of perjury, attesting to his compliance with this requirement, to the State Bar's Office of Probation with Herich's first quarterly report.
- 2. Comply with State Bar Act, Rules of Professional Conduct, and Reprovval Conditions.** Herich must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of this reprovval.
- 3. Maintain Valid Official State Bar Record Address and Other Required Contact Information.** Within 30 days after the effective date of the order imposing discipline in this matter, Herich must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has his current office address, email address, and telephone number. If he does not maintain an office, he must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Herich must report, in writing, any change in the above information to ARCR within 10 days after such change, in the manner required by that office.
- 4. Meet and Cooperate with Office of Probation.** Within 30 days after the effective date of the order imposing discipline in this matter, Herich must schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of Herich's discipline and, within 45 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, he may meet with the probation case specialist in person or by telephone. During the Reprovval Conditions Period, Herich must promptly meet with representatives of the Office of Probation as requested by it

and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide any other information requested by it.

5. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During the Reproval Conditions Period, the State Bar Court retains jurisdiction over Herich to address issues concerning compliance with reproval conditions. During this period, Herich must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to his official State Bar record address, as provided above. Subject to the assertion of applicable privileges, he must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

6. Quarterly and Final Reports.

a. Deadlines for Reports. Herich must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the Reproval Conditions Period. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports Herich must submit a final report no earlier than 10 days before the last day of the Reproval Conditions Period and no later than the last day of the Reproval Conditions Period.

b. Contents of Reports. Herich must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether he has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

c. Submission of Reports. All reports must be submitted to the Office of Probation by: (1) fax or email; (2) personal delivery; (3) certified mail, return receipt requested (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

d. Proof of Compliance. Herich is directed to maintain proof of his compliance with the above requirements for each such report for a minimum of one year after the Reproval Conditions Period has ended. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

7. State Bar Ethics School. Within one year after the effective date of the order imposing discipline in this matter, Herich must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that

session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Herich will not receive MCLE credit for attending this session.

- 8. Abstinence Program Meetings.** Herich must attend a minimum of two meetings per month of an abstinence-based self-help group approved by the Office of Probation. Programs that are not abstinence-based and allow the participant to continue consuming alcohol are not acceptable. Herich must contact the Office of Probation and obtain written approval for the program he wishes to select prior to receiving credit for compliance with this condition for attending meetings of such group. He must provide to the Office of Probation satisfactory proof of attendance at such group meetings with each quarterly and final report; however, in providing such proof, Herich may not sign as the verifier of such attendance.
- 9. Criminal Probation.** Herich must comply with all probation conditions imposed in the underlying criminal matter and must report such compliance under penalty of perjury in all quarterly and final reports submitted to the Office of Probation covering any portion of the period of the criminal probation. In each quarterly and final report, if Herich has an assigned criminal probation officer, he must provide the name and current contact information for that criminal probation officer. If the criminal probation was successfully completed during the period covered by a quarterly or final report, that fact must be reported by Herich in such report and satisfactory evidence of such fact must be provided with it. If, at any time before or during the period of probation, Herich's criminal probation is revoked, he is sanctioned by the criminal court, or his status is otherwise changed due to any alleged violation of the criminal probation conditions by him, Herich must submit the criminal court records regarding any such action with his next quarterly or final report.

COSTS

It is further ordered that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment, and may be collected by the State Bar through any means permitted by law.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.

No. SBC-19-C-30587

In the Matter of
EMIL WALTER HERICH

Hearing Judge

Hon. Dennis G. Saab

Counsel for the Parties

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For Respondent:

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CERTIFICATE OF ELECTRONIC SERVICE

(Rules Proc. of State Bar, rule 5.27.1.)

I, the undersigned, certify that I am a Court Specialist of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, on December 22, 2021, I transmitted a true copy of the following document(s):

OPINION AND ORDER FILED MAY 19, 2021 [As Modified on July 2, 2021]

by electronic service to Emil Walter Herich at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

eherich@kilpatricktownsend.com


by electronic service to Rachel S. Grunberg at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

Rachel.Grunberg@calbar.ca.gov

The above document(s) was/were served electronically. My electronic service address is ctroomA@statebarcourt.ca.gov and my business address is 845 South Figueroa Street, Los Angeles, CA 90017.

I declare, under penalty of perjury under the laws of the State of California, that the information above is true and correct.

Date: December 22, 2021



Julieta Gonzalez,
Court Specialist
State Bar Court