STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PATRICK M. PASSENHEIM

A Member of the State Bar

No. 86-C-13006

Filed February 19, 1992; as modified, March 6, 1992

SUMMARY

Respondent participated in two different cocaine distribution operations during 1977 and 1978. He was admitted to practice in June 1989. In August 1989, he pled guilty in federal district court to one count of conspiracy to distribute cocaine. Respondent reported his conviction promptly to the State Bar, and was placed on interim suspension in April 1990. The hearing judge weighed respondent's considerable mitigating and rehabilitative evidence against the seriousness of and harm caused by his criminal conduct and determined that respondent should be suspended for three years, stayed, on conditions of three years probation and actual suspension for 20 months, retroactive to the start of his interim suspension. (Hon. Ellen R. Peck, Hearing Judge.)

The State Bar examiner requested review, asserting that respondent had not demonstrated sufficient rehabilitation and that disbarment was the appropriate discipline. The review department found the hearing department decision to be well reasoned in recognizing the unique nature of the case, with the considerable passage of time since the criminal conduct and the ample evidence of respondent's strong, positive and consistent rehabilitation. However, to better underscore the gravity of respondent's criminal conduct, the review department lengthened the actual suspension to two years, retroactive to the date of the interim suspension, and until respondent makes a showing under standard 1.4(c)(ii) of rehabilitation, including expert evidence of continued freedom from drug dependency, and of present learning and ability in the law.

COUNSEL FOR PARTIES

For Office of Trials: Loren J. McQueen

For Respondent: James J. Warner

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 a-c] **144 Evidence—Self-Incrimination**
193 Constitutional Issues
750.10 Mitigation—Rehabilitation—Found
1699 Conviction Cases—Miscellaneous Issues
2690 Moral Character—Miscellaneous
No question on respondent's application for admission to practice law called upon respondent, as an applicant, to reveal criminal conduct for which respondent had not yet been convicted or arrested and for which respondent was not awaiting trial. If any such question had been asked, respondent would have had a good argument for withholding information that would lead to criminal liability. Nothing in respondent's manner of completing the application, or in respondent's subsequent two-month delay in reporting to the State Bar a criminal indictment handed down after the application was completed, undermined respondent's showing of rehabilitation from pre-admission criminal conduct.

[2] **740.10 Mitigation—Good Character—Found**
750.10 Mitigation—Rehabilitation—Found
791 Mitigation—Other—Found
1699 Conviction Cases—Miscellaneous Issues
If an attorney engages in criminal conduct, it is not a minimum requirement for rehabilitation that the attorney turn himself or herself in to law enforcement authorities. Where the attorney was not hiding from anyone except those who wished him to resume his criminal activities; he cooperated fully with law enforcement once asked, and he presented character witnesses who attested to his current good character, the hearing judge's finding of rehabilitation was appropriate.

[3 a, b] **745.10 Mitigation—Remorse/Restitution—Found**
750.10 Mitigation—Rehabilitation—Found
801.41 Standards—Deviation From—Justified
1092 Substantive Issues re Discipline—Excessiveness
1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Although respondent's use and distribution of illegal drugs did not result from an initial, legal use of prescribed medications, which would have mitigated his later, reprehensible drug transactions, the great number of years which had passed since the attorney's misconduct, coupled with evidence of impressive and sustained rehabilitation, were sufficiently mitigating to conclude that disbarment would be excessive discipline. To underscore the gravity of the attorney's misconduct, which occurred after the attorney had completed law school and had applied unsuccessfully to the California bar, the review department recommended two years actual suspension, retroactive to the start of the attorney's interim suspension.

[4] **176 Discipline—Standard 1.4(c)(ii)**
1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes
1699 Conviction Cases—Miscellaneous Issues
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous
Where an attorney previously involved in serious drug abuse had ceased such abuse unilaterally and did not present any expert evidence of current freedom from substance abuse, and the attorney

did not submit any evidence of present learning and ability in the law following an interim suspension the length of which exceeded the attorney's prior period of licensure, public protection would be served by continuing the attorney's actual suspension until the attorney established freedom from drug dependency and present learning and ability in the general law.

ADDITIONAL ANALYSIS

Aggravation

Found

521 Multiple Acts
584.10 Harm to Public

Declined to Find

695 Other

Mitigation

Found

735.10 Candor—Bar

Discipline

1613.09 Stayed Suspension—3 Years
1615.08 Actual Suspension—2 Years
1616.50 Relationship of Actual to Interim Suspension—Full Credit
1617.09 Probation—3 Years

Probation Conditions

1023.40 Testing/Treatment—Psychological
1024 Ethics Exam/School
1630 Standard 1.4(c)(ii)

Other

1521 Conviction Matters—Moral Turpitude—Per Se
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

STOVITZ, J.:

Respondent, Patrick M. Passenheim, was admitted to practice law in California in 1989. Later that same year, he pled guilty in federal court to one count of conspiracy to distribute cocaine. (21 U.S.C. § 846.) In April 1990, after the record of respondent's conviction was sent to the Supreme Court, it placed him on interim suspension, since his crime was one involving moral turpitude per se. As of the filing of this opinion, respondent's interim suspension has lasted about 22 months.

Respondent's crime was inexcusable for it undeniably involved his trafficking in large quantities of cocaine for profit. Yet this proceeding is unique in State Bar jurisprudence because respondent's misdeeds occurred over 13 years ago. In a record where many of the facts were either stipulated or not in dispute, the judge concluded that respondent showed exemplary conduct since his offenses and his proof of rehabilitation is "exceptionally compelling, predominating and unusual." The judge recommended that respondent be suspended for three years, stayed, on conditions of three years probation and actual suspension for 20 months, retroactive to the start of his interim suspension.[1]

The State Bar examiner seeks review contending that respondent has not shown sufficient rehabilitation and that we should recommend his disbarment. Respondent urges that the judge's decision below is correctly reasoned and her suspension recommendation should be adopted.

As is our function, we have independently reviewed the record. While we do not condone respondent's acts in 1977 and 1978, any more than did the judge, we conclude that the judge skillfully performed her function in recognizing the unique nature of the passage of so many years since respondent's misdeeds coupled with ample evidence of his strong, positive and consistent rehabilitation. Her conclusion as to respondent's rehabilitation is fully supported by this record.

Although we also recommend suspension, for the reasons which follow, we shall recommend a two-year actual suspension, commencing on the effective date of respondent's interim suspension and continuing until respondent presents sufficient evidence to the State Bar Court under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V), particularly that he has sufficient present learning and ability in the law to resume practice.

I. RESPONDENT'S OFFENSES.

In September 1966 respondent started a business which involved the tinting of windows. Originally the company was very successful and respondent began selling franchises nationwide. In the mid-1970's, the business ran into some financial problems. Respondent, who had been attending law school during this period, graduated in 1975. He took the California Bar Examination that same year, but as he was not seriously interested in becoming a lawyer at that time, he did not prepare for the examination and failed it. He registered for the February 1976 bar examination, but did not take the test. (I R.T. pp. 18-20.)[2]

About a year later, respondent was approached by a cocaine dealer, Stolpmann, who invited respondent to participate in distributing cocaine. Stolpmann had met respondent during the previous summer in connection with respondent's window tinting business, knew that respondent was a cocaine user and had given cocaine to respondent. In the fall of 1977, respondent agreed to participate with Stolpmann and his partners in distributing cocaine and between fall of 1977 and April 1978 respondent distributed a total of about 110 pounds of the drug by the following

1. The judge filed her recommendation in July 1991. Had no request for review been filed, the Supreme Court likely would have acted on this recommendation in December 1991 at just about the time of respondent's 20th month of interim suspension.

2. For convenience, the phrase "I R.T." refers to the reporter's transcript of January 22, 1991, and the phrase "II R.T." to the reporter's transcript of January 23, 1991.

method: He would receive a suitcase or suitcases filled with cocaine from either Stolpmann or another. Respondent would then distribute the cocaine to one of four persons according to prescribed procedures. When delivered, respondent would receive cash from the recipient. He would then deliver the cash to Stolpmann or Stolpmann's partner, keeping a percentage of the profits for himself. (Partial stipulation as to facts ("S.") pp. 7-8.)

In about April 1978, when those in the drug operation asked respondent to be involved with weapons, respondent ceased dealings with this group (which later became known as the Medellin Cartel). In May 1978, one month later, respondent met with another cocaine dealer, Hunter. Hunter asked respondent to deal cocaine with him since respondent was no longer involved with Stolpmann's group. Respondent agreed and between May 1978 and October 1978, respondent participated with Hunter in distributing and selling cocaine. (*Id.* pp. 7-9.)

In the fall of 1978, respondent stopped all cocaine distribution activities. Respondent did not keep records of how much he had made from cocaine dealing. However, after taking several vacations and making several business investments such as purchasing land on the island of Kauai, the amount of money he had left in 1979 from cocaine sales was $100,000. Respondent did not report any of the money he earned in cocaine deals to taxing authorities. At some later time, he settled with the Internal Revenue Service by paying $30,000 in taxes on a portion of his unreported income. (S. pp. 8-9; I R.T. pp. 45-50, 117.)

II. RESPONDENT'S CONDUCT SINCE 1978.

The record contains no evidence that respondent has engaged in any other conduct reflecting adversely on his character since he stopped dealing in cocaine in 1978. Additionally, respondent took positive, consistent steps reflecting his rehabilitation. We summarize the findings of the hearing judge as to respondent's post-1978 activities, noting that none have been disputed on review.

On his own, respondent ceased using cocaine and has not used any controlled substance since 1978. (Decision p. 12.)[3] He rebuffed repeated overtures in 1978 and 1979 from those with whom he dealt in cocaine to return to that activity, even moving great distances to avoid them. (*Id.* pp. 12-13.) He used some profits from his past cocaine distribution to fund a legitimate business in gemstones which he conducted in 1981 and 1982 (*id.* p. 13), but the record yields no evidence that this business was conducted in any but a legitimate manner. In 1984 respondent attended to his very ill grandmother, living with her and assisting her until her death at the end of that year. (*Ibid.*) After her death, respondent stayed with his mother who was depressed and quite ill. Between 1985 and 1989, respondent assisted his mother and was her primary source of care until her death from cancer. (*Id.* p. 14.)

III. RESPONDENT'S PASSAGE OF THE BAR EXAMINATION, INDICTMENT AND CONVICTION.

While taking care of his ill mother, respondent decided to prepare seriously to practice law and he again attempted the California Bar Examination. After six tries, he passed in 1989. (I R.T. pp. 18, 93-96, 99.) Respondent's 1986 application for admission to practice law in California is in evidence. (Exh. 12.) **[1a]** No question on the application called on respondent to reveal his conduct for which he had not yet been convicted or arrested and for which he was not awaiting trial.[4] **[1b - see fn. 4]**

On about April 7, 1989, respondent learned that he had been indicted in U.S. District Court, Middle District of Florida, Jacksonville. His first reaction was disbelief, but within a few days of his learning of his indictment, he realized he had a duty to update his

3. References to "decision" are to the hearing judge's decision filed July 15, 1991.

4. **[1b]** Even if a question on the application for admission had asked respondent for information about criminal conduct for which he had not been charged, he would have had a good argument to withhold information which would have subjected him to criminal liability. (See the disciplinary case of *Black* v. *State Bar* (1972) 7 Cal.3d 676, 684-688, and cases cited.)

State Bar application and notify the bar of the indictment. At the same time, he was taking care of his mother who was going through chemotherapy and radiation treatment and he contacted the counsel who represents him in this proceeding, James Warner, Esq., to deal with issues such as notifying the bar. (I R.T. pp. 36-38.)

Respondent learned of his passage of the bar examination on May 29, 1989. According to the record, Warner's first letter to the State Bar notifying it of respondent's indictment was dated June 2, 1989. (Exh. 5.) Respondent was admitted to practice law five days later on June 7. At the hearing, respondent testified that he thought that Warner had had earlier telephone conversations with State Bar staff about the indictment, but Warner's own June 2 letter did not so state. At oral argument, Warner represented to us that he had had such telephone contacts with State Bar staff.

It is undisputed that, once he learned of his indictment, respondent cooperated fully with federal authorities, making several trips from San Diego to Jacksonville, Florida, including one on less than one day's notice. He gave evidence against the others who had acted in the drug cartel and participated in a detailed written criminal court agreement to plead guilty, which he did in August 1989, to one count of conspiracy to distribute cocaine. Respondent was sentenced to two years imprisonment, but the conditions of that sentence allowed him to be confined for six months in a halfway facility with execution of the remainder of the sentence suspended. He was placed on four years probation and ordered to pay a $20,000 fine. According to respondent, he had not yet paid the fine, but he was given until the end of his probation, December 6, 1993, to do so. The State Bar introduced no evidence to rebut respondent's testimony that he successfully completed his halfway house confinement and is successfully completing his probation. (I R.T. pp. 109-115.)

IV. OTHER CHARACTER AND MITIGATION EVIDENCE.

At the State Bar Court hearing, respondent testified to the shame he felt over his earlier cocaine involvement. He is now totally against the use of cocaine and has developed a great maturity of insight and hindsight about his earlier life. (I R.T. pp. 63, 97-99, 113-114, 116.)

Five character witnesses also testified on respondent's behalf. One was a lawyer in San Diego who had known respondent since 1986 and the other four were business people such as investment advisors and small business owners who had known respondent anywhere from just under two years to twenty-six years. All of these witnesses gave positive ratings to respondent on his moral character, none had reservations about him, all were generally familiar with his history of drug dealing and three of the witnesses testified to the manner in which respondent had displayed remorse and regret for his earlier acts. Almost all of the witnesses gave specific, credible examples of respondent's more recent actions which show why they considered him to be a moral person and a person about whom they would have no reservations in hiring as their lawyer. The testimony of attorney Carnohan was especially significant. He testified that while he was a friend of respondent and wanted him to succeed because of that, another side of Carnohan was as a lawyer, member of the bar and "officer of the court" and therefore he had a responsibility to make sure that the public was protected. Carnohan saw respondent as no threat to the bar, but rather as one who would be beneficial to the bar. In Carnohan's view, it would be an injustice for respondent to be disbarred in that he has been fully rehabilitated. (II R.T. p. 42.)

V. HEARING JUDGE'S DECISION.

After making findings of fact as generally outlined *ante*, which we adopt, the hearing judge gave mitigating weight to respondent's candor and cooperation with law enforcement authorities after indictment and with the State Bar, his "sound demonstration" of good character evidenced by those generally familiar with his prior misdeeds, his spontaneous removal from the drug conspiracy and his demonstration of regret and remorse for his misdeeds. The judge gave substantial weight in mitigation to the number of years which had passed since respondent's misconduct together with his convincing proof of rehabilitation. (Decision pp. 17-19.) In aggravation, the judge considered respondent's mul-

tiple acts of misconduct over a substantial time period and the great harm caused society by his distribution of cocaine, undertaken by respondent without thoughts as to the consequences of that activity. (*Id.* pp. 19-20.)

After discussing opinions of the Supreme Court imposing attorney discipline for drug-related convictions of other attorneys, the hearing judge observed that respondent's cessation of drug use and activity was unique because it was self-occasioned and not the result of pressures of the criminal justice system. Further, the judge reasoned that his period of rehabilitation was the longest and most consistent of all the cases cited. She concluded that, while respondent's misconduct was extremely serious, his proof of rehabilitation was "exceptionally compelling, predominating and unusual" and obviated the need for further prospective actual suspension. She recommended prospective probation and counseling to ensure, respectively, promotion of public confidence in the integrity of the legal profession and unbroken continuation of respondent's rehabilitation. (*Id.* pp. 23-26.)

VI. DISCUSSION.

The hearing judge recognized the unique nature of this case. She was fully aware of the cases cited by the examiner which would guide that judge as well as us to recommend disbarment for any drug profiteering by an attorney of the type engaged in here if the conduct were more recent and the rehabilitation less. (See *In re Meacham* (1988) 47 Cal.3d 510; *In re Giddens* (1981) 30 Cal.3d 110.) Both cases ordered disbarment, *Meacham* for conspiracy to distribute cocaine and *Giddens* for conspiracy to distribute amphetamines over several months where Giddens made a $5,000 to $7,000 profit. (*Id.* at p. 113.) *Meacham* was a memorandum opinion, but in *Giddens*, the Court was influenced by several factors, most notably the failure of any explanation, such as alcohol or drug abuse or other emotional disorders, which got Giddens into drug dealing coupled with the Court's conclusion that his rehabilitation had not been complete. In addition, the Court did express concern that Giddens did not attempt to contact the authorities to try to halt the scheme or surrender himself to law enforcement until after indictment. That is the one aspect that this case has in common with the facts in *Giddens*. However, unlike Giddens, respondent was a cocaine user at the time he started dealing, although it appears that his motivation was more monetary than it was in keeping a cocaine supply. Another important difference between *Giddens* and this case is the 13 years which have passed since the very serious misconduct without any hint of subsequent illegal activity or any reason to believe that respondent is anything but completely rehabilitated.

The disbarment case of *In re Possino* (1984) 37 Cal.3d 163 (conviction of possessing for sale 350 pounds of marijuana), cited by the examiner, is readily distinguishable. Other misconduct was apparent in that case, including the attorney's offer to sell large amounts of stolen securities. His attempt to show that he was rehabilitated was undermined by evidence that he had made an ex parte contact with a member of the jury sitting in judgment on his criminal case. The more recent disbarment opinion of *In re Scott* (1991) 52 Cal.3d 968, following conviction of possession of cocaine, was influenced strongly by Scott's open use of cocaine while a sitting judge and his presiding over an arraignment of one who had previously sold him drugs.

The examiner has cited cases which have imposed suspension for drug offenses. (See *In re Leardo* (1991) 53 Cal.3d 1 and *In re Nadrich* (1988) 44 Cal.3d 271.) Leardo engaged in several drug sales over only a three-month period, all to one undercover agent. He put no illicit drugs in circulation and made no profit other than getting to keep a small part of the drugs for himself. His drug crimes occurred after he had become addicted to the drugs following his failure to be able to obtain prescribed drugs for the pain of a broken leg. As soon as he was arrested, Leardo's rehabilitation began (six years before the Supreme Court's opinion). The Supreme Court deemed that Leardo's five-year interim suspension was sufficient discipline. Finally, in *In re Nadrich, supra*, that attorney, too, was addicted to drugs and became a large-scale drug dealer to support that addiction. He was convicted of possessing for sale LSD valued at $60,000, but there was evidence that he had also sold substantial quantities of other illegal drugs, including heroin and cocaine, for financial

gain. He admitted engaging in at least eight transactions over two years. This happened about seven years before the Supreme Court's opinion. Nadrich had been on interim suspension two and a half years and the Supreme Court ordered an additional year of actual suspension.

[2] While not objecting to most of the judge's findings of fact, the examiner does dispute the hearing judge's conclusion that respondent is rehabilitated and that he should be suspended rather than disbarred. She points to his lack of expert evidence that he has overcome his drug addiction. She posits that respondent deserves recognition for his cooperation and recognition only since 1989, contending that he was earlier "on the lam" or a fugitive. She points out that respondent took no earlier steps to stop the cocaine dealing operation or report it to law enforcement and that his living a law-abiding life since 1978, like any citizen is expected to do, is not adequate to establish rehabilitation. In our view, the examiner has judged too harshly respondent's life since 1978. There is no evidence that respondent was hiding from anyone, except those who repeatedly urged him to re-enter drug trafficking. While he did not turn himself in to law enforcement, that requirement has never been a minimum requirement for rehabilitation. Once respondent was asked to cooperate with the prosecution, even the examiner does not dispute that his cooperation was complete and unwavering. Finally, we believe that the five character witnesses he presented amply showed that his current character was undoubtedly high.

[3a] We agree with the hearing judge's emphasis on the great number of years which have passed since respondent's grievous misconduct together with the evidence of rehabilitation as being determinative in this matter. As is the judge, we are unaware of any previous decision of our Supreme Court which has presented such a great number of years of sustained rehabilitation since the offense. In the present case, respondent was a cocaine user at the time he started dealing. He did not have the mitigation of *Nadrich* and *Leardo* of entry into cocaine abuse through legally prescribed drugs. His drug transactions were reprehensible. No one, including respondent himself, denies that. But because of the extraordinary passage of time since his offense coupled with evidence showing impressive and sustained rehabilitation, we conclude that disbarment would be excessive in this matter.[5] **[1c - see fn. 5]** **[3b]** Nevertheless, we believe that the three-year stayed suspension and three-year probation recommended by the hearing judge are appropriate with the exception that, as a condition thereof, respondent should be actually suspended for a period of two years commencing on April 13, 1990, the effective date of the Supreme Court's order of interim suspension. We believe that our two-year actual suspension recommendation will better underscore the gravity of respondent's offenses, occurring as they did, after he completed law school and had applied unsuccessfully for the California bar. **[4]** At the same time, the Standards for Attorney Sanctions for Professional Misconduct guide that an actual suspension of two years or greater should ordinarily be accompanied by a showing under standard 1.4(c)(ii). While we conclude that respondent's overall rehabilitation has been impressively demonstrated, we also agree with the hearing judge's observation that respondent's self-cessation of serious drug abuse is unique in drug-related attorney discipline cases decided by our Supreme Court. Respondent presented no expert evidence as to his current freedom from substance abuse. We also note that the record is barren of any evidence as to whether respondent has maintained his present learning and ability in the law. Considering that respondent's suspension from practice has exceeded his period of licensure, we believe that for the added protection of the public, his actual suspension should continue until he establishes under standard 1.4(c)(ii), his learning and ability in the general law. It would also be appropriate for him to

5. **[1c]** While not raised by the examiner, we do not see anything in the manner in which respondent completed his application for admission to practice law in 1986 or in the two-month delay from the time respondent became aware of his federal indictment until his counsel formally revealed it to the State Bar which would undermine respondent's rehabilitative showing.

provide at that time medical evidence that confirms that he does not suffer from any condition of drug or substance abuse or dependency.[6]

Should the Supreme Court adopt this recommendation, respondent would be entitled to petition the State Bar Court for termination of his suspension as soon as he is prepared to make the specified showing under standard 1.4(c)(ii). (See Trans. Rules Proc. of State Bar, rule 812.)

VII. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for a period of three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on the following conditions:

1. That he shall be actually suspended from the practice of law in this state for a period of two years and until he has shown proof satisfactory to the State Bar Court, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, of his learning and ability in the general law and medical evidence that he does not suffer from any condition of substance abuse or dependency. The period of actual suspension shall commence on April 13, 1990, the effective date of the Supreme Court's order of interim suspension.

2. That he shall comply with conditions 2 through 10 and the further condition of passage of the Professional Responsibility Examination as recommended by the hearing judge on pages 27 through 30 of her decision; but that he not be required to comply with the provisions of rule 955, California Rules of Court for the reason given by the judge. We recommend that costs be awarded the State Bar as recommended by the judge.

We concur:

PEARLMAN, P.J.
NORIAN, J.

6. At oral argument, respondent represented to us that he was willing to comply with a condition of probation that he be required to seek psychiatric or psychological counseling at least to determine if further such treatment were needed. We shall adopt that condition and the other conditions of probation recommended by the hearing judge and we deem our recommendation of presentation under standard 1.4(c)(ii) of medical proof of freedom from substance abuse to be related to this probation condition.