PUBLIC MATTER

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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **MARC ANTHONY GUILLORY,** **Member No. 214098,** A Member of the State Bar.	)))))))	Case Nos.: **12-C-11576; 12-C-11759; 12-C-12032; 12-C-12883 -PEM (Cons.)** **DECISION**

Introduction[1]

This disciplinary proceeding arises out of four separate criminal convictions of respondent Marc Anthony Guillory, three of which involve misdemeanor convictions for violations for driving under the influence, and the fourth which involved a misdemeanor violation for reckless driving (alcohol-related). Upon finality of the convictions in three of the cases, i.e., case Nos. 12-C-11759, 12-C-12032, and 12-C-12883, the Review Department of the State Bar Court (review department) issued an order referring this matter to the hearing department for a hearing and decision recommending the discipline to be imposed if the facts and circumstances surrounding respondent's convictions involve moral turpitude or other misconduct warranting discipline. Additionally, upon finality of the conviction in case No. 12-C-11576, the review department issued an order referring case No. 12-C-11576 to the Hearing Department of the State Bar Court (hearing department) for a hearing and decision

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

recommending the discipline to be imposed, if the facts and circumstances surrounding the conviction, which underlies case No. 12-C-11756, involve moral turpitude or other misconduct warranting discipline.

The court finds, by clear and convincing evidence, that respondent is culpable of the misconduct alleged in all four matters. After having thoroughly reviewed the record, the court also finds that the facts and circumstances surrounding respondent's convictions involve moral turpitude. Based on the nature and extent of culpability, as well as the applicable aggravating circumstances, in conjunction with meeting the goals of attorney discipline, the court recommends, among other things, that respondent be actually suspended from the practice of law for two years and remain suspended until he satisfactorily proves to the State Bar Court his rehabilitation, present fitness and learning and legal ability under the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(c)(1).

Significant Procedural History

On May 11, 2012, the review department issued an order referring three misdemeanor convictions to the hearing department for a hearing and decision recommending the discipline to be imposed upon respondent, if the hearing department finds that the facts and circumstances surrounding respondent's misdemeanor convictions for violating: (1) Vehicle Code section 23152, subdivision (a) (driving under the influence) in case No. 12-C-11759; (2) Vehicle Code section 23152, subdivision (a) (driving under the influence) in case No. 12-C-12032; and (3) Vehicle Code section 23103 (reckless driving [wet reckless]) in case No. 12-C-12883, involve moral turpitude or other misconduct warranting discipline[2]

[2] The three cases referred on May 11, 2012, had not as of that date been consolidated.

On May 17, 2012, the State Bar Court issued and properly served a notice of hearing on conviction on respondent in each of the following: case No. 12-C-11759, case No. 12-C-12032, and case No. 12-C-12883. On June 12, 2012, respondent submitted his response to the notices of hearing on conviction. The response was filed with the court on June 19, 2012. The court struck respondent's response and ordered him to file a second response. Respondent's second response was filed on June 29, 2012.

On June 25, 2012, the court ordered that case Nos. 12-C-11759, 12-C-12032, and 12-C-12883 be consolidated. The court's order, consolidating the three cases, was filed on June 26, 2012.

On June 20, 2013, the review department issued an order referring case No. 12-C-1576 to the hearing department for a hearing and decision recommending the discipline to be imposed if the hearing department finds that respondent's misdemeanor conviction for violating Vehicle Code section 23152, subdivision (b) (driving with 0.08% or more alcohol in blood) involves moral turpitude or other misconduct warranting discipline.

On June 21, 2013, the State Bar Court issued and properly served a notice of hearing on conviction in case No. 12-C-1576 on respondent. Respondent filed a response on July 8, 2013. And, on July 8, 2013, the court ordered that case Nos. 12-C-11759, 12-C-12032, and 12-C-12883 be consolidated with case No. 12-C-1576. That order was filed on July 11, 2013.

A six-day trial was held on November 5, 6, 7, 8, 12 and 13, 2013. The State Bar of California, Office of the Chief Trial Counsel (State Bar) was represented by Deputy Trial Counsel Robin Brune. Respondent represented himself. Following closing arguments and respondent's submission of two character declarations, the case was submitted on November 18, 2013.

Findings of Fact and Conclusions of Law

Respondent's culpability in this proceeding is conclusively established by the record of his conviction. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097.) Respondent is presumed to have committed all of the elements of the crimes of which he was convicted. (*In re Duggan* (1976) 17 Cal.3d 416, 423; *In the Matter of Respondent O* (Review Dept. 1933) 2 Cal. State Bar Ct. Rptr. 581, 588.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 12, 2001, and has been a member of the State Bar of California at all times since that date.

B. Findings of Fact

1. Background Facts

Respondent was sworn in as a district attorney in San Bernardino in 2002. From 2002 to November 2006, he tried misdemeanor and felony cases. In November 2006, respondent joined the San Francisco District Attorney's Office, where he worked until 2012. Thus, at the time of his DUI convictions in 2008, 2010, and 2012, respondent was a deputy district attorney. By 2007, respondent had prosecuted 15 to 20 DUI cases. He even testified that he had prosecuted a minor for driving with a 0.01 percent blood alcohol content. Respondent settled as many as 100 DUI cases. As such, respondent was well-aware of the harm that a person driving under the influence of alcohol could do to himself or to others.

In 2007, respondent's marriage ended in divorce and a child custody battle ensued. In 2009, respondent's grandmother passed away, and in 2011, his grandfather also passed away. According to respondent, his drinking was "situational" and in response to the stressors of his divorce and loss of his family members. He states that he did not have the proper coping mechanisms to deal with the afore-listed confluence of events that spanned the four year period

from 2006 through 2011. He asserts that he is not an alcoholic because that stressful time has passed.

In January 2012, respondent entered a 33-day outpatient treatment "process." In or about May 2012, the review department referred respondent's convictions in case Nos. 12-C-11759, 12-C-12032, and 12-C-12883 to the Hearing Department to determine whether the surrounding facts and circumstances involved moral turpitude or other misconduct warranting discipline, and, if so, the discipline to be imposed. Respondent requested participation in the State Bar Court's Alternative Discipline Program (ADP), asserting that his situational depression and alcohol dependency causally contributed to his convictions. (Rules Proc. of State Bar, rule 5.382(A)(2).)

On August 8, 2012, respondent signed a Participation Plan with the Lawyer Assistance Program (LAP). By August 2012, respondent was not in compliance with the Participation Plan in that he was failing to show proof of attendance at Alcoholic Anonymous meetings, as required by the plan. In December 2012, the LAP issued a noncompliance report regarding respondent, based upon a laboratory report which detected use of an unauthorized substance by respondent. Respondent then had an unexcused missed lab test in December 2012 and another in January 2013. On January 30, 2013, respondent withdrew from the program. (Exh. 20.)

On February 19, 2013, respondent decided to rejoin the LAP, and an evaluation committee meeting was scheduled for March 27, 2013. (Exh. 20.) As a condition of his probation relating to his December 18, 2012 conviction, respondent was not to consume any alcoholic beverages. Yet, in May 2013, he had an unexcused missed lab test and withdrew from the LAP. (Exh. 20.)

By May 2013, respondent was no longer in any alcohol testing program, although he purported to be attending AA meetings twice a week. Without corroborating evidence, however, this court has no reason to believe that respondent has abstained from alcohol, attended therapy

to deal with the issues that drove him to drink, or attended any program or group sessions that address alcohol abuse issues. (Exh. 20.)

The evidence before this court shows that respondent does not believe he is an alcoholic nor has a serious alcohol abuse problem. Nor does he believe that his driving with a 0.06 percent BAC played any part in his cousin's death. Rather, he asserts that his drinking is merely situational.

2. Case Number 12-C-12883 – 1999 Reckless Driving Conviction

In June 1999, respondent, after leaving a party, rear-ended a disabled bus while driving at night. The bus, which was parked off to the right side of the number one traffic lane alongside the curb, had a red reflector strip across its back end and its red hazard flashers were activated. No cones or other warnings had been placed to the left of the bus in the traffic lane in which it was stopped. There were, however, street lights directly above the bus.[3]

Respondent reported to the police that he thought the bus was moving and he blinked and the bus was there blocking the lane. (Exh.1, p. 24.) He then, without braking, made a sharp turn to the left in an attempt to swerve away from the bus. But, he did not avoid hitting the bus. Respondent's first cousin, who was passenger in the car, died from massive injuries sustained in the accident.

The officer, who arrived at the scene of the accident, upon determining that respondent displayed objective signs of intoxication, administered field sobriety tests to respondent. After the tests were conducted, the officer formed the opinion that respondent was driving under the influence of alcohol. Respondent was then transported to a police station where, more than two hours after the crash, his blood alcohol content (BAC) measured 0.06 percent.

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[3] Another driver/passer-by, who had successfully passed the bus, returned to the scene of the collision.

A toxicologist, who testified as an expert at the trial in this matter, explained that the available data indicates that respondent's BAC at the time of the accident was more likely a 0.09 percent, which is over the 0.08 percent legal limit. The toxicologist also testified that respondent was likely to have consumed almost four 12-ounce beers or some combination of alcohol and beer that would have been the equivalent of four 12-ounces beers. Further, the toxicologist's expert testimony established that the type of impairment that the human body experiences with a BAC of 0.04 percent – 0.06 percent is consistent with the impairment that occurred with respect to respondent at the time of his collision with the disabled bus. Vision-impairment can begin to occur when the body has a BAC of 0.03 percent. Reaction-time impairment begins at 0.04 percent. And, the ability and skills, needed by a person to perform divided attention tasks that would have been required of a driver to swerve or respond in order to avoid hitting the disabled bus, would have been impaired, when the person's BAC was 0.06 percent.

The evidence is clear and convincing that respondent's ability to adjust to changes in light was impaired by alcohol, as was his ability to perceive the lack of movement/speed of the bus.[4] As explained by the toxicologist, respondent's delayed response time, once he did realize that the bus was stopped, is also consistent with alcohol impairment.[5]

Respondent pled nolo contendere to driving recklessly with alcohol in his system and on October 29, 1999, was convicted of a misdemeanor violation of Vehicle Code section 23103 (a wet reckless). Nearly two years later, on June 12, 2001, respondent was admitted to practice law in California. In May 2001, prior to his admission, respondent testified about his wet reckless driving conviction before the Subcommittee on Moral Character, Committee of Bar Examiners

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[4] Respondent stated that he did not know that the bus was stopped.

[5] In the Pretrial Statement, which respondent filed in this matter he asserts that he was not driving under the influence of alcohol in the 1999 reckless driving matter as his BAC registered 0.06 percent. Respondent further argues that the police officer mistakenly mistook symptoms of shock for objective symptoms of driving under the influence.

of the State Bar of California (Committee). Respondent testified that he had drunk two beers prior to the accident. A committee member then asked respondent, "So you had two beers that evening?" Respondent replied, "Yes." When asked if he had any other substances or alcohol, respondent answered, "Nope." (Exh. 9, p. 6.) Respondent also described the accident as an "isolated incident."

In response to additional questioning from Committee members, respondent explained that every day he would live with the awareness of his cousin's death. He assured the Committee that he would not again drink and drive. (Exh. 9, pp. 12-15.)

Although, at the hearing in this matter, respondent also testified that he has to live with the awareness of his cousin's death, he shows little insight into the role he played in his cousin's demise. He fails to acknowledge his part in contributing to his cousin's death. Instead, he argues that if the bus had not been stopped in the "middle" of the road and if the bus driver had placed warning cones in the area, the accident never would have occurred. Respondent now denies that his alcohol consumption played any role in the fatal crash that caused the death of his cousin. In fact, respondent stated his belief that he had nothing to do with causing his cousin's death.

3. Case Number 12-C-12032 – 2008 DUI Conviction

While driving in December 2007, respondent was stopped by Officer Hernandez (Hernandez), after respondent changed lanes without signaling and after forcing other vehicles, including a motorcycle to maneuver out of his way to avoid a collision. After detaining respondent, Hernandez noted additional signs of intoxication and requested respondent's driver's license. Instead, respondent gave Hernandez his district attorney's identification badge. Hernandez understood respondent's gesture of showing his DA badge to be a request for special treatment. The gesture is known as "badging." Respondent told Hernandez that he had drunk a

"couple of beers" at a party. Hernandez administered field sobriety tests. After respondent performed poorly on the tests, Hernandez arrested respondent and conducted a BAC test. Respondent's BAC was 0.18 percent, which is over twice the legal limit.[6]

In February 2008, respondent pled nolo contendere to, and was convicted of, a misdemeanor violation of Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol). The court sentenced him to two days in jail and three years' probation. The court further ordered respondent not to drive if he had <u>any</u> measurable alcohol in his blood. Respondent's conviction began on February 6, 2008, and continued to February 6, 2011.

4. Case Number 12-C-11759 – 2010 DUI Conviction

On December 30, 2009, while respondent was still on probation for his prior DUI conviction (the 2008 DUI Conviction), Officer Rodrigues (Rodrigues), a seasoned patrol officer with 38 years of experience, detained respondent for speeding, while weaving his vehicle within the lanes and speaking on a cellular telephone while driving. When respondent was detained Rodrigues noticed slurred speech, an odor of alcohol, and watery eyes. Rodrigues asked respondent how much alcohol he had been drinking earlier. Respondent stated that he had "a couple earlier in the evening." Rodrigues asked for respondent's driver's license and respondent presented his district attorney's badge. Rodrigues testified that presenting the badge to a police officer is understood as a bid for special dispensation. Rodrigues explained that in his experience when judges, policemen, firemen and attorneys present identification, indicating their employment, it is a gesture for special treatment due to their status.

Due to the fact that Rodrigues was transporting another suspect, he called for back-up. Officer Miller (Miller) and Officer Butler (Butler) arrived to continue the investigation.

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[6] The toxicologist ,who appeared as an expert witness in the instant proceeding, testified that judgment of distance, dimension, and speed are impaired at 0.08 percent.

Respondent was administered field sobriety tests and failed. During the course of his interaction with the officers, respondent told them that he worked for the city and county of San Francisco and that they could just let him go. He said, "I work for you guys." Miller perceived that respondent was trying to get a break, because respondent was a district attorney.

Respondent's BAC was 0.15 percent – almost twice the legal limit. Moreover, he had been driving while his license was suspended. Respondent informed the officer that his license had been suspended, but that he was permitted to drive for employment purposes only (Exh. 5, p. 8.) Respondent knew that his driving suspension did not include an exception for driving for employment and he knew that he was not driving to or from work when he was stopped by the officer.

Respondent ultimately pled nolo contender to driving under the influence on March 23, 2010, with a prior DUI. Respondent's probation conditions included a conditional sentence and probation of three years with 15 days in the county jail with credit for two days served. Respondent was also required to attend an 18-month alcohol treatment program.

5. ***Case Number 12-C-11576 – 2012 DUI Conviction***

On December 24, 2011, at 2:20 a.m., Officer Mayberry (Mayberry) found respondent passed out in a motor vehicle, which was stopped in a traffic intersection with the engine running. When Mayberry arrived on the scene, he circled the vehicle. Respondent had his eyes closed and his head tilted back. Mayberry shined his flashlight onto respondent, who did not react. Mayberry observed that the vehicle was turned on and running, shifted into drive, and respondent's foot was on the brake. As the car doors were locked, Mayberry knocked on the drive door, thereby waking respondent. Once roused, respondent started to get out of the vehicle, which began to roll forward. Respondent got back into the vehicle and stopped the vehicle's roll forward. As respondent exited the vehicle, Mayberry noted signs of intoxication

including watery eyes and the odor of alcohol (Exh. 7.) Mayberry asked respondent how much alcohol he had to drink. Respondent answered, "Nothing."

When asked for identification, respondent produced his district attorney's badge. Respondent made statements that the officer should let him go because he was well-known among San Francisco police officers. Mayberry also testified that he understood that respondent was seeking special treatment due to his status as a district attorney. Respondent was disorientated during the investigation.

Respondent was then arrested and taken to the police station. A blood technician drew two vials of respondent's blood, which registered a BAC of 0.24 percent. The toxicologist, who testified in this proceeding, stated that a person with a 0.24 percent BAC lacks divided attention skills. The expert also testified that a person with a BAC of 0.20 percent will become very sleepy and will be completely unaware of what is happening around him.

On December 18, 2012, respondent pled nolo contendere to and was convicted of a misdemeanor violation of Vehicle Code section 23152 (b) for to driving under the influence with a BAC of 0.08 percent or higher, with two admitted prior DUI convictions. Respondent was sentenced to 180 days of home detention, involving a device that would record anytime respondent ingested alcohol. Respondent was also ordered placed on probation for five years, during which period he was to be prohibited from driving a motor vehicle, unless he were properly licensed. Respondent's probation also prohibited him from driving with any measurable alcohol in his blood or driving any motor vehicle, unless said vehicle came equipped with a certified ignition interlock device. Additionally, respondent was specifically prohibited from consuming any alcoholic beverages during his probation period.

C. Conclusions of Law

Respondent's convictions are final and conclusively establish that respondent was convicted of a misdemeanor violation of Vehicle Code section 23103 (reckless driving, involving alcohol, i.e., a wet reckless), two misdemeanor violations of Vehicle Code section 23152, subdivision (a) (driving under the influence), and one misdemeanor violation of Vehicle Code section 23152, subdivision (b), (driving under the influence with a blood alcohol content of more than 0.08 percent).

An attorney's conviction for driving under the influence, however, does not establish moral turpitude per se. (*In re Kelley* (1990) 52 Cal.3d 487, 494.) And, since respondent's offenses do not involve moral turpitude per se, this court must first determine whether the facts and circumstances surrounding respondent's convictions involved moral turpitude or other misconduct warranting discipline.

The term moral turpitude is defined broadly. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 49 Cal.3d 804, 815, fn. 3.) It has consistently been described as any "act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. [Citation.]" (*In re Craig* (1938) 12 Cal.2d 93, 97.) "It is measured by the morals of the day [citation] and may vary according to the community or the times. [Citation.]" (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 214.)

As the Supreme Court stated in *In re Lesansky* (2001) 25 Cal.4th 11, 16:

> [W]e can provide this guidance: Criminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession.

Here, respondent was convicted of a wet reckless involving a fatality, followed by two DUI misdemeanors convictions, one of which occurred while respondent was still on probation for the previous conviction. Thereafter, respondent was convicted in yet another DUI matter in which he was found to have been driving with a blood alcohol content in excess of 0.08 percent with two priors, while already on probation for driving under the influence.

In this proceeding, respondent argues that his conduct was aberrational and situational and will not again occur. He ultimately denies that moral turpitude surrounded the misconduct giving rise to his criminal convictions.

The State Bar, on the other hand, argues that the facts and circumstances surrounding respondent's convictions of a wet reckless, and three DUIs, two of which were committed when he was on probation and one of which registered a BAC in excess of 0.08 percent, involve moral turpitude. The State Bar asks this court to examine the facts and circumstances surrounding respondent's convictions and conclude that the course of respondent's conduct when viewed as a whole involves moral turpitude.

Here, the conduct underlying respondent's convictions and the circumstances surrounding that conduct began in 1999, and has continued through at least December 2011 – a period of 12 years. During that 12-year period, respondent has engaged in criminal conduct, which involved driving on the roads of California with increasing levels of alcohol in his blood The 1999 conviction for a wet reckless, which resulted in a fatality, involved a BAC of 0.06 percent; the 2008 DUI conviction involved a BAC of 0.18 percent, twice the legal limit; the 2010 DUI conviction involved a BAC of 0.15 percent, almost twice the legal limit, and the 2011 DUI involved a BAC of 0.24 percent (three times the legal limit).

By driving with such elevated levels of alcohol in his blood, respondent has demonstrated his indifference to obeying the laws of this state, as well as the requirements of his probation. He

has acted with flagrant disregard for the safety of others, whom he puts at risk each time he gets behind the wheel while intoxicated. As a former DA, who prosecuted DUIs, respondent is well-aware of the wide swath of death, pain, grief and untold physical and emotional injury that the drunk driver[7] cuts across the roads of California and the rest of this country. The monstrous proportions of the problem have been lamented in graphic terms by the courts. (See *Taylor v. Superior Court* (1979) 24 Cal.3d, 890 898-899.) Respondent, who by 2007, had prosecuted 15 to 20 DUI cases and who has since settled as many as 100 DUI cases, is well-aware of the harm a drunk driver can cause himself and others. Respondent's repeated alcohol-related criminal conduct, which has spanned a period of 12 years or more, shows a wanton disregard for the safety of the public and abnegation by respondent of the duties that he owes to his fellow man. Such conduct clearly involves moral turpitude.

When respondent's misconduct began in 1999, he did not expect or intend to hit a disabled bus or get into an accident which would result in another's death. If in 1999, respondent did not understand the significance of what the possible and/or probable consequences were of driving while intoxicated, he learned or should have learned when he was convicted of driving recklessly with alcohol in his system how his 0.06 percent BAC contributed to his cousin's death. And, if respondent somehow did not come to understand the perils of drunk driving at that time, respondent learned or certainly should have learned how his 0.06 percent BAC contributed to the accident when he became a district attorney and prosecuted DUIs.

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[7] The use of the term "drunk driving" and "drunk driver" follows the Supreme Court's use of the term "drunk driver" in a colloquial sense to refer to any of the several offenses of prohibited driving after the excess consumption of alcohol. (*In re Kelley*, supra, 52 Cal.3d at p. 484, fn. 3.)

One of the consequences of respondent's driving conviction was that he had to appear before the State Bar's Subcommittee on Moral Character in May 2001. When questioned as to the amount of alcohol he had drunk prior to the 1999 accident, respondent testified that he had drunk two beers. When asked if he had ingested any other alcohol, he replied, "Nope." However, the toxicologist, who testified in this case, testified that the data shows that respondent would have had to have drunk almost four 12-ounce beers or some combination of alcohol and beer that would have been the equivalent of four 12-ounce beers prior to the accident.

Respondent's testimony before the Subcommittee on Moral Character appears to have been less than candid.

The evidence also shows that respondent has been less than candid in dealing with the police officers who stopped and/or arrested him in relation to his DUI matters. He has consistently underreported his alcohol consumption when questioned by the officers during the course of their duties. In the 2008 conviction matter, respondent reported to the officer that he had a "couple of beers." His BAC in that matter measured 0.18 percent. In the 2010 conviction matter, respondent reported to Officer Rodrigues that he had "a couple earlier in the evening." (Exh. 5, p. 10.) When he thereafter spoke with Officer Butler, respondent told the officer that he had one glass of wine with his mother. (Exh. 5, p. 6.) In fact, respondent's BAC measured 0.15 percent, almost twice the legal limit.

In the 2012 conviction matter, when initially asked by the officer, who had stopped him, how much alcohol he had consumed, respondent answered "nothing." When asked after being given his Miranda rights, what he had drunk, respondent said "two beers." His BAC registered 0.24 percent.

In his statements to law enforcement officers, respondent consistently underreported his alcohol consumption. Respondent's statements were not only self-serving, but were dishonest and made in bad faith.

One of the more egregious aspects of the conduct surrounding respondent's misconduct were his bad faith attempts to use his position as a public servant to evade arrest and other consequences of his criminal conduct. Respondent engaged in the practice known as "badging." Badging, involves the presentation of one's employment identification by an individual, such as a judge, attorney, policeperson or a fireperson, to a law enforcement office in order to gain special treatment and/or avoid arrest based on one's status as a public servant.

Respondent not only showed his employment identification, but he made specific verbal requests of law enforcement officers to let him go based on his status as a district attorney. Respondent engaged in badging in his interactions with Officer Hernandez when stopped by him in December 2007. In his arrest in December 2009, respondent also engaged in badging in regards to his interactions with Officers Rodrigues and Butler. Respondent specifically told them that he worked for the City and County of San Francisco. He went on to say that he worked for the officers, and asked that they let him go.

In the December 24, 2011 incident, when Officer Mayberry asked respondent for his identification, respondent produced his district attorney badge. Respondent also urged Mayberry to let him go, because he was well-known among San Francisco police officers. Mayberry testified in this proceeding that he understood that respondent was seeking special treatment due to his status as a district attorney. Several of the other arresting officers testified that they understood that respondent was attempting to "get a break" because he was a district attorney. The court concludes that respondent's attempts to obtain special dispensations from the arresting officers based on his position as a public servant involved corruption and moral turpitude.

Additionally, on December 30, 2009, respondent made misrepresentations to a law enforcement officer. In the course of respondent's arrest, one of the officers ran a DMV check and discovered that respondent's California driver's license had been suspended as the result of his prior DUI. Respondent informed the officer that he knew that his license was suspended; but, per the DMV he could drive for employment purposes. In fact, no such employment exemption was given to respondent. (Exh. 5, p. 8.) Respondent's false statements to a law enforcement officer, who was acting in the course of his duties, involved dishonesty and moral turpitude.

Over the period of years during which his misconduct occurred, respondent failed to follow the law or the orders which were part of his probation. Respondent was ordered to obey all laws as a condition of his separate criminal probations in 2008 and 2010. His convictions evidence that he did not do so. His last three convictions involved conduct which took place in 2008, 2009, and 2011. Respondent violated his 2008 probation by driving under the influence of alcohol in 2009. He violated the terms of both his 2008 and 2010 probation when he drove while under the influence of alcohol with a BAC of greater than 0.08 percent. And as noted, respondent knowingly drove while his license was suspended.

Respondent's most recent conviction in 2012 provides clear evidence that by 2011, respondent's misconduct crossed "the moral turpitude line." (See, *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.)

As set forth, *ante*, on December 24, 2011, at 2:20 a.m. in the morning, respondent was passed out behind the wheel in the middle of an intersection with the car engine running. Respondent's foot was still on the brake. When finally roused by Officer Mayberry, who responded to a call reporting a passed out driver, respondent started to get out of the vehicle. The car then began to roll forward. Respondent, fortuitously was able to reenter the car and shift it into "park." During the course of his interactions with Mayberry, respondent showed the

officer his DA badge and asked Mayberry to let him go. He told Mayberry that he had drunk "nothing." Later he changed his statement regarding his alcohol consumption, saying he had had two beers. Respondent had borrowed his father's vehicle on December 24th to drive to the party, knowing that his license had been suspended and he was on active probation for a prior DUI. When respondent was given a blood alcohol test, his BAC measured 0.24 percent – three times the legal limit.

Respondent engaged in conduct, which demonstrates not only a disregard for his own safety, but a flagrant disregard for the safety of others, whom he puts at risk. Respondent has also acted with a disregard for the law and court orders.

Consequently, the court concludes that the facts and circumstances surrounding respondent's misdemeanor violations of Vehicle Code section 23152, subdivision (a) (driving under the influence), Vehicle Code section 23152, subdivision (b) (driving with 0.08% or more alcohol in blood), and Vehicle Code section 23103 (reckless driving [wet reckless]) involve dishonesty and moral turpitude.

Aggravation[8]

Multiple Acts of Wrongdoing (Std. 1.5(b).)

Respondent's four criminal convictions evidence multiple acts of misconduct, which constitute an aggravating factor.

Bad Faith (Std. 1.5(d)

Since the court has determined that respondent's misconduct involved moral turpitude, based on his false statements to law enforcement officers and his attempts in his three DUI matters to use the authority of his position an assistant district attorney to avoid arrest in those

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[8] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, effective January 1, 2014.

matters, no additional aggravating factor involving bad faith is found. To again consider this factor in aggravation would improperly give it double weight. (*In re Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68.)

Harm to Client/Public/Administration of Justice (Std. 1.5(f).)

Since the court has determined that respondent's misconduct involved his violations of the law and repeated violations of probation while he was an assistant district attorney, no additional aggravating factor involving harm to the administration of justice is found. To again consider this factor in aggravation would improperly give it double weight. (*In re Duxbury*, *supra*, (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68.)

Indifference Toward Rectification/Atonement (Std. 1.5(g).)

The evidence shows that respondent does not believe he is an alcoholic nor has a serious alcohol abuse problem. Rather, he asserts that his drinking is merely situational. Furthermore, respondent believes that he played any part in his cousin's death. But, respondent's convictions and the circumstances surrounding them indicate a serious substance abuse problem.

Respondent has not shown any proof of sustained participation or completion of any therapy, group, or program, where his alcohol abuse issues could have been treated. Respondent has failed to address his alcohol abuse problem. Such failure shows indifference toward rectification.

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.6(e).)

The court finds that respondent has failed to meet his burden of proving any mitigation by clear and convincing evidence.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.1.)

Standard 1.7 provides, in pertinent part, that the specific sanction for the particular violation found must be balanced with any mitigating or aggravating circumstances.

Standard 1.7(b) provides that if aggravating circumstances are found, they should be considered alone and in balance with any mitigating circumstances, and if the net effect demonstrates that a greater sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a greater sanction than what is otherwise specified in a given standard. On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, or the profession and where the record demonstrates that the member is unwilling or unable to conform to ethical responsibilities in the future.

Standard 2.11(b) provides that disbarment or actual suspension is appropriate for final conviction of a misdemeanor involving moral turpitude. (See Business and Professions Code § 6101, subd. (a).)

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51

Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

In a conviction referral proceeding, "discipline is imposed according to the gravity of the crime and the circumstances of the case." (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.) An attorney's commission of a crime involving moral turpitude is always a matter of serious consequence; but, it does not always result in disbarment. The sanction imposed is determined in each case depending on the nature of the crime and the circumstances presented by the record. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 103.)

The State Bar urges that disbarment is warranted, contending that *Alkow's* low level of discipline imposed in 1966 is no longer appropriate, in light of current societal rejection of impaired driving, especially drunken driving, and the standards for attorney sanctions that were adopted in 1986, some 20 years after *Alkow*. (i.e., former Standard 3.2, renumbered and revised as standard 2.11, effective January 1, 2014.)

Respondent contends that during the time of his misconduct he was suffering from an extreme set of circumstances that created emotional turmoil related to alcohol abuse and has since shown understanding of and remorse for his actions. The court does not agree with respondent. As noted, respondent provided no evidence of sustained participation in any substance abuse program or treatment. Indeed, respondent had "dirty tests" and withdrew from the LAP, after he allegedly completed what he has described as "intensive substance abuse counsel." As the California Supreme Court has stated, "Rehabilitative efforts presuppose admission of the problem. . . . [The] failure to recognize the problem, its effect on [one's] private life . . ., and its potential effect on [one's] professional practice, heighten the need for discipline." (*In re Kelley*, supra, 52 Cal.3d at p. 484, 498.) Here, respondent has convinced

himself that his use of alcohol was "situational" and that since the stressors that created the "situation" are no longer present, he does not have an alcohol abuse problem.

Respondent's explanation fails to take into account the reality that almost every individual will go through several periods of extreme stress during his or her lifetime and will be faced with extreme stressors, such as financial difficulties, the death or illness of a loved one, serious personal health problems, loss of a job, or any one of a myriad of other problems. Until respondent learns why he turned to alcohol as a coping mechanism when he went through an extremely stressful period and learns how to avoid repeating that behavior in the future, he is certainly capable of putting himself and others at risk.

To determine the level of discipline to impose in this matter, the court turns to the case law in addition to the standards. Both the State Bar and respondent cite to *In re Carr* (1988) 46 Cal.3d 1089, *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, and *Alkow v. State Bar* (1966) 64 Cal.2d 838. Each of these cases involves discipline relating to a conviction for driving under the influence of alcohol or while physically impaired.

In *Carr*, the attorney was convicted of two separate violations of driving under the influence of alcohol. In an abbreviated decision, the Supreme Court determined that these convictions did not involve moral turpitude and suspended Carr for two years, stayed, with a five year probationary period, including a six month actual suspension.

In *Anderson*, an attorney was convicted, among other things, of four separate counts of driving under the influence of alcohol over a six-year period. The Review Department found that Anderson's misconduct did not constitute moral turpitude, but did demonstrate conduct warranting discipline. In aggravation, Anderson was uncooperative and aggressive towards the arresting officers and had been twice disciplined in the past. In mitigation, Anderson presented "impressive character evidence." (*In the Matter of Anderson*, *supra*, 2 Cal. State Bar Ct. Rptr.

208, 213.) The Review Department recommended a one-year stayed suspension, a three-year probation, and a 60-day actual suspension.

The instant case, however, is not truly on point with *Carr*, *Anderson*, or *Alkow*. But, the court finds that the instant matter shares some similar qualities with both *Alkow* and *Anderson*.

The common thread between the present case and *Anderson*, is that both cases both cases involve a conviction for driving under the influence of alcohol. While *Anderson* does not include a finding of moral turpitude, it does involve an attorney with four convictions for driving under the influence of alcohol and considerable aggravation. Therefore, as the present case involves moral turpitude, the court finds that it warrants significantly more discipline than that which was ordered in *Anderson*.

Alkow and the present case also have a common thread. Respondent's, misconduct is similar to the attorney in *In re Alkow* (1966) 64 Cal.2d 838. In *Alkow*, the Supreme Court found that the circumstances surrounding a vehicular manslaughter conviction of an attorney involved moral turpitude because of his complete disregard of the law, the conditions of a prior criminal probation order, and the safety of the public. "Although he did not intend the accident, Alkow knew his vision was defective and reasonably must have known that injury to others was a possible if not a probable result of his driving." (*Id.* at p. 840.)

Here, respondent like the attorney in *Alkow* has acted with moral turpitude. The Supreme Court wrote that the attorney in *Alkow* "reasonably must have known that injury to others was a possible, if not probable result of his driving." (*In re Alkow*, supra, 64 Cal.2d at p. 840.) At the time Alkow drove without a license, he did not intend for an accident to happen. Nonetheless, the Supreme Court found that Alkow's "conduct showed a complete disregard for his probation, the law, and the safety of the public and involved moral turpitude." (*Id.* at p. 841.)

Here, respondent, like the *Alkow* attorney, does not intend for accidents to happen. But, over a period of almost 12 years, he has acted in complete disregard of the law and court orders; and, he has violated his criminal probation. Respondent intended to drive without a valid license. He went to parties, when he knew or should have known that he would consume alcohol. Respondent knew or should have known that he would leave the party after drinking and would, therefore, drive after ingesting the alcoholic beverages. Respondent, who was a district attorney, was aware of the problems of drunk driving due to his past prosecutorial experience, as well as his own personal involvement in a fatal crash. The fact that after the 1999 fatality accident, respondent's subsequent drunk driving did not result in further serious injury or death was merely fortuitous. It was also fortuitous that respondent, who was passed out or in a stupor, when stopped in the middle of an intersection on December 24, 2011, did not lift his foot from the brake and cause serious injury to himself and others.

But, despite the common thread that links the instant matter with *Alkow* and *Anderson,* the instant matter is not truly on point with either of those cases.

Ultimately, this court agrees with the State Bar when it points out discipline imposed in 1966, is no longer applicable, in light of current societal rejection of impaired driving, especially drunk driving, and the implementation of standards for attorney sanctions that were adopted in 1986, some 20 years after *Alkow* was decided.

Finally, in determining the appropriate discipline to recommend, the court looks again to the purpose of State Bar disciplinary proceedings. The primary purpose is to protect the public, to preserve public confidence in the profession, and to maintain the highest professional standards for attorneys. The court finds that a recommendation of disbarment, as urged by the State Bar, would be excessive and unnecessary to accomplish the intended purpose of this disciplinary matter. On the other hand respondent's a 60-day suspension, as suggested by

respondent, is an insufficient period of time for respondent to address his alcohol abuse issue and ensure the safety of the public.

Therefore, to reduce the risk of any future misconduct due to respondent's alcohol abuse problem, the court recommends that respondent be suspended for three years, that execution of the suspension be stayed, and that he be placed on probation for four years, and that, among other things, he be actually suspended for a minimum of two years and remain suspended until he satisfactorily proves to the State Bar Court his rehabilitation, present fitness to practice and present learning and ability in the general law under standard 1.2(c)(1). The court believes that the recommended suspension properly promotes the goals of attorney discipline and will adequately protect the public, the courts, and the legal profession.

Recommendations

Accordingly, it is recommended that respondent Marc Anthony Guillory, State Bar Number 214098, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of four years subject to the following conditions:

1. Respondent Marc Anthony Guillory is suspended from the practice of law for a minimum of the first two years of probation, and must remain suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

3. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation

conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

4. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

7. Respondent must comply with all conditions of respondent's criminal probation and must so declare under penalty of perjury in any quarterly report required to be filed with the Office of Probation. If respondent has completed probation in the underlying criminal matter, or completes it during the period of his disciplinary probation, respondent must provide to the Office of Probation satisfactory documentary evidence of the successful completion of the criminal probation in the quarterly report due after such completion. If such satisfactory evidence is provided, respondent will be deemed to have fully satisfied this probation condition.

8. Respondent must abstain from using alcoholic beverages and must not use or possess any narcotics, dangerous or restricted drugs, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription.

9. Respondent must select a licensed medical laboratory approved by the Office of Probation. Respondent must furnish to the laboratory such blood and/or urine samples as may be required to show that respondent has abstained from alcohol and/or drugs. The samples must be furnished to the laboratory in such a manner as may be specified by the laboratory to ensure specimen integrity. Respondent must cause the laboratory to provide to the Office of Probation, at respondent's expense, a screening report on or before the 10th day of each month of the probation period,

containing an analysis of respondent's blood and/or urine obtained not more than 10 days earlier.

10. Respondent must maintain with the Office of Probation a current address and a current telephone number at which respondent can be reached. Respondent must return any call from the Office of Probation concerning testing of respondent's blood or urine within 12 hours. For good cause, the Office of Probation may require respondent to deliver respondent's urine and/or blood sample(s) for additional reports to the laboratory no later than six hours after actual notice to respondent that the Office of Probation requires an additional screening report.

At the expiration of the probation period, if respondent has complied with all conditions of probation, the order of the Supreme Court suspending respondent from the practice of law for two years will be satisfied and the stayed suspension will be terminated.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination during the period of his suspension and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

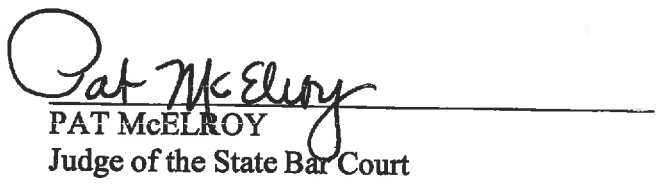
California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: February 13, 2014



PAT McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on February 13, 2014, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

MARC A. GUILLORY
1701 HARRISON ST
OAKLAND, CA 94612

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Robin B. Brune, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on February 13, 2014.

George Hue
Case Administrator
State Bar Court