STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

AARON LEE KATZ

A Member of the State Bar

[No. 83-C-14452]

Filed May 21, 1991

SUMMARY

Respondent was convicted in 1983 of one felony count of perjury resulting from his false testimony at a vehicle infraction trial relating to his avoidance of California use and vehicle registration taxes. Respondent was placed on interim suspension in April 1984 pending disposition of the disciplinary proceeding against him. The hearing judge recommended a three-year stayed suspension, three years probation, and actual suspension for an additional eighteen months and until respondent established rehabilitation, fitness to practice, and learning in the law pursuant to standard 1.4(c)(ii). (Hon. Alan K. Goldhammer, Hearing Judge.)

Both parties requested review. The examiner sought disbarment, and respondent sought to overturn certain findings and reduce the recommended actual suspension.

Because respondent was given full credit in the review department's disciplinary recommendation for the time that he had spent on interim suspension, the review department rejected respondent's claim that he had been prejudiced by delays during the disciplinary process. The review department also rejected respondent's claim that he had received insufficient notice that issues beyond his perjury conviction would be considered at trial. Although the review department found that respondent had failed to come to grips with his culpability and had not been entirely candid, the review department concluded that disbarment was not necessary in light of respondent's interim suspension of nearly seven years and other mitigating evidence. The review department recommended that respondent be suspended for three years on conditions of probation including actual suspension for six months from the effective date of the Supreme Court's order and until he satisfied the requirements of standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter

For Respondent: Marshall W. Krause

For Amici Curiae: William H. Morris

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

HEADNOTES

[1] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
755.52 Mitigation—Prejudicial Delay—Declined to Find
1699 Conviction Cases—Miscellaneous Issues
Delays in disciplinary proceedings merit consideration only if they have caused specific, legally cognizable prejudice (e.g., by impairing the presentation of evidence). Where respondent was not prepared to state that his case would have been stronger if no delays had occurred, and respondent received credit for time on interim suspension following conviction, respondent failed to demonstrate prejudice from delay in disciplinary proceeding.

[2] **141 Evidence—Relevance**
1691 Conviction Cases—Record in Criminal Proceeding
1699 Conviction Cases—Miscellaneous Issues
In conviction referral proceedings, discipline is imposed according to the gravity of the crime and the circumstances of the case. In examining such circumstances, the court may look beyond the specific elements of a crime to the whole course of an attorney's conduct as it reflects upon the attorney's fitness to practice law.

[3] **106.20 Procedure—Pleadings—Notice of Charges**
135 Procedure—Rules of Procedure
192 Due Process/Procedural Rights
1691 Conviction Cases—Record in Criminal Proceeding
Given that the examiner's pretrial statement indicated that facts and circumstances surrounding respondent's perjury conviction would be at issue and that the record would include the transcript of a related infraction trial as well as respondent's perjury trial, and given the rule permitting the hearing judge to consider evidence of facts not directly connected with respondent's conviction if such facts are material to the issues stated in the order of reference, respondent had sufficient notice that all relevant facts and circumstances would be considered in the disciplinary proceeding. (Trans. Rules Proc. of State Bar, rule 602.)

[4] **139 Procedure—Miscellaneous**
151 Evidence—Stipulations
The respondent in a disciplinary proceeding must accept facts to which the respondent has stipulated.

[5] **801.10 Standards—Effective Date/Retroactivity**
1551 Conviction Matters—Standards—Scope
The Standards for Attorney Sanctions for Professional Misconduct may be applied retroactively to criminal conduct which occurred before they were adopted.

[6] **621 Aggravation—Lack of Remorse—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
The law does not require false penitence; however, it does require that the respondent accept responsibility for his acts and come to grips with his culpability.

[7] **740.10 Mitigation—Good Character—Found**
The confidence in respondent expressed by fellow attorneys may be considered in mitigation. Where attorneys who testified as character witnesses knew respondent well and were aware of the

circumstances prompting the disciplinary proceeding, their testimony regarding respondent's integrity and honesty deserved consideration.

[8 a, b] **695 Aggravation—Other—Declined to Find**
1691 Conviction Cases—Record in Criminal Proceeding
In a disciplinary hearing, the record of a felony conviction conclusively establishes the attorney's guilt of the felony. Nevertheless, testimony from attorney character witnesses as to their belief that the respondent was innocent should not have been considered as an aggravating circumstance.

[9] **199 General Issues—Miscellaneous**
204.90 Culpability—General Substantive Issues
740.59 Mitigation—Good Character—Declined to Find
Focusing on technicalities in the law is a very shortsighted approach to the ethical obligations of attorneys; such technical approaches to the body of law regulating attorneys' ethics may be described as undermining the moral fiber of the profession. Evidence of good character does not rest on technicalities.

[10 a, b] **740.32 Mitigation—Good Character—Found but Discounted**
740.33 Mitigation—Good Character—Found but Discounted
Where hearing judge found that character witnesses' testimony was undercut by their inability to point to any persuasive reason for their belief in respondent's good character, and where the witnesses' lack of knowledge of the details of respondent's conviction also undermined the value of their testimony, respondent's contention that character evidence had not been sufficiently credited was rejected by review department.

[11 a, b] **801.30 Standards—Effect as Guidelines**
801.41 Standards—Deviation From—Justified
822.59 Standards—Misappropriation—Declined to Apply
1091 Substantive Issues re Discipline—Proportionality
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
The Standards for Attorney Sanctions for Professional Misconduct are guidelines; they do not need to be followed in talismanic fashion. Hearing judge in matter arising from perjury conviction properly analyzed relevant case law in order to arrive at appropriate sanction, rather than automatically applying standard 3.2, which provides that discipline for conviction of a crime involving moral turpitude shall be disbarment unless compelling circumstances clearly predominate. Supreme Court cases involving crimes of moral turpitude have considered the nature of the crime and the magnitude of its impact on the public and the integrity of the legal system. This factual analysis in determining the propriety of disbarment is similar to that used in matters involving entrusted funds or property.

[12 a-c] **176 Discipline—Standard 1.4(c)(ii)**
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where relevant facts and circumstances surrounding perjury conviction were serious, and respondent had not yet demonstrated sufficient rehabilitation, but in light of mitigation and circumstances as a whole disbarment was not necessary, lengthy actual suspension, including some prospective suspension, and standard 1.4(c)(ii) requirement were appropriate discipline. However,

review department reduced length of recommended prospective suspension to reflect time expired since issuance of hearing judge's decision.

[13 a-c] **755.10 Mitigation—Prejudicial Delay—Found**
1549 Conviction Matters—Interim Suspension—Miscellaneous
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Credit for interim suspension in conviction matters is not restricted to cases in which there are compelling mitigating factors. All facts and circumstances, including unexplained delay in State Bar proceedings, are considered, and all relevant factors are balanced in arriving at a proper discipline. Disciplinary recommendations should not penalize the respondent for appealing a criminal conviction or contesting the State Bar Court's findings and recommendations. Where lengthy interim suspension has occurred, the appropriate consideration in determining whether prospective suspension is necessary is whether the facts and circumstances of a particular matter require a further period of actual suspension for the protection of the public, the profession or the courts.

[14] **135 Procedure—Rules of Procedure**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues
Where examiner was concerned to obtain detailed, complete information regarding respondent's anticipated application to resume practice pursuant to standard 1.4(c)(ii), review department recommended that respondent follow same format in application as in an application for reinstatement; otherwise, examiner could seek such information by a discovery request which would be more time consuming. (Trans. Rules Proc. of State Bar, rules 810-826.)

[15] **141 Evidence—Relevance**
173 Discipline—Ethics Exam/Ethics School
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
Passage of the Professional Responsibility Examination would be relevant evidence in a hearing pursuant to standard 1.4(c)(ii), but is not a condition precedent. Accordingly, respondent ordered to take PRE was given the standard period of one year to do so even though respondent's standard 1.4(c)(ii) hearing might occur sooner.

[16] **175 Discipline—Rule 955**
1699 Conviction Cases—Miscellaneous Issues
Where respondent in conviction matter had complied with rule 955, California Rules of Court at time of respondent's interim suspension, and had not practiced since, order to comply with rule 955 again upon imposition of final discipline was not necessary.

ADDITIONAL ANALYSIS

Aggravation
Found
541 Bad Faith, Dishonesty
Discipline
1613.09 Stayed Suspension—3 Years
1615.04 Actual Suspension—6 Months
1616.70 Relationship of Actual to Interim Suspension—Prospective, but Reduced
1617.09 Probation—3 Years

Probation Conditions

1024 Ethics Exam/School
1630 Standard 1.4(c)(ii)

Other

1521 Conviction Matters—Moral Turpitude—Per Se
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P.J.:

Respondent Aaron Lee Katz was admitted to the practice of law in California in December 1973 and has no prior record of discipline. This case arises from his criminal conviction in 1983 on one count of perjury involving a personal tax avoidance scheme. He has been on interim suspension since April 1984. The hearing judge considered all of the circumstances and concluded that respondent should be suspended for three years, stayed on conditions including probation for three years and actual suspension for eighteen months and until satisfactory proof of 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 (Trans. Rules Proc. of State Bar, div. V [hereafter "standards"]). No credit was recommended for his seven years of interim suspension.

Both parties sought review: the examiner on the ground that the decision ought to have recommended disbarment; Katz on numerous grounds challenging both the findings and the length of suspension. Among other things, Katz alleged improper failure to consider his lengthy interim suspension, prejudicial delays during the disciplinary process, improper application of standard 3.2, lack of support for the hearing judge's conclusions regarding remorse, and mishandling of character testimony by three attorneys and by lay witnesses.

In addition to the briefs of the parties, one of the three attorneys who served as character witnesses filed an amicus brief in which the other two attorney witnesses subsequently joined. The brief challenged the hearing judge's findings with respect to their testimony and objected to the recommended discipline as too harsh.

Upon our independent review, we adopt the hearing judge's findings and disciplinary recommendation with a few modifications. Taking Katz's lengthy interim suspension, including the additional one year since the hearing judge entered his decision, into account, we reduce the prospective suspension to six months actual suspension and until compliance with standard 1.4(c)(ii).

I. PROCEDURAL HISTORY

In 1976, Katz formed a corporation called Caarco, Inc.,[1] under the laws of Nevada. Katz used Caarco to hold title to two automobiles, including a 1981 Mercedes Benz registered in Oregon, and to avoid paying California motor vehicle fees and taxes. Katz was convicted in 1982 on a vehicle infraction charge and in 1983 on a perjury charge arising from his testimony in the infraction trial.[2] The Court of Appeal for the First Appellate District affirmed the perjury conviction in 1987.[3]

In the infraction trial, Katz was charged with failing to register the two automobiles in California, failing to pay registration taxes, and displaying improper license plates. (Decision by State Bar Court Hearing Department [hereafter cited as "Decision"] at p. 5; App. Ct. Opn. at p. 3.) The record indicates that Katz was convicted only for displaying improper license plates. (III Reporter's Transcript of the State Bar Court hearing [hereafter cited as "R.T."] 368-369; II R.T. 163.)[4] During the infraction trial, Katz testified that Caarco had a branch office at 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon, and owned two vehicles used in respect to its branch office operations at the Oregon address. (App. Ct. Opn. at p. 5)

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1. Katz indicated that "Caarco" was an acronym combining the first names of his wife and himself and stood for "Carolyn and Aaron Company." (Appellate Court Opinion [hereafter cited as "App. Ct. Opn."] at p. 3, fn. 1.)

2. Shortly after Katz was found guilty in the infraction trial, Caarco prevailed in a mandate proceeding seeking the return of the two automobiles, which had been impounded. (App. Ct. Opn. at pp. 5-8.)

3. The California Supreme Court denied Katz's petition for review, but a federal habeas corpus attack on the perjury conviction was still pending by the end of September 1990.

4. Although the appellate court opinion suggests that Katz was convicted on all of the infraction charges, the uncontroverted testimony at the disciplinary hearing is to the contrary, and we rely on the testimony in the record. (See App. Ct. Opn. at p. 6.)

Although Katz was charged with multiple counts of perjury based on his testimony at the infraction trial, all but two counts were dismissed. (Decision at p. 4.) On one count, the jury found that he had not falsely testified in stating that Caarco had a branch office at 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon, but found on the other count that he had falsely testified in stating that Caarco owned two vehicles used in respect to its branch office operations in Oregon.

As a result of the perjury conviction, Katz was sentenced to serve three years in state prison, suspended on condition of serving one year in the county jail. This sentence was later modified to remove the service of one year in the county jail and to require instead the payment of a $10,000 fine. Katz paid the fine; and in 1988, the Santa Clara County Superior Court entered an order terminating Katz's probation and expunging his conviction. (Agreed statement of facts at pp. 2-3.)

In the State Bar Court proceeding prompted by the perjury conviction, the hearing judge recommended three years stayed suspension on conditions including actual prospective suspension of Katz for eighteen months and until Katz has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law at a standard 1.4(c)(ii) hearing. (Decision at pp. 24-25.)

II. STATEMENT OF FACTS

In the agreed statement of facts, the examiner and the attorney for Katz stipulated that the facts surrounding Katz's perjury conviction were correctly stated in the appellate court opinion of June 9, 1987, as modified in minor ways on July 2, 1987. (Agreed statement of facts at pp. 2-3.) The following statement of facts is based on the facts as found by the court of appeal, except where otherwise noted.

Caarco was a shell corporation designed to avoid California use and vehicle registration taxes. During most of Caarco's existence, its only officers, directors, shareholders, and employees were Katz and his wife. (App. Ct. Opn. at p. 2.)

Katz involved Dorothy Cichon, a client whose marital dissolution he was handling at the time, in Caarco's affairs. In the infraction and perjury trials, she testified that she paid a $1,000 retainer fee at Katz's direction to Stevens Creek Volkswagen as a deposit on a 1981 Mercedes Benz. (*Id.* at pp. 3-4.) Katz denied that Cichon had purchased the car on his behalf, but acknowledged that the receipt for her $1,000 deposit indicated the deposit was "for and on behalf of the undersigned," who was Katz. (*Id.* at p. 13.)

Following Katz's instructions, Cichon took delivery of the 1981 Mercedes Benz in Germany, drove it in Europe, arranged for shipment to California, collected it from the U.S. Customs Service, and turned it over to Katz. At Katz's direction, she also signed an Oregon registration application listing her address as 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon, although she had never lived there. Two days before the infraction trial, she received a letter in which Katz asked her to sign a bill of sale backdated by Katz and again listing her address as 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon. (*Id.* at p. 4.)

At the infraction trial, California Highway Patrolman Milton Stark testified that he had received a tip from an anonymous informant, later identified as Katz's neighbor and former client Wayne Averill. Stark discovered that the 1981 Mercedes Benz, which bore the Nevada license plate "CAARCO," should have displayed the Oregon license plate "GPC301." (*Id.* at pp. 3-5.)

During the infraction trial, Katz denied that Caarco was a sham corporation. He also maintained that Caarco had a branch office in a rudimentary structure called a "pole house" at the Oregon address and that he had used the 1981 Mercedes Benz on Caarco business in California and Oregon. (*Id.* at pp. 5-6.)

Because of his testimony at the infraction trial, Katz was charged with eight counts of perjury, which were reduced to two counts by the time of trial. (Agreed statement of facts at pp. 1-2.) He was convicted in October 1983 on one count for falsely

testifying that Caarco owned two vehicles used in respect to its branch office operations in Oregon. (Perjury verdict.)

At the perjury trial, Sue Patterson testified that she lived near the pole house on the Jump Off Joe Creek Road property, which she had previously owned, but had sold to Richard Groen, a former client of Katz. Patterson explained that the pole house had no telephone, no electricity, and no septic tank or sewer connection; that the Jump Off Joe Creek Road address was actually a bullet-ridden mailbox about 12 miles from the pole house; that the road to the pole house ran in front of her home and through two gates at its side; that the property could not be approached in a Mercedes Benz without breaking an oil pan; that she could not recall any visit by Katz to the property; and that she had never heard of Caarco or Katz until early 1982. (App. Ct. Opn. at pp. 8-9.)

In early 1982, Patterson had received a letter written by Katz's wife with his knowledge and approval. The letter stated that Patterson, if asked about Caarco, need not cooperate with law enforcement authorities. Further, the letter urged Patterson, if she did respond to inquiries, to say that she was familiar with Caarco and that Caarco maintained an office on the Jump Off Joe Creek Road property. (*Id.* at p. 9.)

Richard Groen testified at the perjury trial that he had given Katz permission to use the pole house property, that he had gone with Katz to the property, that the property could be reached without a four-wheel-drive vehicle, and that he had personally introduced Katz to Patterson. (*Id.* at 11.) Groen's wife asserted that Caarco had permission to use the pole house property and that she had informed Patterson, who was forgetful, about Caarco and Katz. (*Id.* at p. 12.)

Katz testified at the perjury trial that he used the Oregon address to minimize registration fees and use taxes, had visited the pole house property several times, had met Sue Patterson, and had discussed with her the use of the property as Caarco's mailing address. In Katz's opinion, he had conducted Caarco business in traveling to Oregon to register his vehicles and had used the vehicles in respect to the Oregon branch office. (*Id.* at p. 13.)

Soon after the perjury trial began, Katz attempted to intimidate Averill, the initially anonymous police informant and a potential witness. Katz drove an automobile onto Averill's property, stopped a couple of feet from Averill, and pointed his finger at Averill in a threatening manner. In early 1982, Averill also had received three identical anonymous threatening letters which he believed Katz had sent. (*Id.* at pp. 19-21.)[5]

After his perjury conviction, Katz applied in March 1984 to become an inactive member of the State Bar. This application was given retroactive application to January 1, 1984. (III R.T. 411-412.)

On March 21, 1984, the California Supreme Court ordered that Katz be put on interim suspension pursuant to Business and Professions Code section 6102 (a) and that Katz comply with rule 955 of the California Rules of Court. The effective date of the order was April 20, 1984. (Interim suspension order.)

At the disciplinary hearing, the examiner argued that the only issue was the level of discipline and that disbarment was appropriate under standard 3.2 because the most compelling mitigating circumstances did not clearly predominate. (I R.T. 13-14.) Respondent's counsel claimed that Katz's conduct posed "a very technical question, inappropriate for a perjury conviction"; that Katz had merely pressed "a minor matter too far"; and that he was a rehabilitated, honest man. (I R.T. 15-17.) Testimony was presented by Katz, Patrolman Stark, Katz's psychotherapist, Katz's former probation officer, the

5. At the perjury trial, Katz denied threatening Averill. He asserted that Averill had hidden assets from him after previous litigation and that he had entered Averill's driveway to note the license number of an apparently new automobile, so that he might possibly obtain a writ of execution on it. (App. Ct. Opn. at p. 21.) The appellate court opinion, however, accepted the view that Katz threatened Averill. (*Id.* at p. 27.)

superior court judge who had presided at Katz's perjury trial, three attorneys who had either represented or worked for Katz, and six lay witnesses.

The hearing judge restricted his findings of fact to the facts stipulated by the parties and set forth in the appellate court opinion. (Decision at pp. 4-8.) He concluded that the crime of which Katz was convicted involved moral turpitude, as did the facts and circumstances surrounding it. (*Id.* at p. 8.) With regards to mitigation and aggravation, the hearing judge made two findings: that bad faith, dishonesty, concealment, and overreaching surrounded Katz's conduct and that the most compelling mitigating circumstances did not predominate. (*Id.* at p. 9.) As discussed above, the hearing judge declined to impose disbarment or to give Katz any credit for several years of interim suspension. Instead, the hearing judge recommended actual suspension for 18 months and until Katz 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). (*Id.* at pp. 16-17, 21-22, 24.)

III. DISCUSSION

A. Delays During the Disciplinary Process.

[1] Katz alleges prejudicial delays during the disciplinary process, but was not prepared to state that his case would have been stronger if no delays had occurred. Delays in disciplinary proceedings merit consideration only if they have caused specific, legally cognizable prejudice (e.g., by impairing the presentation of evidence). (*Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774; *In re Ford* (1988) 44 Cal.3d 810, 818; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 310.) Absent any credit for time on interim suspension Katz might have been able to demonstrate prejudice from the delays, but we believe we have obviated any such potential prejudice by our recommended discipline. (See discussion *post.*)

B. Finding of Fact No. 7.

Katz argues that finding of fact number 7, which describes the infraction and perjury trials, exceeds the scope of the hearing ordered by the California Supreme Court because it deals with matters other than simply the perjury conviction. **[2]** In a conviction referral, discipline is imposed according to the gravity of the crime and the circumstances of the case. (Bus. and Prof. Code, § 6102 (d).) In examining such circumstances, the court may look beyond the specific elements of a crime to the whole course of an attorney's conduct as it reflects upon the attorney's fitness to practice law. (*In re Kristovich* (1976) 18 Cal.3d 468, 472; *In re Higbie* (1972) 6 Cal.3d 562, 572.) The disciplinary hearing thus properly encompassed the whole course of Katz's conduct resulting in the perjury conviction.

[3] Katz also alleges that he had lack of notice that matters beyond the perjury conviction were to be considered at the disciplinary hearing. The examiner, however, in his pretrial statement informed Katz that the facts and circumstances surrounding the perjury conviction would be at issue and that the record would include the transcript of the infraction trial, as well as the transcript of the perjury trial. In addition, pursuant to rule 602 of the Transitional Rules of Procedure,[6] the hearing judge may consider evidence of facts not directly connected with the crime of which the member was convicted if such facts are material to the issues stated in the order of reference. Both the examiner's pretrial statement and rule 602 gave Katz sufficient notice that all relevant facts and circumstances would be considered.

Katz especially objects to the references in finding of fact number 7 of the hearing judge's decision concerning alleged mistreatment of Cichon and Averill. The finding merely incorporates stipulated facts from the appellate court's opinion. **[4]** The respondent in a disciplinary proceeding must accept facts to which he has stipulated. (*Levin* v. *State Bar*

6. All further references herein to the Rules of Procedure refer to the Transitional Rules of Procedure of the State Bar.

(1989) 47 Cal.3d 1140, 1143; *Inniss* v. *State Bar* (1978) 20 Cal.3d 552, 555.)

C. Application of Standard 3.2 to Katz's Conduct.

[5] Katz claims that standard 3.2, which deals with the appropriate sanction for an attorney convicted of a crime involving moral turpitude, does not apply to his conduct because it did not exist when he committed perjury. (Respondent's request for review at p. 3.) The California Supreme Court, however, has made it clear that the standards may be applied retroactively. (*In re Aquino* (1989) 49 Cal.3d 1122, 1133-1134, fn. 5; *Kennedy* v. *State Bar* (1989) 48 Cal.3d 610, 617, fn. 3; *In re Ford* (1988) 44 Cal.3d 810, 816, fn. 6.)

D. Katz's Remorse.

Katz testified below that he was "very sorry" about the perjury conviction, but "probably more sorry on [sic]" himself. (III R.T. 376.) He realized that he had made a "very big mistake" and had harmed his family, clients, and the public, although he did not consider them victims. (III R.T. 389; I R.T. 48.) He believed that he did not deserve to be convicted of perjury and that certain "behavior traits" had gotten him into trouble, particularly a tendency to have "tunnel vision" and to ignore the adverse consequences of holding onto a position regardless of how right he considers the position. (I R.T. 38; III R.T. 374, 435, 439-440.) When the hearing judge suggested that Katz did not mean to say the lesson Katz had learned from his conviction was "You can't fight City Hall," Katz replied that it might be the lesson. The basic fault which Katz perceived in his conduct was that he had allowed minor matters to escalate. (III R.T. 433-434.) We have no basis for disturbing the hearing judge's findings.

In *In re Aquino*, *supra*, 49 Cal.3d 1122, the Supreme Court gave similar statements of remorse little weight. After his criminal conviction, Aquino published an advertisement in a paper serving his immigrant community. The advertisement stated that Aquino was "very sorry" for the shame which he had caused his family and community and that he was "equally sorry for the embarrassment" which he had caused the legal profession. At his disciplinary hearing, Aquino expressed regret for his conduct; and his psychologist testified that although Aquino had initially viewed himself as a victim of circumstance, he had come to accept responsibility for his conduct. Nevertheless, the California Supreme Court observed that Aquino's evidence raised serious doubts about whether, when, and to what extent he had come to grips with his culpability. (*Id.* at pp. 1132-1133.)

Here, similarly, Katz failed to come to grips with his culpability in asserting that he had merely made a mistake in pressing a correct position too far. (III R.T. 374, 376.) While he claimed to respect the perjury conviction, he repeatedly testified that he was innocent of perjury. (I R.T. 38; III R.T. 439-440.) Katz acknowledged fault only for having failed to communicate clearly. (III R.T. 439-440.) At no point in the disciplinary hearing did he either concede that he had lied under oath or express regret for such lying.

Katz also failed to acknowledge the other aspects of his culpability. In seeking to avoid paying California motor vehicle taxes and fees for his automobiles he engaged in extensive chicanery. He had his client, Dorothy Cichon, pay a retainer fee to that Oregon corporation to make it appear as though it were a car deposit. Then he directed her to lie about her address on a car registration application and asked her to sign a backdated bill of sale with the same wrong address. With his approval, his wife urged a key witness, Sue Patterson, not to cooperate with law enforcement authorities. During the perjury trial, he threatened his neighbor, Wayne Averill, a potential witness against him. Katz's actions can by no stretch of the imagination be considered a legitimate position asserting the inapplicability of the California tax laws for his use of an automobile. As the hearing judge properly observed, they showed bad faith, dishonesty, concealment, and overreaching. Such deliberate misconduct would have warranted discipline even if a jury had not convicted Katz of perjury in connection therewith.

[6] The law does not require false penitence. (Cf. *Hall* v. *Comm. of Bar Examiners* (1979) 25 Cal.3d 730.) But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. (*In re Aquino*, *supra*, 49 Cal.3d at p. 1133.)

E. Testimony by Three Attorneys as Character Witnesses.

The hearing judge described much of Katz's trial strategy as a "not well veiled attack on the conviction itself, despite some assertions to the contrary." (Decision at p. 10.) The hearing judge regarded the disciplinary hearing as the wrong forum for testimony by the three attorneys who served as character witnesses that Katz's conviction was invalid; and he stated that "the facts clearly show their opinions to be grievously, completely and utterly wrong." (*Id.* at p. 13.) The expression of such opinions by the attorneys led the hearing judge to believe that Katz's sanction "must be a strong one in order to deter such attitudes on the part of attorneys which can only generate disrespect of the public for the legal profession." (*Id.* at pp. 13-14.) Further, he suggested that the attorneys' character evidence was undercut by their view of Katz's crime. (*Id.* at p. 18.)

Katz argues that the character testimony by the three attorney witnesses should not have been discounted because they expressed the opinion that Katz's perjury conviction was a mistake. Katz also objects to the hearing judge's imposing a more severe discipline because the attorneys expressed their belief in Katz's innocence. The amicus brief raises similar concerns.

[7] The confidence of fellow attorneys may be considered in mitigation. (*In re Aquino*, *supra*, 49 Cal.3d at p. 1131; *In re Demergian* (1989) 48 Cal.3d 284, 296.) Because Morris, Mesirow, and Rosenblatt have all known Katz well and are aware of the circumstances prompting the disciplinary proceeding, their testimony regarding Katz's integrity and honesty deserved consideration.

William H. Morris clerked for Katz, did research about the vehicle infraction charges, and had fairly detailed knowledge of the perjury conviction. On direct examination, he testified that Katz was and is honest, that the jury in Katz's perjury trial made a mistake, and that Katz formerly suffered from hubris, but has outgrown his problems. On cross-examination, he conceded that Katz committed perjury, but contended that the conviction was probably not appropriate. (II R.T. 302, 306, 308, 310, 313.)

Charles M. Mesirow, who represented Katz in the perjury trial, expressed strong criticisms of the perjury trial and conviction on direct examination. He also stated that Katz had better judgment now than formerly, "is probably one of the more honest people that there are," poses no danger to the public, and should be reinstated. On cross-examination, he reiterated his opinion that Katz had not committed perjury. (II R.T. 199-200, 209, 210, 213.)

Philip S. Rosenblatt shared office space with Katz, represented him in the writ proceeding against the Department of Motor Vehicles, and "lived through" the perjury prosecution and conviction with him. On direct examination, he expressed the opinions that Katz would be an honest and effective attorney, poses no danger to the public, and was wrongly convicted of perjury. On questioning from the hearing judge, Rosenblatt reiterated that Katz had not committed perjury, but had a "mode of behavior" problem which has lessened. (II R.T. 151, 152, 155, 165, 167, 190, 191.)

All the attorneys criticized the perjury conviction on direct examination in accordance with respondent's strategy to attack the conviction outlined in the opening statement by Katz's counsel, who contended that Katz's conduct raised "a very technical question, inappropriate for a perjury conviction," and who expressed an intention to show that "Katz always believed he was telling the truth." (I R.T. 15-16.) **[8a]** In a disciplinary hearing, however, the record of a felony conviction conclusively establishes the member's guilt of the felony. (Bus. & Prof. Code, § 6101 (a).) The hearing judge was therefore correct in pointing out that it was both too late and the wrong forum to challenge the conviction.

[9] Indeed, although it is not uncommon for attorneys to focus on technicalities in all areas of the law, it is nonetheless a very shortsighted approach to the ethical obligations of attorneys. As the examiner pointed out at oral argument, a leading ethicist, Professor Josephson of the Josephson Institute for the Advancement of Ethics, in his numerous seminars and speeches, has described similar technical approaches to the body of law regulating attorneys' ethics as undermining the moral fiber of the profession. Evidence of good character does not rest on technicalities.

[8b] Nevertheless, by stating that Katz's sanction must be strong precisely because three attorneys expressed their belief in Katz's innocence of perjury, the hearing judge mistakenly converted misguided testimony by the attorneys into an aggravating circumstance. Character evidence from more disinterested attorneys with knowledge of the conviction might have deserved more weight in mitigation, but we decline to assess greater discipline against the respondent on the basis of the three attorneys' testimony as to their attitude toward the conviction.

F. Testimony by Six Lay Character Witnesses.

[10a] Katz claims that the hearing judge failed to give enough credit to the character evidence presented by six lay witnesses. We disagree. Although the hearing judge was impressed by the number of witnesses, by the breadth and strength of their backgrounds, and by their vouching for Katz's character, he described their testimony as "seriously undercut because aside from the bare fact of the attestation, none of the witnesses could point to any persuasive reasons other than their acquaintanceship" for believing Katz to have good character.[7]

[10b] The hearing judge's decision does not expressly address the fact that Katz's lay witnesses lacked knowledge of the details of his conviction. The guideline which is provided by the standards is "an extraordinary demonstration of a member's good character attested to by a wide range of references" if such references are aware of the "full extent" of the member's misconduct. (Standard 1.2(e)(vi).) Applying standard 1.2(e)(vi), the California Supreme Court has discounted extensive character testimony and letters because "*most* of those who testified or wrote *may not* have been familiar with the *details*" of a member's misconduct. (*In re Aquino*, *supra*, 49 Cal.3d at p. 1131, emphasis added.) In Katz's case, one lay witness knew that the perjury conviction related to a vehicle registration problem; and another knew that a state policeman had gone to Oregon for evidence against Katz. (II R.T. 269, 277-278.) None of Katz's lay witnesses knew the details of his conviction. (I R.T. 114, 137-138; II R.T. 266, 268, 269, 275, 277-278, 290, 299-300.) Such lack of knowledge undermined the value of their character testimony.

G. Recommended Discipline.

(1) Hearing Judge's Analysis.

The hearing judge started his analysis with the provisions of standard 3.2, which, as indicated above, may properly be applied to facts predating its adoption. **[11a]** The California Supreme Court treats standard 3.2 the same way as other standards—as a guideline which it is not compelled to follow in talismanic fashion. (*In re Young* (1989) 49 Cal.3d 257, 268 [declining to apply standard 3.2's prospective suspension requirement]; cf. *Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221.) The hearing judge found that Katz's conviction on one count of perjury involved moral turpitude, both inherently and in the surrounding facts and circumstances, and that compelling mitigating circumstances did not predominate. (Decision at p. 9.) He then properly proceeded to analyze the relevant case law in order to arrive at the appropriate sanction, instead of automatically applying standard 3.2 to disbar the respondent.

The hearing judge distinguished various cases cited by Katz (*In re Chira* (1986) 42 Cal.3d 904; *In re Effenbeck* (1988) 44 Cal.3d 306; *In re Chernick* (1989) 49 Cal.3d 467) on the grounds that these cases did not involve perjury. (Decision at pp. 10-11.) The hearing judge also distinguished cases cited by the examiner in which the California Supreme Court imposed disbarment on attorneys who bribed witnesses. (*In re Allen* (1959) 52 Cal.2d 762; *In re Hanley* (1975) 13 Cal.3d 448.) The hearing judge observed that the "perversion of the judicial process involved in bribing witnesses appears different in character than that of perjury." (Decision at p. 14.)[8]

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7. The hearing judge observed that most of the lay witnesses were acquaintances who saw Katz only occasionally, that three knew him only through a Hawaii condominium project, and that "none could point to good works, involvement in the community, civic or career achievements, or any of the usual benchmarks for notable character or compelling mitigation." (Decision at p. 18.)

8. The hearing judge declined to follow three other disbarment cases cited by the examiner (*Snyder* v. *State Bar* (1976) 18 Cal.3d 286, *Garlow* v. *State Bar* (1988) 44 Cal.3d 689, and *Marquette* v. *State Bar* (1988) 44 Cal.3d 253) because each case involved a number of dishonest acts. (Decision at p. 14.) The facts of *Snyder* v. *State Bar*, *supra*, *Garlow* v. *State Bar*, *supra*, and *Marquette* v. *State Bar*, *supra*, were far more egregious than the facts of Katz's case.

In his analysis, the hearing judge relied in part on the Supreme Court's decision in *In re Kristovich* (1976) 18 Cal.3d 468, which was decided only one year after *In re Hanley, supra.* In *In re Kristovich, supra,* in light of compelling mitigation, the attorney received three months suspension for two acts of perjury and preparing a false statement.

In determining the appropriate discipline, the hearing judge also looked for guidance from three other cases involving deceit: *Levin* v. *State Bar, supra,* 47 Cal.3d 1140 (six months actual suspension for numerous dishonest acts and careless handling of client's affairs), *Olguin* v. *State Bar* (1980) 28 Cal.3d 195 (six months actual suspension for abandoning a client, lying to a State Bar investigation committee, and fabricating false documents), and *Montag* v. *State Bar* (1982) 32 Cal.3d 721 (six months actual suspension for perjury before a grand jury). (Decision at pp. 15-17.)

The severity of the recommended discipline below compared to that in cases such as *Montag* v. *State Bar, supra,* 32 Cal.3d 721 and *In re Kristovich, supra,* 18 Cal.3d 468 appears to be predicated on Katz's surrounding acts of bad faith, dishonesty, concealment, and overreaching, as well as the lack of the most compelling mitigating circumstances.

(2) Recent Cases Applying Standard 3.2.

The most recent Supreme Court decision involving standard 3.2 is *In re Leardo* (1991) 53 Cal.3d 1,[9] in which the California Supreme Court unanimously rejected our predecessor volunteer review department's recommendation of disbarment, gave credit for four and one-half years' interim suspension, and imposed no prospective suspension for a drug offense as not required under the circumstances for the protection of the public, the profession or the courts. (*Id.* at p. 18.) In so ruling, the Court noted: "We recognize that standard 3.2 of the State Bar Standards for Attorney Sanctions for Professional Misconduct (Rules Proc. of State Bar, div. V) provides that discipline for conviction of a crime involving moral turpitude shall be disbarment unless compelling mitigating circumstances clearly predominate; and in the latter event, discipline shall not be less than a two-year actual suspension prospective to any interim suspension, 'irrespective of mitigating circumstances.' Those standards, however, 'are simply guidelines for use by the State Bar. Whether the recommended discipline is appropriate is still a matter for our independent review.' (*Boehme* v. *State Bar* (1988) 47 Cal.3d 448, 454; *Greenbaum* v. *State Bar* (1987) 43 Cal.3d 543, 550.) For the reasons stated herein, neither the discipline recommended by the review department nor the minimum discipline provided in standard 3.2 is appropriate. We note that the Office of Trial Counsel itself did not feel bound by the letter of this standard, because it recommended an actual suspension of one year rather than two." (*In re Leardo, supra,* 53 Cal.3d at p. 18, fn. 8.)

The mitigation in *In re Leardo, supra,* 53 Cal.3d 1, was far more compelling than here and the circumstances were unusual. In contrast, however, in four other recent criminal referral cases resulting in disbarment, the circumstances were substantially more egregious than those involved here and nonetheless caused the Court to split on the issue of appropriate discipline. (*In re Aquino, supra,* 49 Cal.3d 1122; *In re Lamb* (1989) 49 Cal.3d 239; *In re Rivas* (1989) 49 Cal.3d 794; and *In re Scott* (1991) 52 Cal.3d 968.)

[11b] In *In re Leardo, In re Aquino, In re Lamb, In re Rivas,* and *In re Scott,* the Supreme Court went beyond the determinations that a crime of moral turpitude was involved to look at the nature of the crime and the magnitude of its impact on the public and the integrity of the legal system. This factual analysis in determining the propriety of disbarment is very similar to what it has done in applying the similarly worded guideline set forth in standard 2.2 for offenses involving entrusted funds or property. Thus, for example, in *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, the Supreme Court did not impose disbarment pursuant to standard 2.2 even with aggra-

9. Although the California Supreme Court issued its opinion in *In re Leardo, supra,* 53 Cal.3d 1, after oral argument in the present proceeding, we accepted posthearing briefing from the parties regarding *In re Leardo* and deferred submission of this matter to the date of the last filed posthearing brief.

vating circumstances involving perjury, in light of other mitigating factors, including the finding as made here that apart from the charged misconduct, the respondent was found to be basically honest and unlikely to commit a similar act again. There, the Supreme Court deemed disbarment excessive in view of the prophylactic purpose of attorney discipline. (*Id.* at p. 245; cf. *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 958 ["We have no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public"].) **[12a]** Here, because the relevant facts and circumstances surrounding the perjury conviction were serious, the hearing judge's recommendation of lengthy suspension, a standard 1.4(c)(ii) hearing, and a Professional Responsibility Examination requirement are clearly appropriate. Nonetheless, in light of the hearing judge's findings in mitigation and the circumstances taken as a whole, we adopt the hearing judge's conclusion that disbarment is not necessary.

We next consider the impact on the prospective aspect of the suspension recommendation of respondent's seven plus years on interim suspension, which resulted in part because he appealed his conviction and in part because of other delays.

H. Credit for Interim Suspension.

[13a] The hearing judge refused to give any credit for Katz's interim suspension because he interpreted *In re Young*, *supra*, 49 Cal.3d at p. 268 to make such credit available only on a finding of compelling mitigating factors. (Decision at pp. 21-22.) He noted that Young did not seek to promote his own self-interest or to obtain financial gain; suffered from physical, mental, and emotional exhaustion; and committed acts which were out of character and highly unlikely to recur. By contrast, Katz carefully planned his perjury and deliberately arranged a scheme for his own financial gain. (*Id.* at p. 22.)

[13b] The hearing judge's interpretation of *In re Young*, *supra*, appears too restrictive. In *In re Fudge*, *supra*, 49 Cal.3d at 645, the Supreme Court gave full credit for interim suspension without expressly finding compelling mitigation, but just upon "considering all the facts and circumstances" including unexplained delay in the State Bar proceedings. Delays also permit the respondent to show in mitigation a sustained period of good conduct following the misconduct at issue. (See, e.g., *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at pp. 316-317.) Thus, in *In re Young*, *supra*, the California Supreme Court stressed that it balanced all relevant factors in arriving at a proper discipline. (*In re Young*, *supra*, 49 Cal.3d at p. 266.) In Young's case, these factors included an interim suspension of three years, as well as the facts and circumstances surrounding Young's crime and other significant mitigating factors. (*Id.* at p. 268.) As the Supreme Court recently stated in *In re Leardo*, *supra*, 53 Cal.3d at p. 18, "whether a suspension be called interim or actual, of course, the effect on the attorney is the same—he is denied the right to practice his profession for the duration of the suspension." Katz's interim suspension of nearly seven years should weigh heavily in balancing all the relevant factors of his case.

[13c] We are particularly concerned about penalizing Katz for pursuing his criminal appeal. The rationale underlying *In re Young* is that disciplinary recommendations should not "essentially penalize" a member for appealing a criminal conviction or contesting the State Bar Court's findings and recommendations. (*In re Young*, *supra*, 49 Cal.3d at p. 267.) Previously, in *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, we relied on *In re Young*, *supra*, in holding that "Respondent should not be penalized for his entirely proper exercise of his right to appeal by forfeiting his right to practice law for longer than would have been the case had he allowed his conviction to become final earlier." (*In the Matter of Stamper*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 109-110.) Where lengthy interim suspension has occurred, the appropriate consideration in determining whether prospective suspension is necessary is whether the facts and circumstances of a particular matter require a further period of actual suspension for the protection of the public, the profession, or the courts. (*In re Leardo*, *supra*, 53 Cal.3d at p. 18.)

[12b] While we consider credit for time spent on interim suspension appropriate, we agree with the hearing judge that respondent has yet to demonstrate sufficient rehabilitation and therefore some prospective suspension is appropriate until respondent proves

his entitlement to resume practice in accordance with standard 1.4(c)(ii). We also note that more than a year has expired since the hearing judge recommended a prospective period of eighteen months. Although respondent's counsel maintains that respondent is entitled to immediate reinstatement, he also recognizes the appropriateness of a 1.4(c)(ii) hearing before respondent is permitted to resume the practice of law. The examiner prefers a reinstatement proceeding because of untested concerns regarding the scope of discovery in the newly established 1.4(c)(ii) proceeding and because of the higher burden of proof in a reinstatement proceeding. However, the examiner was unable to demonstrate that the hearing judge's recommendation of a 1.4(c)(ii) proceeding could not adequately protect the public. (Cf. *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d 924, 958.)

[12c] We therefore adopt the hearing judge's findings and decision that the misconduct was worthy of lengthy actual suspension and a standard 1.4(c)(ii) hearing, at which respondent by a preponderance of the evidence must affirmatively demonstrate rehabilitation, present fitness to practice, and present learning and ability in the general law. (Rule 817.)[10] We also agree with the need for his requirement of passage of the California Professional Responsibility Examination. With credit for time spent on interim suspension, and in recognition of the substantial passage of time since the hearing judge entered his order, we recommend actual prospective suspension from the effective date of the Supreme Court order for six months and until satisfaction of the standard 1.4(c)(ii) requirement. In making this recommendation, we note that an application for a standard 1.4(c)(ii) hearing may be filed no earlier than 150 days prior to the earliest date that the member's actual suspension can be terminated. (Rule 812.) Prospective suspension for six months will give the respondent a month to prepare the earliest application which may be entertained under the rules.[11] **[14 - see fn. 11]** We further recommend that respondent be allowed one year from the effective date of our decision to pass the California Professional Responsibility Examination. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 892.)[12] **[15 - see fn. 12]**

IV. FORMAL RECOMMENDATION

In light of the above, it is therefore recommended to the Supreme Court that it adopt the recommendation of the hearing judge below with the following modifications: In paragraph 1, substitute "six months" for "eighteen months." In the final paragraph, add the word "California" prior to "Professional Responsibility Examination" and substitute "within one year of the effective date of this order" for "the period of his actual suspension."[13] **[16 - see fn. 13]**

We concur:

NORIAN, J.
ROBBINS, J.*

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10. Rules 810 through 826 currently govern proceedings pursuant to standard 1.4(c)(ii). Such proceedings are expedited. (Rule 810.) The member and the Office of Trial Counsel may stipulate that the member meets the conditions for the termination of the member's actual suspension. (Rule 818.) However, if the matter is contested, discovery is permitted by an order of the assigned hearing judge upon a showing of good cause. (Rule 819.)

11. **[14]** Since the examiner has raised concerns regarding the ability of her office to determine its position with respect to respondent's resumption of practice absent information as detailed and complete as in an application for reinstatement, we recommend that respondent follow the same format in this case in presenting his initial application as someone applying for reinstatement would do. Otherwise, a discovery request from the examiner would be the appropriate means for seeking such information and would be more time-consuming.

12. **[15]** While passage of the Professional Responsibility Examination would be relevant evidence in a hearing pursuant to standard 1.4(c)(ii), it is not a condition precedent. We recognize that time constraints may not permit respondent to take and pass the Professional Responsibility Examination before the standard 1.4(c)(ii) hearing and therefore have recommended the standard period of one year for passage of such examination.

13. **[16]** Like the hearing judge below, we do not see the necessity of an order to comply with the provisions of rule 955, California Rules of Court since respondent did so at the time of his interim suspension and has not practiced since that time.

* By appointment of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.