STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID M. LYBBERT

A Member of the State Bar

No. 91-C-04924

Filed February 23, 1993

SUMMARY

While in law school, respondent signed blank welfare eligibility forms which his wife then filled out, fraudulently failing to report respondent's income so that the welfare grant needed to feed their nine children would not be reduced. Shortly after his admission to practice, respondent was convicted of welfare fraud and placed on interim suspension. Respondent was candid and cooperative with the welfare authorities and the State Bar, was remorseful, had made substantial restitution despite financial problems, and presented evidence of good character. In light of these mitigating circumstances, the hearing judge recommended three years stayed suspension, three years probation, and eighteen months actual suspension with credit for the time spent on interim suspension. (Philip L. Johnson, Judge Pro Tempore.)

Both parties requested review, the examiner arguing for disbarment and respondent seeking a reduction of the actual suspension to the time already served on interim suspension. The review department held that disbarment was not warranted, and found no reason in the record to depart from the two-year minimum actual suspension called for by the Standards for Attorney Sanctions for Professional Misconduct, except by crediting respondent for the time served on interim suspension.

COUNSEL FOR PARTIES

For Office of Trials: Billy R. Wedgeworth

For Respondent: Ellen A. Pansky

HEADNOTES

[1] **101 Procedure—Jurisdiction**
1699 Conviction Cases—Miscellaneous Issues
Where respondent was convicted after being admitted to practice law for criminal conduct occurring before such admission, there was statutory authority for disciplining respondent as an attorney, based on the conviction. Had the conviction occurred earlier, the disciplinary system would still have had jurisdiction over the misconduct under the Supreme Court's inherent authority.

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.

[2 a-c] **162.20 Proof—Respondent's Burden**
165 Adequacy of Hearing Decision
795 Mitigation—Other—Declined to Find
1512 Conviction Matters—Nature of Conviction—Theft Crimes
Where respondent, who had pleaded guilty to welfare fraud based on eligibility statements signed by him but filled out by his wife, attempted to establish in mitigation that he did not know of his wife's fraudulent conduct, it was respondent's burden to prove such mitigation, and review department gave great weight to hearing judge's contrary finding based on evaluation of credibility of respondent and his wife.

[3 a, b] **159 Evidence—Miscellaneous**
162.19 Proof—State Bar's Burden—Other/General
164 Proof of Intent
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1691 Conviction Cases—Record in Criminal Proceeding
Where respondent's knowledge of welfare fraud perpetrated by his wife was conclusively established by his guilty plea to a crime of which fraud was an essential element, the State Bar did not need affirmative evidence beyond the conviction itself to prove respondent's participation in the fraud.

[4] **730.10 Mitigation—Candor—Victim—Found**
735.10 Mitigation—Candor—Bar—Found
745.10 Mitigation—Remorse/Restitution—Found
1092 Substantive Issues re Discipline—Excessiveness
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where respondent, after authorities' discovery of welfare fraud committed by him and his wife, was cooperative with welfare authorities and remorseful, took full responsibility, and stipulated to most of the facts at the State Bar hearing, hearing judge was justified in recommending lengthy suspension in lieu of disbarment.

[5] **745.31 Mitigation—Remorse/Restitution—Found but Discounted**
760.12 Mitigation—Personal/Financial Problems—Found
In light of respondent's very limited ability to pay, it was appropriate to consider in mitigation fact that restitution ordered by criminal court was nearly complete, but such fact was given less weight than if restitution had begun earlier as a voluntary act.

[6] **791 Mitigation—Other—Found**
Uncontroverted evidence of respondent's church, community, and volunteer activities was appropriate to consider in mitigation.

[7] **1099 Substantive Issues re Discipline—Miscellaneous**
1549 Conviction Matters—Interim Suspension—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues
Whether a suspension is interim or actual, the effect on the attorney is the same. The issue is what is the appropriate total length of suspension under the circumstances of each case.

[8] **795 Mitigation—Other—Declined to Find**
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1518 Conviction Matters—Nature of Conviction—Justice Offenses
It was not mitigating that when respondent signed a declaration that the information on welfare eligibility forms was true, the forms were actually still blank, and untrue information was filled in thereafter by respondent's wife. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

[9] **141 Evidence—Relevance**
1699 Conviction Cases—Miscellaneous Issues
In recommending discipline in a matter arising from a criminal conviction, the State Bar Court is not limited to examining only the elements of the offense in question, but is obligated to look at all facts and circumstances surrounding the offense to assess the respondent's fitness as an attorney.

[10] **1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply**
The Supreme Court has effectively modified the standard calling for a minimum two-year prospective suspension in matters arising from convictions for crimes of moral turpitude, by rejecting the requirement that the suspension be automatically prospective.

[11 a, b] **801.45 Standards—Deviation From—Not Justified**
801.47 Standards—Deviation From—Necessity to Explain
1093 Substantive Issues re Discipline—Inadequacy
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
The Supreme Court has expressed concern that the State Bar Court should make clear the reasons for departure from the standards in any case where the recommended discipline differs therefrom. Where hearing judge did not articulate basis for recommending 18 months suspension instead of two-year minimum called for by applicable standard, respondent would have had to wait two years to reapply for admission if criminal conviction had occurred prior to admission to practice, and no reason appeared on record to depart from standard except to give credit for time spent on interim suspension, review department recommended actual suspension of two years.

[12] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
113 Procedure—Discovery
139 Procedure—Miscellaneous
Issue of alleged misconduct of examiner during pretrial discovery was moot, where issue had been addressed by order of hearing judge which respondent did not challenge on review, and where only prejudice alleged was unnecessary prolongation of interim suspension for which review department gave respondent credit against recommended actual suspension.

[13 a, b] **176 Discipline—Standard 1.4(c)(ii)**
Requiring respondent to show rehabilitation and fitness to practice before termination of two-year actual suspension was particularly appropriate where respondent was placed on interim suspension shortly after admission to practice due to conviction for criminal conduct committed before admission, which, if conviction had occurred prior to admission, would likely have resulted in denial of admission and requirement to reapply after two years.

[14] **171 Discipline—Restitution**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
In hearing to establish fitness to return to practice after suspension, respondent could either show that restitution had been completed or that restitution had been made to the best of respondent's financial ability.

[15] **173 Discipline—Ethics Exam/Ethics School**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
Where time period between effective date of discipline and eligibility to apply to return to active practice would not necessarily be long enough for respondent to take and pass professional responsibility examination before hearing on fitness to practice, review department did not recommend that respondent be given less than the normal one-year period to pass such examination. Passage of the examination would be relevant evidence at fitness hearing but was not a condition precedent to return to practice.

ADDITIONAL ANALYSIS

Mitigation
Found but Discounted
740.32 Good Character
Standards
801.20 Purpose
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
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 ON REVIEW AND ORDER DENYING MOTION TO VACATE ORDER OF INTERIM SUSPENSION

PEARLMAN, P. J.:

This matter involves a criminal misdemeanor conviction for welfare fraud by respondent, David M. Lybbert, a law student who was admitted to practice shortly before his guilty plea. Had respondent's criminal conduct come to light sooner, he would presumably have been denied admission and required to wait two years to reapply.[1] **[1 - see fn. 1]** The hearing judge pro tempore, in light of mitigating circumstances, recommended 18 months suspension with credit for time served on interim suspension. Respondent has been on interim suspension since September 1991.

Both respondent and the Office of Trials sought review. The respondent's counsel contends the recommendation is too severe and urges that his suspension be limited to time already served; the examiner seeks disbarment or, in the alternative, two years prospective suspension pursuant to standard 3.2 of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("the standard(s)").

Respondent's petition for review was accompanied by a simultaneous motion to vacate respondent's interim suspension. Since the issue of the propriety of vacating the interim suspension order was intertwined with the determination of the cross requests for review, the motion was set for oral argument together with the review requests and determined at the same time.

The only basis for deviating from the standards which has been presented is the appropriateness of credit for time already spent on interim suspension. We find the credit appropriate in this case. We therefore increase the recommended suspension to include actual suspension for two years and until satisfaction of the standard 1.4(c)(ii) requirement that respondent prove present fitness to practice and ability in the general law before relief from actual suspension is granted. Because respondent has already been required to comply with rule 955 of the California Rules of Court in connection with his interim suspension, we delete that requirement. In all other respects, we affirm the decision below. Accordingly, we also deny the motion to vacate the order of interim suspension.

FACTS

On September 13, 1990, respondent, along with his wife, entered a plea of guilty to a misdemeanor violation of California Welfare and Institutions Code section 10980, subdivision (c) in the Riverside County Municipal Court, thereby admitting that they both wilfully and unlawfully, by means of false statement, obtained and retained aid under the provisions of division 9 of the Welfare and Institutions Code for themselves and their children in an amount exceeding $400. Neither respondent nor his wife was sentenced to any jail time, but they were placed on summary probation and ordered to make restitution and to complete 300 hours of community service.

Thereafter, discharging authority delegated by the Supreme Court, we ordered that respondent be placed on interim suspension from the practice of law, effective September 21, 1991, since he had been convicted of a crime involving moral turpitude. (Bus. & Prof. Code, § 6102 (a).)[2] We also ordered that the matter be referred for a hearing and decision recommending the discipline to be imposed.

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1. [1] Because respondent's conviction occurred after his admission to practice, there is statutory authority for disciplining him as an attorney, based on the conviction. (Bus. & Prof. Code, §§ 6100-6101; *In re Bogart* (1973) 9 Cal.3d 743, 749.) Had the conviction occurred earlier, the disciplinary system would still have jurisdiction over his misconduct under the Supreme Court's inherent authority. (*Stratmore v. State Bar* (1976) 14 Cal.3d 887.)

2. The original effective date of suspension was ordered to be September 1, 1991, but was postponed temporarily to consider respondent's "Motion to Vacate, Delay the Effective Date of and Temporarily Stay the Effective Date of Interim Suspension . . . ." That motion was opposed by the Office of Trial Counsel and denied by the review department by order filed September 11, 1991.

In proceedings before a judge pro tempore of the hearing department pursuant to the notice of hearing re conviction in this matter, respondent and the Office of Trials entered into a partial stipulation as to facts which were deemed admitted with no additional proof required or contradictory evidence allowed during the hearing. The stipulated facts included the fact that on or about November 4, 1987, respondent and his wife applied for cash aid and food stamps at the Riverside County Department of Public Social Services ("DPSS") at which time respondent personally signed three forms acknowledging his duty to report all income received. Beginning November 4, 1987, respondent knew he was legally required to report to the DPSS any receipt of money from any source.

From November 1987 through January 1989, respondent received income each month from his work as a law clerk for the law firm of Garrett, Fisher, Jensen & Sanders, totalling approximately $7,400. Subsequent to November 4, 1987, during 15 consecutive months, respondent signed monthly eligibility reports which failed to disclose the income he received from Garrett, Fisher, Jensen & Sanders. Respondent's failure to report his earnings resulted in a cash overpayment of $7,489 and a food stamp overissuance of $2,751 from DPSS.

BACKGROUND

Respondent was born on June 27, 1942, in Utah and married his wife, Marsha, on November 11, 1969. He obtained a bachelor of science degree in microbiology in 1975 from Colorado State University. After completing college, respondent began work with a small pharmaceutical laboratory in Denver, Colorado, where he worked for about six months. He then obtained a job in southern Colorado, as a caretaker of a cattle range, until the end of October 1976.

Thereafter, the Lybbert family moved to Denver, and respondent worked as a lab technician at a community college until about July 1980. He then unsuccessfully tried to sell life insurance during the latter part of 1980 and early 1981.

In the summer of 1981, the Lybbert family moved to Oklahoma to join some friends who were attempting a land development project which terminated unsuccessfully in about December 1981. Lybbert then began working part-time as a custodian at a church. He made contact with some people who had developed an acid process to enhance recovery of oil from Oklahoma oil fields. The company for which respondent first began to work in connection with the oil recovery project went bankrupt. The process was sold to a Denver firm, for which respondent continued to work until December 1985. At that time, the Denver firm also closed down.

In 1986, respondent could not find work in either Oklahoma or Colorado. On a friend's recommendation, he came to California to look for work, was unable to find any, and eventually applied for and was accepted at Western State University Law School. Meanwhile, his wife Marsha and their then eight minor children were in Oklahoma, receiving assistance from her father. Respondent stayed with friends when he commenced law school at Western State in January 1987, and for part of that year worked part-time with Norrell Temporary Services.

In September 1987, Marsha Lybbert won a car in a contest, and elected to take cash instead of the car. Using the $5,000 Marsha had won, she and the children moved to California in September 1987 to reunite the family. Other than respondent's part-time income, the only asset the family had to support themselves was the remainder of Marsha's prize money. In about November 1987, the Lybberts applied for public assistance.

With respect to the facts underlying the criminal conviction, respondent testified at the hearing that he knew that if his family experienced a change in income, it was to be reported; that he began working for the Garrett law firm on approximately Thanksgiving 1987 and that he never reported to DPSS that he had begun working. Between November 1987 and January 1989, he was the sole source of support for his wife and, by then, nine minor children, except for welfare benefits.

In explanation of his misconduct, respondent testified that while he was attending law school from 1987 through 1989, he was usually gone from the home by 6:30 a.m., returning at 10 p.m. On other

nights he studied until midnight. During this time he had no household responsibilities. His wife was responsible for the family finances, including the responsibility to report any income to DPSS. Respondent testified that the monthly eligibility reports would come in the mail approximately the last day of each month. He would take the blank form and sign it. His wife would then complete it and submit it. He testified that he never discussed with her what she was or was not including as income, and he never saw the DPSS checks. In 1989, after their benefits were cut off, he learned from his wife that they had failed to report his income. After learning that his income had not been reported, he decided to contact the DPSS and find out how much they owed. During his interview with the DPSS investigator, he never denied responsibility. He further testified that the "failing was—he didn't supervise it," meaning the filing of the monthly reports, but acknowledged that without welfare benefits he would not have been able to make it through law school. At the time of the hearing respondent had repaid more than $7,000 of the $10,000 owed in restitution to the government.

Marsha Lybbert, respondent's wife, also testified on his behalf. She testified that, upon receipt of the monthly eligibility forms, she would pin them on the bulletin board and respondent would sign them in blank. He would always be away when she filled them out. She completed all the reports and never told respondent she was not reporting his income. She agonized over that monthly. She acknowledged that she knew, based on a prior episode in Colorado when she and the children were living separately from her husband, that if she reported any income, the government would take that much away in dollars and food stamps. She knew that she should report the income and expressed remorse that she did not report it. However, she found it very hard to see her nine children go hungry. Although she spoke with her husband all the time, she testified that she did not tell him what she had done until the initial letter arrived from DPSS asking them to report for an investigation. She testified that she told the DPSS investigator that they were sorry, that they did not deny what they had done, and that respondent had signed the forms in blank.

The DPSS investigator was called as a witness and testified that both the Lybberts were cooperative with her investigation and that either respondent or his wife, she could not recall which, informed her that they needed extra money for respondent to attend law school.

The judge below found that even if the forms were, in fact, signed by respondent in blank, as respondent and his wife testified, respondent was nonetheless certifying that the information contained on each form was correct. The judge rejected the credibility of both of the Lybberts on the issue of whether they ever discussed respondent's income and its effect on their welfare benefits. He also found it implausible that a law student would sign such a form in blank and then fail to ensure that the information contained in said form was complete and accurate.

MITIGATING CIRCUMSTANCES

The judge pro tempore found no aggravating circumstances. In mitigation, he found that respondent was open, candid and cooperative during the Riverside County DPSS investigation.

Several witnesses testified as to respondent's good character. John Hemphill Frost, an attorney in private practice in Riverside, met respondent in 1990, when he represented the plaintiff and respondent represented the defendant in an automobile accident case. They became friends and met on a weekly basis. The judge below found that Frost was told by respondent about the facts of the welfare fraud and that, despite such knowledge, Frost testified that he had the highest regard for respondent and would not hesitate to hire him for his own law firm.

John Michael Harris, in-house counsel for Continental Insurance Company, also met respondent in law school. He testified that respondent had never denied violating the law. Harris had not heard of any dishonest acts by respondent, other than the admitted fraud. He had not seen respondent exhibit any other unethical conduct and believed respondent fit to practice law.

Attorney Edgar C. Johnson was also a classmate of respondent's during law school. Although Johnson was aware of some problems respondent had with welfare, he was not aware of respondent's conviction. Johnson, however, considered respondent to be "of high integrity" and believed respondent fit to practice law.

The court also admitted into evidence and considered five letters from friends and associates of respondent and the bishop of the Mormon Church of which he is an active member. Although the writers of the letter did not indicate their familiarity with respondent's conviction, each letter attested to respondent's integrity.

The judge below also took into account the economic circumstances faced by the Lybberts while respondent was in law school, working to better their condition.

DISCUSSION

[2a] Respondent's counsel argues that we should reverse the factual findings of the hearing judge rejecting the credibility of the Lybberts on the issue of respondent's knowledge of the fraud. This overlooks the legal implications of the crime he pleaded guilty to committing. **[3a]** Respondent's knowledge of the welfare fraud perpetrated by his wife by failing to report his part-time income from clerking during law school is established conclusively by the conviction. (Bus. & Prof. Code, § 6101 (a); see *In re Higbie* (1972) 6 Cal.3d 562, 570; *In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201; *People* v. *Ochoa* (1991) 231 Cal.App.3d 1413, 1420, fn. 1.) **[2b]** To the extent that respondent sought to establish in mitigation that he was too immersed in his law studies to pay attention to family finances, it was his burden of proof, not that of the State Bar. The judge pro tempore was in the best position to evaluate the witnesses' credibility and we give great weight to his determination. (Rule 453, Trans. Rules Proc. of State Bar.)

Respondent's counsel cites *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737 for the proposition that rejection of uncontroverted testimony does not create affirmative evidence. *In the Matter of DeMassa* is not apposite. **[3b]** Prior to the State Bar proceeding, respondent had already pleaded guilty to obtaining or retaining aid for himself for a child not entitled thereto "by means of false statement or representation . . . or other fraudulent device." Unlike the situation in *In the Matter of DeMassa*, the State Bar did not need affirmative evidence beyond the conviction itself to prove respondent's participation in the fraud, since it was an essential element of the crime to which he pleaded guilty. (See *People* v. *Ochoa*, *supra*, 231 Cal.App.3d at p. 1420, fn. 1.) The State Bar's production of proof of the guilty plea conclusively established that respondent committed all of the elements of the crime. (*In re Higbie*, *supra*, 6 Cal.3d at p. 570.) **[2c]** It was respondent who had the burden of establishing the mitigating circumstances and his rehabilitation. (*Warner* v. *State Bar* (1983) 34 Cal.3d 36, 42-43; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 699.)

[4] The examiner, on the other hand, argues that there was no cognizable evidence in mitigation, thereby justifying disbarment. The record discloses that the hearing judge did have mitigating evidence on which to base his recommendation of lengthy suspension in lieu of disbarment. As soon as the DPSS raised the Lybberts' failure to report income, respondent was cooperative and remorseful and took full responsibility for the fraud. This was taken into account in the recommendation of the welfare investigator that a misdemeanor be charged and not a felony. The welfare investigator also testified to the same effect at the State Bar hearing. Respondent also cooperated by stipulating to most of the facts at the State Bar hearing. Cooperation and remorse are appropriately taken into account in mitigation. (Std. 1.2(e)(vii).)

[5] Although restitution was ordered as part of respondent's criminal probation, given his very limited ability to pay, it does not appear inappropriate to consider in mitigation that restitution is almost complete. (Std. 1.2(e).) We give this less weight, however, than if the restitution had begun earlier as a voluntary act. (See *In the Matter of Morone* (Review Dept.

1990) 1 Cal. State Bar Ct. Rptr. 207, 213; *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 13.)

[6] It is also appropriate to consider in mitigation uncontroverted evidence offered below of respondent's church and community activities including 10 to 15 hours per month of volunteer work to counsel people in crisis. (See, e.g., *In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.) This was in addition to fulfilling the community service imposed as part of his criminal probation. Attestation to his good moral character by others is also entitled to some weight in mitigation. Three witnesses testified at the hearing and five letters were submitted on Lybbert's behalf, including one from the bishop of his church. The letters were objected to as hearsay, but the examiner did not raise this issue on review and, in response to questions from the bench, he stated that he had withdrawn any objection. We therefore consider all eight character attestations, but give the letters little weight because they do not indicate knowledge of the misconduct.

DISCIPLINE

Respondent's counsel relies on several inapposite cases in arguing that we should cut short the suspension here to the time already served on interim suspension. For example, she again cites to *In the Matter of DeMassa* in which two months actual suspension was ordered. That analogy is misplaced since DeMassa's crime (harboring a fugitive overnight) was committed in overzealous representation of a client for no personal gain 12 years before the State Bar Court Review Department acted. DeMassa had enjoyed an excellent reputation prior to the conviction and, in the intervening 12 years, there was overwhelming evidence of mitigation and rehabilitation, including numerous judges and highly reputable attorneys attesting to DeMassa's good character.

Respondent's counsel also cites *In re Rohan* (1978) 21 Cal.3d 195 and *In re Morales* (1983) 35 Cal.3d 1, neither of which involved acts of moral turpitude. It is simply not true as respondent's counsel argues that "there is virtually no difference between" Morales' repeated failure to withhold or pay payroll taxes and employment insurance contributions and Lybbert's repeated fraudulent declarations under penalty of perjury.

Respondent's counsel also cites *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502 and *In re Kristovich* (1976) 18 Cal.3d 468, both of which involved attorneys convicted of perjury, but neither of these attorneys committed it repeatedly for an extended period of time as did Lybbert.[3] Kristovich's lenient discipline was imposed in light of a lengthy otherwise unblemished record of practice, the lack of any personal gain from his misconduct and many character references to his otherwise distinguished career. Katz was on interim suspension for seven years which was taken into account in determining the minimum of six months prospective suspension recommended by this review department in 1991, which was coupled with a requirement of a hearing under rule 1.4(c)(ii) prior to resuming practice. Similarly, in *In re Effenbeck* (1988) 44 Cal.3d 306, the one-year prospective suspension followed five years of interim suspension.

[7] As the Supreme Court succinctly stated in crediting the respondent with his four years of interim suspension in *In re Leardo* (1991) 53 Cal.3d 1, 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." The judge below similarly took into account the time respondent has spent on interim suspension. The issue is what is the appropriate total length of suspension under the circumstances of each case. If anything, the *Katz* and *Effenbeck* cases would suggest that lengthy actual suspension is also warranted here.

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3. *In re Chira* (1986) 42 Cal.3d 904, in which no actual suspension was ordered, is similarly distinguishable. Chira's tax fraud conviction for a single incident involving backdated documents was the only misconduct in an otherwise unblemished legal career of 24 years. Chira was so devastated he did not practice law for 3 years after his conviction and underwent about 100 hours of therapy prior to the Supreme Court's review of his record for purposes of assessing discipline. *In re Chernik* (1989) 49 Cal.3d 467 involved a similar incident of backdating in a tax shelter scheme only in the practice of law and not in connection with personal affairs as in *In re Chira*. Chernik received one year actual suspension for this single fraudulent transaction after taking into account his otherwise unblemished record in 20 years of practice.

[8] Respondent signed his name under penalty of perjury to 15 monthly welfare forms which deliberately omitted mention of income which would have disqualified his family from receiving some of the welfare benefits they obtained. He and his wife signed a statement which acknowledged that this was done to allow him to pay law school tuition in the accelerated program in which he had enrolled. Declarations under penalty of perjury are documents which go to the heart of the role of attorneys as officers of the court. Respondent sought to downplay his misconduct by explaining that he signed blank forms under penalty of perjury without any regard to how they would later be completed. His attempt at mitigation is misguided. It is not mitigating that respondent irresponsibly signed them in blank rather than signing them after they were completed improperly by his wife. Such conduct is equally reprehensible. "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." (Pen. Code, § 125.) Respondent wilfully represented to the DPSS that each completed monthly form was personally attested to as true and cannot deny knowledge that such representations were fraudulent. (See generally 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1983) §§ 602-611, pp. 680-695.) Indeed, it gives the appearance of an attempt in advance to create deniability on his part of any personal wrongdoing.

In assessing the appropriate discipline we are not persuaded that the disbarment cases of *In re Crooks* (1990) 51 Cal.3d 1090 and *Stanley* v. *State Bar* (1990) 50 Cal.3d 555, cited by the examiner, are analogous. Crooks's and Stanley's misconduct was far more egregious. Crooks was sentenced to two years in jail for conspiracy to defraud the United States in a multi-million dollar fraudulent tax shelter investment scheme involving thousands of investors. *Stanley* involved an attorney who was convicted of 3 crimes of moral turpitude; committed more than 30 acts of misconduct against more than 20 clients; and misappropriated more than $20,000. **[9]** Respondent's counsel is correct that in recommending discipline "the State Bar Court is not limited to examining only the elements of the offense in question, but is obligated to look at all facts and circumstances surrounding the offense to assess the respondent's fitness as an attorney." (*In the Matter of DeMassa, supra*, 1 Cal. State Bar Ct. Rptr. at p. 747.)

The examiner has made alternative recommendations of disbarment or a minimum of two years actual suspension. He has not persuaded us that the facts and circumstances warrant disbarment here. Neither party cited *Stratmore* v. *State Bar, supra*, 14 Cal.3d 887 which is somewhat analogous to the present case. There, a law student defrauded 11 New York firms who interviewed him for a job and misappropriated a similar amount of money as respondent did here if we consider the effect of inflation.[4] The primary question was whether Stratmore could be disciplined for misconduct before becoming a member of the bar when there was no legislative authorization for the Supreme Court to discipline an attorney in an original proceeding under such circumstances. The Supreme Court answered that question in the affirmative. In assessing discipline, the Court ordered Stratmore suspended for two years, stayed, on conditions including actual suspension for nine months.

Here, instead of multiple simultaneous acts of fraud, we have 15 consecutive months of fraud which presents more troubling extended deceit. (Cf. *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300 [two years actual suspension primarily for repeated fraud on the probate court]; *In the Matter of Hertz, supra*, 1 Cal. State Bar Ct. Rptr. 456 [two years actual suspension primarily for extended fraud on the court and opposing counsel].) Here, we also have far more mitigation offered than appears to have been offered by Stratmore, but we do have a criminal conviction which was not obtained in the *Stratmore* case. We also have more recent high court decisions favoring more substantial discipline and standards for discipline which are far more stringent than the prevailing case law at the time *Stratmore* was decided. (See *Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131.)

4. Respondent received approximately $10,000 worth of benefits in 1987-1988 by concealing over $7,000 in income. Stratmore obtained over $5,000 by larceny in 1971.

The standards were adopted by the State Bar Board of Governors in 1985 in order to provide guiding principles in fixing discipline for lawyer misconduct. Standard 3.2 calls for a minimum of two years prospective suspension for final conviction of a crime of moral turpitude, regardless of mitigating circumstances.

[10] The Supreme Court has effectively modified standard 3.2, by rejecting the requirement that the suspension be automatically prospective since "strict reliance on standard 3.2 does not appear to adequately fulfill the goal of ensuring that the State Bar Court's disciplinary recommendations are fair and consistent." (*In re Young* (1989) 49 Cal.3d 257, 268, fn. omitted.) **[11a]** The Supreme Court has in other cases expressed its concern that the State Bar Court should make clear the reasons for departure from the standards in any case where the recommended discipline differs therefrom. (See, e.g., *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [increasing recommendation of 18 months suspension by the former volunteer review department to 2 years actual suspension in a case where standard 1.7(b) called for disbarment absent the most compelling mitigating circumstances].)

[11b] Here, the judge below did not articulate the basis for recommending 18 months suspension instead of following standard 3.2. We note that had Lybbert's 15 months of fraud in 1987 and 1988 on the Riverside County DPSS while a law student come to light before he was admitted in 1989, he would presumably have been denied admission and required to wait two years to reapply. (Former rule X, § 104, Rules Regulating Admission to Practice Law in California (as amended to May 13, 1989); see now rule X, § 3, Rules Regulating Admission to Practice Law in California (as amended to July 13, 1991).) This period of time coincides with the minimum called for under standard 3.2 for a crime of moral turpitude. No reason appears on the facts established in this record for us to depart therefrom except to extend credit for time spent on interim suspension. (*In re Young*, *supra*, 49 Cal.3d at p. 261; *In re Leardo*, *supra*, 51 Cal.3d at p. 18.)[5] **[12 - see fn. 5]**

[13a] Because the recommended length of actual suspension is two years, we also include the normal recommendation of a standard 1.4(c)(ii) hearing prior to resumption of practice. We made such a recommendation in *In the Matter of Passenheim* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 62, 69, recommended discipline imposed by Supreme Court, May 19, 1992 (S014161). In that proceeding respondent had similarly practiced for a short period of time before he was interimly suspended for a conviction stemming from criminal conduct prior to admission to practice law.[6]

[13b] Here, in light of the fact that respondent would in all likelihood have faced denial of admission and a reapplication hearing two years later had his criminal conviction occurred before he was admitted to practice, it seems particularly appropriate to impose the requirement of a standard 1.4(c)(ii) hearing in conjunction with his two-year suspension. **[14]** Since restitution is not yet complete, respondent may be permitted to show either that he has completed restitution or that he has made restitutionary payment to the best of his ability and his financial situation has rendered him unable to complete restitution by such time. (Cf. *Galardi* v. *State Bar* (1987) 43 Cal.3d 683, 694-695.)

We therefore adopt the recommendation of the judge below of three years stayed suspension and three years probation upon the conditions set forth in the decision filed July 24, 1992, as amended by his order dated August 4, 1992, with the following

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5. **[12]** Respondent's counsel also raised in her brief on review alleged misconduct on the part of the examiner during pretrial discovery which was addressed by the judge below in a pretrial order. Since respondent's counsel does not challenge that order on review and the only prejudice alleged is unnecessary prolongation of respondent's interim suspension, we consider the issue moot in light of the discipline we recommend.

6. The Supreme Court, in accepting the recommendation of the review department, ordered that Passenheim receive the recommended credit for time already served on interim suspension, rendering him immediately eligible to petition the State Bar Court for termination of suspension upon fulfilling the standard 1.4(c)(ii) requirement. (Trans. Rules Proc. of State Bar, rule 812.)

modifications: that the stay of the three-year suspension be conditioned on respondent receiving actual suspension for two years and until satisfaction of standard 1.4(c)(ii) instead of eighteen months actual suspension; that credit be given for time spent on interim suspension; and that respondent not be ordered to comply with rule 955, California Rules of Court since respondent has already complied with rule 955 in connection with his ongoing interim suspension. (See *In the Matter of Katz, supra*, 1 Cal. State Bar Ct. Rptr. at p. 516, fn. 13.)[7] **[15 - see fn. 7]** In making our 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, Trans. Rules Proc. of State Bar.)[8] If our recommendation is adopted by the Supreme Court, the prospective portion of respondent's suspension should approximate that time period. We also recommend that costs be awarded the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

7. **[15]** As in *In the Matter of Katz, supra*, we do not recommend shortening the one-year period of time recommended below for proof of passage of the California Professional Responsibility Examination ("CPRE"). "While passage of the [CPRE] 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 [CPRE] before the standard 1.4(c)(ii) hearing and therefore have recommended the standard period of one year for passage of such examination." (*Id.*, 1 Cal. State Bar Ct. Rptr. at p. 516, fn. 12.)

8. Rules 810 through 826 of the Transitional Rules of Procedure of the State Bar 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.)