

**FILED July 17, 2008**

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of	)	<b>06-C-13063</b>
<b>MARK STEVEN WILLIAMS,</b>	)	
A Member of the State Bar.	)	<b>OPINION ON REVIEW</b>
_____	)	

It is clear that respondent, Mark Steven Williams, has problems dealing with authority and managing his anger. In 1998, he was convicted of trespassing, and then in 2005, he was convicted of a misdemeanor for fleeing from a park ranger. Both incidents started with respondent’s fairly innocuous but improper behavior, i.e., jogging on private property and jogging with his dog off leash. However, when confronted, both ended with respondent’s irrational and unlawful responses. Pursuant to our referral order, the hearing department held a hearing and determined that the facts and circumstances surrounding respondent’s convictions involved moral turpitude and recommended that he be disbarred. Respondent seeks review of the hearing judge’s disciplinary recommendation, alleging error as to some of the hearing judge’s procedural and evidentiary rulings. The State Bar asks us to affirm the hearing judge’s decision.<sup>1</sup>

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we find that the facts and circumstances surrounding respondent’s misdemeanor convictions do not involve moral turpitude, but do involve other misconduct warranting discipline. We also find that there

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<sup>1</sup>In pre- and post-trial briefing below, the State Bar argued that respondent’s convictions do *not* involve moral turpitude and recommended a two-year actual suspension. In changing its position on review, the State Bar asserts that its prior position was in error.

is serious aggravation, but we nevertheless conclude that the hearing judge's disbarment recommendation is excessive. Instead, we conclude that the goals of attorney discipline will be best served if respondent is actually suspended for two years and until he establishes his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

## **I. PROCEDURAL ISSUES**

Respondent alleges that the hearing judge made a number of procedural and evidentiary errors. Those allegations not expressly addressed here have been considered and rejected as without merit and/or irrelevant. In general, we review de novo hearing department decisions, but we review procedural matters for an abuse of discretion. (*In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 474.)

### **A. Requests for Continuance**

Respondent filed a written motion to continue 30 days before trial and an oral motion to continue on the day of trial, both of which the hearing judge denied. Respondent alleges that it was an abuse of discretion for the hearing judge to deny his motions for continuance. We disagree because a request for a continuance must be supported by a factual showing of good cause (State Bar Ct. Rules of Prac., rule 1131(c); *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218, 1232), a showing respondent failed to make.

Respondent contends that he was trying to obtain the proper medical assistance for his ill parents and this adversely affected his ability to prepare for the hearing. Respondent neglected to provide any evidence of his parents' illnesses, such as declarations from his parents' physicians or caretakers, or any documentation to show the dates and extent of his travel. The clerk of the court first served respondent notice of the conviction referral proceedings on July 21, 2006, providing respondent with ample notice and the opportunity to prepare for the hearing and

to prepare a defense. Thus, the hearing judge did not abuse his discretion by denying respondent's motions to continue the trial. (*Bambic v. State Bar* (1985) 40 Cal.3d 314, 319 [proper to deny continuance after petitioner repeatedly failed to appear at hearings and failed to show good cause].)

### **B. Sanction Order**

The hearing judge's January 19, 2007, sanction order precluding respondent from presenting documentary evidence or witness testimony, other than his own, was not an abuse of discretion since respondent failed to file a pretrial statement, failed to designate witnesses or exhibits and failed to appear at the pretrial conference. (Rules Proc. of State Bar, rule 211(f); State Bar Ct. Rules of Prac., rules 1223(g), 1224; *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 38 [hearing judge did not abuse her discretion by issuing sanction order prohibiting respondent from calling witnesses or introducing any exhibits].)

Additionally, there is no merit to the contention that the hearing judge's sanction order prevented respondent from offering a defense at the hearing. The hearing judge allowed respondent to testify at the hearing. Further, the record is void of any admissible testimonial or documentary evidence that respondent was prepared to offer on the day of the hearing.

### **C. Admission of Evidence**

Respondent asserts that admitting into evidence the police and investigative reports concerning his 1998 and 2005 convictions violated the Confrontation Clause of the United States Constitution. This assertion fails because the Confrontation Clause does not apply to State Bar proceedings; the only due process entitlement in State Bar disciplinary proceedings is a fair hearing. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634.)

Additionally, respondent asserts that the hearing judge admitted into evidence police reports and other documents that contained hearsay statements. The hearing judge was not

prohibited from considering the hearsay statements in the police reports for the truth of the matter asserted since no objection was made at the hearing (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 523, fn. 32), and, in any event, the challenge to the introduction of such evidence has been waived. (*In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 857 [failure to object to admission of evidence at trial waives the error on review].)

Notwithstanding the admissibility of the records, based on our independent review, we assign little weight to the double and triple hearsay statements, which we find do not constitute clear and convincing evidence supporting some of the findings made by the hearing judge. Accordingly, we set forth our own factual findings below, based on our de novo review.

#### **D. Credibility Finding**

We reject respondent's claim that the hearing judge's credibility assessment was inappropriate. The hearing judge is in the best position to determine witness credibility and great weight is given to those findings on this subject. (Rules Proc. of State Bar, rule 305(a); *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 143, fn. 7.) We find nothing in the record to justify overturning his credibility determinations.

We also disagree with respondent's contention that the hearing judge erred by precluding respondent from presenting witnesses and documentary evidence, other than his own testimony, and then finding his testimony untruthful based on the lack of corroborating evidence. There is no evidence in the record that respondent was prepared to introduce any admissible documentary evidence or call any witnesses at the time the hearing began.

Furthermore, it would not be proper to consider the evidence respondent sought to introduce to challenge the validity of his prior discipline. (*In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731, 733 [review department no longer retains jurisdiction

over prior attorney discipline matter once the record is transmitted to the Supreme Court and it does not consider issues raised in later proceeding as a collateral attack on that prior discipline].)

## **II. FACTS AND CIRCUMSTANCES OF RESPONDENT'S CONVICTIONS**

Respondent was admitted to practice in California on October 6, 1995. As we discuss *post*, he has one prior record of discipline.

### **A. Respondent's Trespassing Conviction - 1998**

Roger Piers runs a horse stable in Portola Valley, California, on property he rents from Stanford University. Between late June 1997 and early July 1997, Piers saw respondent jogging on the property where "no trespassing" signs were posted. Piers followed respondent in his truck, pulled his truck in front of respondent and stopped. Piers told respondent that he was trespassing and that he must leave. Respondent ignored Piers and continued running. Piers followed respondent and once again drove his truck in front of respondent, stopped, and once again, warned respondent that he was trespassing and must leave. Respondent kicked the right rear panel of Piers's truck and ran away. Respondent's kick caused \$300 in damages to Piers's truck.

On August 31, 1997, Karen Johansen, who rents a horse stable from Piers, saw respondent jogging through the stable area where a "no trespassing" sign was posted. Johansen yelled to respondent that he was trespassing, but respondent kept jogging. Johansen followed respondent on foot as she continued to tell him that he was trespassing. Respondent was wearing a pair of earphones and appeared not to hear Johansen. Johansen climbed into her Ford Bronco and followed respondent, honking her horn and yelling to him. Respondent waved his arms at her but did not stop jogging. While Johansen continued to follow him, respondent eventually stopped and walked back towards her Bronco. Johansen told respondent that he was trespassing

on private property and that he needed to leave. Respondent kicked the driver's door, causing a dent about two feet long and two inches deep, and then ran away.

On October 31, 1997, a misdemeanor complaint was filed charging respondent with: 1) vandalism in an amount less than \$1,000 (Pen. Code § 594, subd. (b)(4)); 2) vandalism in an amount of \$1,000 or more (Pen. Code § 594, subd. (b)(3)); and 3) trespassing (Pen. Code § 602, subd. (k)). On June 4, 1998, respondent pled guilty to the misdemeanor trespassing charge, and the court dismissed the two vandalism charges. The court sentenced respondent to two years' probation, and ordered him to pay fines and fees totaling \$235 and to make restitution for the damages he caused. Respondent paid the restitution and successfully completed probation.

#### **B. Respondent's Conviction for Fleeing from a Park Ranger - 2005**

On November 6, 2004, respondent was running in the Fremont Older Open Space Preserve (Preserve) with a running club. At the same time, Kerry Carlson, a park ranger, was on patrol in a marked ranger vehicle and observed an unleashed golden retriever. Ranger Carlson, who was in full uniform, got out of his vehicle after he saw respondent put the dog on a leash. Ranger Carlson asked respondent to stop and respondent stated, "Don't worry, I just had my dog off-leash to go to the bathroom." Ranger Carlson told respondent to step over to Ranger Carlson's vehicle so he could speak to respondent. Respondent moved toward the vehicle but then ran away. Ranger Carlson got into his patrol vehicle and over the public address loudspeaker, advised respondent to "stop" and that continuing to run from a peace officer was a misdemeanor. Respondent kept running. Ranger Carlson and two other rangers searched for respondent for an hour but could not find him. Ranger Carlson subsequently discovered the identity of respondent from a witness who observed the incident.

On April 1, 2005, respondent was charged with one misdemeanor count of resisting, delaying, or obstructing an officer pursuant to Penal Code section 148, subdivision (a)(1). The

complaint was amended to charge respondent with one misdemeanor count of fighting in a public place or challenging another to fight in a public place under Penal Code section 415, subdivision (1). Respondent pled nolo contendere to the Penal Code section 415, subdivision (1), charge,<sup>2</sup> and the court sentenced him to two years' probation and ordered respondent to pay fines and fees totaling \$465. In addition, the court ordered him not to enter the Preserve. Respondent paid the fines and fees, and completed probation without incident.

### **C. Subsequent Uncharged Misconduct**

On November 11, 2004, the president of the Palo Alto Run Club, Kirsten Kempe, notified Park Ranger Lisa Myers that respondent might try to attend the club's function in Foothills Park scheduled for November 14, 2004. Kempe claimed that respondent caused problems previously and she wanted the rangers to keep respondent out of the park to avoid any problems. Local ordinance designates Foothills Park as a "residents only" park, meaning only Palo Alto residents and their accompanied guests may enter Foothills Park. Respondent was a Menlo Park resident.

On November 14, 2004, Ranger Myers was stationed at the entrance of the park. She had a guest list from the Palo Alto Run Club that did not contain respondent's name. When respondent drove up to the entrance, Ranger Myers asked him for identification, but respondent claimed he did not have any with him. Ranger Myers asked respondent his name and he replied, "Chuck Fox"; an individual who was on the guest list. Respondent was unable to provide any identification to prove he was Fox.

As Ranger Myers was speaking with respondent, Steve Foreman drove up behind respondent. Respondent went over to Foreman's vehicle and had a brief conversation with him before Ranger Myers asked respondent to return to her. Foreman pulled his car up, produced his

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<sup>2</sup>A violation of Penal Code section 148, subdivision (a)(1), provides for a fine not to exceed \$1,000 and/or imprisonment in county jail not to exceed one year, while Penal Code section 415, subdivision (1), is limited to a maximum fine of \$400 and/or county jail up to 90 days.

identification, and when Ranger Myers asked Foreman respondent's name, Foreman replied "Chuck Fox." Ranger Myers let both men into the park.

About an hour later, Ranger Myers received a telephone call from another member of the running club explaining that respondent was in the park and requesting that she tell respondent to leave. Ranger Myers contacted the Palo Alto Police for assistance. Two Palo Alto Police officers arrived at the park, spoke with respondent and escorted him from the park.

During trial, respondent objected to the introduction of evidence surrounding the November 14, 2004, incident on grounds that it was not the basis of any of the charges for which he received notice, and that he had first discovered the State Bar intended to introduce the incident at trial only days before. The hearing judge indicated that the evidence would be considered only in aggravation and allowed the testimony of Ranger Myers. However, in his written decision, the hearing judge relied on this incident to find that respondent's conviction for fleeing from Ranger Carlson on November 6, 2004, involved moral turpitude.

### **III. CULPABILITY**

Pursuant to the delegated authority of the Supreme Court, we referred respondent's two convictions to the Hearing Department to determine whether the facts and circumstances surrounding each conviction involved moral turpitude or other misconduct warranting discipline, and if so found, the discipline to be imposed or recommended. (Bus. & Prof. Code, §§ 6101-6102;<sup>3</sup> Cal. Rules of Court, rule 9.10(a).)

In these proceedings, respondent's convictions are conclusive evidence of guilt of the elements of those crimes. (§ 6101, subd. (a).) In deciding whether each conviction involves moral turpitude or other misconduct warranting discipline, we look not only to the crime itself, but also to the "circumstances of its commission." (§ 6102, subd. (e).)

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<sup>3</sup>All further references to section(s) are to the Business and Professions Code, unless otherwise noted.

Whether the circumstances surrounding a conviction constitute moral turpitude is a question of law. (*In re Higbie* (1972) 6 Cal.3d 562, 569.) Moral turpitude has been described as “an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” (*In re Craig* (1938) 12 Cal.2d 93, 97.) The primary purpose of the moral turpitude standard is “ “not to punish practitioners but to protect the public, the courts, and the profession against unsuitable practitioners. [Citations.]” ’ [Citations.]” (*In re Scott* (1991) 52 Cal.3d 968, 978.) Conduct that shows that an attorney is not capable of meeting the professional and fiduciary duties of the practice of law may show that he or she is unfit to practice and constitutes moral turpitude. (*In re Higbie, supra*, 6 Cal.3d at p. 572.)

#### **A. Respondent’s 1998 Trespass Conviction**

The hearing judge determined that the facts and circumstances surrounding respondent’s misconduct during the trespass and vandalism incidents in 1997 involve moral turpitude when viewed collectively. We disagree. Two separate incidents of trespass and vandalism, without more, do not support a finding of moral turpitude. (See, e.g., *In re Hickey* (1996) 50 Cal.3d 571, 579-580 [attorney’s conviction for carrying a concealed weapon did not involve moral turpitude even though attorney physically assaulted wife in one incident and assaulted wife and another in a separate incident].)

We also disagree with the hearing judge’s finding of moral turpitude in the “aggregate” based on the circumstances of respondent’s trespass conviction in 1998, his conviction in 2005, and the misconduct in his prior disciplinary proceeding. In determining moral turpitude, it was improper to consider the circumstances of another conviction that occurred seven years later and was not directly associated with the conviction at issue. (*In re Strick* (1983) 34 Cal.3d 891, 903-904 [could not use facts and circumstances surrounding voluntary manslaughter conviction –

which occurred 21 months later – to find attorney’s conviction for passing forged prescriptions for controlled substances involved moral turpitude].)

Likewise, since respondent’s prior record of discipline is unrelated to the circumstances of the 1998 conviction for trespass,<sup>4</sup> it too cannot be the basis for determining whether the trespass conviction involved moral turpitude. In making a moral turpitude determination, we are not restricted to examining the elements of the crime of which respondent was convicted and may consider the circumstances of its commission “because it is the misconduct underlying respondent’s conviction, as opposed to the conviction itself, that warrants discipline. [Citation.]” (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935.) Nevertheless, “[i]f moral turpitude exists in this case, it must be based *on the particular circumstances surrounding the conviction*. [Citation.]” (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 590, italics added.) We are therefore not at liberty to consider conduct remote in time or unrelated to the commission of the crime.

Lastly, in finding moral turpitude, the hearing judge relied on the fact that when respondent was confronted while trespassing, he responded with “strong physical violence,” causing at least \$1,300 in property damage. The Supreme Court has held that simple assault committed in the heat of anger “or as the result of physical or mental infirmity, does not necessarily reflect on an attorney’s integrity, honesty or fidelity and does not involve moral turpitude. [Citations.]” (*In re Strick, supra*, 34 Cal.3d at p. 902.) Respondent’s trespass conviction involved assaults resulting in property damage, but no physical harm. Respondent is

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<sup>4</sup>In his prior discipline, we found respondent culpable of: 1) violating section 6106 for making false and misleading statements and omissions on his applications for hospital staff privileges between 1993-1996; 2) failing to report to the State Bar his professional discipline from the Medical Board in 1999 in violation of section 6068, subdivision (o)(6); and 3) failing to support the laws of this state in violation of section 6068, subdivision (a), by holding himself out to be a doctor and using “Dr.” and “M.D.” when he did not have a valid California medical license (§§ 2052, 2054).

guilty of entering another's land unlawfully, responding angrily and causing at least \$1,300 in property damage. While unacceptable, unlawful and worthy of discipline, such misconduct does not involve moral turpitude. (*In re Larkin* (1989) 48 Cal.3d 236 [misdemeanor assault with a deadly weapon and conspiracy to commit the assault involved other misconduct warranting discipline but not moral turpitude]; *In re Hickey, supra*, 50 Cal.3d 571 [despite evidence of assault with a deadly weapon and spousal abuse, conviction for carrying a concealed weapon constituted other misconduct warranting discipline]; *In the Matter of Stewart* (Review Dept. (1994) 3 Cal. State Bar Ct. Rptr. 52 [conviction for misdemeanor battery on a police officer constituted other misconduct warranting discipline].)

**B. Respondent's 2005 Conviction as a Result of Fleeing from a Park Ranger**

In finding that respondent's conviction for violating Penal Code section 415, subdivision (1), involved moral turpitude, the hearing judge relied on the fact that respondent lied when he explained that he had his dog unleashed so it could go to the bathroom. We do not find clear and convincing evidence that respondent's statement was a lie.

The park district's incident report contains the statement of Gayla Johnson, a running club member, who claims she saw respondent's unleashed dog chasing deer on the morning of the run, and saw the dog unleashed immediately before the incident between Ranger Carlson and respondent. Although the incident report was admitted at trial as part of the park district's file, the incident report was not identified at trial; Johnson did not testify; the ranger who apparently took Johnson's statement did not testify; and respondent was not asked about Johnson's statement. Moreover, although both testified, neither Ranger Carlson nor respondent were questioned about the veracity of respondent's statement. Since the "lie" was never discussed as a possible basis for a moral turpitude finding until the hearing judge's written decision, respondent

was not provided an opportunity to explain what has been determined to be his prior inconsistent behavior.

The evidence in the record demonstrates that Ranger Carlson was on patrol on November 6, 2004, when he observed respondent's unleashed golden retriever. There is no evidence in the record detailing the length of time respondent had his dog unleashed prior to Ranger Carlson seeing the dog, and no contrary evidence explaining the reason the dog was unleashed. "All reasonable doubts are resolved in favor of the attorney. [Citation.]" (*Ballard v. State Bar* (1983) 35 Cal.3d 274, 291.) We find insufficient evidence to support a finding of moral turpitude based on respondent's response to Ranger Carlson when caught with his dog off-leash.

We also find that the hearing judge inappropriately considered the November 14, 2004, incident to determine that respondent's misconduct on November 6, 2004, involved moral turpitude. While we look not only to the crime itself, but also to the "circumstances of its commission" (§ 6102, subd. (e)), we find that the November 14, 2004, incident is not part of the "circumstances of" respondent's conviction of Penal Code section 415, subdivision (1). The incident occurred at a different park, involved a different park ranger, a different running club, did not involve leash laws or respondent's dog, and occurred eight days after the misconduct encompassing respondent's conviction. The record is void of any evidence that the misconduct formed the basis of any criminal charges. (*In re Langford* (1966) 64 Cal.2d 489, 496 [in resolving issue of moral turpitude, it was appropriate to consider other transactions that occurred within a short time after the criminal offense, were proposed by attorney as means of recouping victim's losses resulting from crime, and were basis of additional counts in the criminal proceedings which were dismissed as part of plea].) Based on the limited record before us, we do not find that the subsequent incident transforms respondent's misconduct eight days earlier into an act of moral turpitude. Nonetheless, as we discuss *infra*, we find that the November 14,

2004, incident is relevant and admissible for the purpose of showing that respondent's problems with authority are not aberrational or isolated, but instead implicate serious issues he must address before he should resume the practice of law. (See *In Re Possino* (1984) 37 Cal.3d 163, 169-170 [attorney's expressed interest in promoting other illegal transactions with same undercover agents indicated that his conviction for marijuana sale was not an isolated incident or aberrational conduct].)

The record reveals that respondent unleashed his dog during a running club event, ignoring the local ordinance prohibiting dogs from being unleashed while in the Preserve. Respondent admitted that he was aware of that ordinance. When Ranger Carlson caught respondent with his dog off-leash, respondent chose to flee rather than to obey the ranger's command to step over to the vehicle to speak with him. Respondent continued to run even after Ranger Carlson ordered him to stop and advised him that evading a peace officer is a misdemeanor. Respondent's misconduct demonstrates a lack of respect for authority, which warrants discipline, but we do not find that it involves moral turpitude. (*In the Matter of Stewart, supra*, 3 Cal. State Bar Ct. Rptr. 52, 56-57 [conviction for misdemeanor battery of police officer stemming from respondent resisting arrest did not involve moral turpitude]; *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 212-217 [respondent's drunk driving convictions did not involve moral turpitude even though convictions included fleeing the scene and resisting arrest].)

#### **IV. DEGREE OF DISCIPLINE**

##### **A. Aggravation and Mitigation**

##### **1. Aggravation**

We agree with the hearing judge's finding that respondent's prior record of discipline is a strong aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for

Prof. Misconduct, std. 1.2 (b)(i), hereinafter “standards”.) Even though respondent’s prior discipline is not yet final, we are obligated to consider it a prior record of discipline. (Rules Proc. of State Bar, rule 216(c) [prior discipline record is not inadmissible because discipline has been recommended but not yet imposed].)

The misconduct in respondent’s prior discipline case (*Williams I*) involved various acts of moral turpitude and dishonesty for making false and misleading statements and omissions on various applications for hospital staff privileges and membership, and his persistent use of the designation M.D. even after criminal charges were brought against him for the continued use of the designation. We recommended that respondent be actually suspended from the practice of law for six months as a condition of a two-year stayed suspension.

Most troubling to us is that our concerns with respondent’s conduct in *Williams I* echo our concerns in the instant matter. In *Williams I*, we found as a significant aggravating factor respondent’s persistent use of the designation M.D. in the face of a challenge to that use by the Sonoma County District Attorney. Respondent continued to assert that he was legally entitled to use that designation even though California law is well settled that he was not. We accordingly found in *Williams I* that this was evidence of respondent’s indifference toward rectification of or atonement for the consequences of his misconduct under standard 1.2(b)(v).

We once again find that the record in the instant matter provides strong evidence of respondent’s continued indifference and lack of understanding of the consequences of his misconduct. (Std. 1.2(b)(v).) We note that the misconduct underlying the 2005 conviction occurred *after* the proceedings had been initiated in *Williams I*. Thus, neither respondent’s 1998 criminal conviction nor his prior disciplinary proceeding persuaded respondent to conform his conduct to ethical norms, again demonstrating respondent’s indifference to atonement.

We also agree with the hearing judge's finding that respondent lacks insight into the nature and extent of his misconduct. (Std. 1.2(b)(v).) As for the 1998 conviction, respondent asserted that "hundreds of runners" jog on the property on which he trespassed, people use the land for recreational purposes, and "hundreds of people from Stanford" use the land without any problems. Respondent's testimony reveals that he believes his misconduct should be excused because so many others also trespass on the land without incident, while he ignores that his actions violated the law and resulted in damage to private property. Similarly, although respondent testified that it was wrong for him to provide a false identity to enter a restricted park, he attempts to diminish the implication of his misconduct by arguing that his exclusion was against park policy. When viewed in its entirety, the record clearly confirms that respondent fails to recognize the wrongfulness of his actions. Respondent's holistic problems with authority raise a serious concern regarding his fitness to practice.

We disagree with the hearing judge's finding that respondent's misconduct involves multiple acts of misconduct. As discussed *post*, since respondent's trespass conviction in 1998 occurred contemporaneously with the misconduct in *Williams I* and we consider it with the totality of the circumstances in *Williams I (In the Matter of Sklar (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619)*, we do not use it in aggravation for this proceeding. Respondent's 2005 conviction alone does not evidence multiple acts of misconduct. (*In the Matter of Shalant (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 839* [no aggravation based on multiple acts of misconduct where misconduct involved only two counts and both counts arose from a single transaction of modifying a contingent fee agreement with a client].)

We also disagree with the hearing judge's finding that respondent's misconduct establishes a pattern of misconduct. "Only the most serious instances of repeated misconduct over a prolonged period of time have been considered as evidence of a 'pattern of misconduct.'"

[Citations.]” (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959.) As set forth below, the types of misconduct respondent engaged in are sufficiently different not to constitute a pattern.

<b>Date</b>	<b>Conduct</b>	<b>Disciplinary Proceeding</b>
August 1993	Respondent provides misstatements and fraudulently conceals facts on application for Oregon medical license	<i>Williams I</i>
November 3, 1994	Respondent submits false application for staff privileges at O’Conner Hospital	<i>Williams I</i>
January 18, 1995	Respondent submits false application for staff privileges at El Camino Hospital	<i>Williams I</i>
April 4, 1996	Respondent resubmits false application for staff privileges at O’Conner Hospital	<i>Williams I</i>
June or July 1997	Respondent trespasses and kicks truck	Current proceeding
August 31, 1997	Respondent trespasses and kicks truck	Current proceeding
November 1999	Respondent fails to notify the State Bar of California that his medical license was revoked	<i>Williams I</i>
August 1, 2001	Medical Board investigates respondent’s misuse of M.D. designation	<i>Williams I</i>
2002	Respondent petitions the Medical Board to reinstate his license but fails to disclose the criminal action against him	<i>Williams I</i>
February 28, 2003	State Bar of California files Notice Disciplinary Charges against respondent – <i>Williams I</i> case	<i>Williams I</i>
November 6, 2004	Respondent runs in park with dog unleashed and evades park ranger	Current proceeding

The circumstances in this case are distinguishable from the cases cited by the hearing judge where a pattern of misconduct was found for a wide range of improper behavior involving the habitual disregard of client interests. (*In the Matter of Valinoti, supra*, 4 Cal. State Bar Ct. Rptr. 498 [pattern of misconduct found when attorney failed to maintain adequate client records,

properly protect client records, file pleadings, and appear at clients' immigration court hearings, and abandoned clients]; *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657 [pattern of misconduct found when, over a ten-year period, attorney neglected clients by failing to communicate and/or return files and by failing to supervise subordinate staff, which adversely affected more than 20 clients]; *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1 [pattern of misconduct involved misappropriation of funds, abandonment of client interests and trust account violations].)

Respondent's discipline in *Williams I* involved fraud and concealment when respondent submitted false applications for staff privileges at various hospitals, failed to notify the State Bar that his medical license was suspended and failed to support the laws of this state by continuing to use the "M.D." designation. The misconduct underlying respondent's convictions involve trespass and assault with damage to personal property and resisting arrest. We find that the facts underlying the various acts of misconduct are quite different from each other and we do not "see a pattern or 'common thread' linking respondent's actions in the [current matter] with his prior misconduct." (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 93 [no pattern of misconduct where attorney's prior discipline was based on a conviction for receipt of stolen property and the issue in the second disciplinary proceeding involved the attorney's concealment of his prior suspensions from the practice of law on applications for attorney positions and an application for employment as a judicial arbitration officer].)

We agree with the hearing judge's conclusion that respondent's failure to attend the pretrial conference is an aggravating circumstance. (Std. 1.2(b)(vi); *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702.) The State Bar contends that the hearing judge erred in not considering respondent's failure to file a pretrial statement as a separate aggravating circumstance. We disagree. The hearing judge in this case already

penalized respondent for failing to file the pretrial statement by prohibiting his introduction of evidence at trial and to use the same misconduct as a factor in aggravation would be duplicative.

## **2. Mitigation**

We agree with the hearing judge's finding that the lack of client harm is a mitigating circumstance. (Std. 1.2(e)(iii).)

We agree with the hearing judge's finding that respondent's post-*Williams I* participation in mental health counseling was not a factor in mitigation because respondent's testimony lacked the support of corroborating evidence. Respondent contends that the *Williams I* finding that he participated in the Lawyer Assistance Program (LAP) and attended weekly group and individual therapy sessions negates the hearing judge's findings. This contention lacks merit because the mitigation findings in *Williams I* have no bearing on whether respondent continues to adequately address his mental health issues. Respondent testified in this proceeding that he attends weekly therapy sessions and has developed a medication regimen with a Stanford psychiatrist. However, the record is void of any expert testimony establishing that respondent's psychological problems were directly responsible for his misconduct, and there is a lack of clear and convincing evidence that respondent no longer suffers from those psychological problems. (Std. 1.2(e)(iv); *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct Rptr. 416, 443 [where attorney suffered from emotional divorce as well as torticollis, dysphonia, and Parkinson's disease, such circumstances were not mitigating since attorney not only failed to establish with expert testimony that his depression and physical maladies were directly responsible for his misconduct but also failed to establish that he no longer suffered from those emotional difficulties and disabilities].)

We disagree with the hearing judge's finding that respondent is not entitled to any mitigation for his community service activities because his testimony lacked the support of

corroborating evidence. Respondent’s testimony about his volunteer work at Stanford University, the park service and other community service is entitled to some weight in mitigation, but we only afford nominal weight to such activities because the nature and extent of his participation is unclear on this record. (*In the Matter of Shalant, supra*, 4 Cal. State Bar Ct. Rptr. at p. 840; *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 287.)

### **B. Level of Discipline**

When determining the appropriate level of discipline, we must always keep in mind that the purpose of discipline is not to punish the attorney, but to protect the public. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) To do this, we consider the standards, prior decisional law, and the facts and circumstances unique to this case. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) Although the standards are afforded “great weight” in determining the appropriate level of discipline (*In re Silvertown* (2005) 36 Cal.4th 81, 92), they are intended to be flexible in nature, so that we may “temper the letter of the law with considerations peculiar to the offense and the offender.” [Citations.]” (*In the Matter of Van Sickle, supra*, 4 Cal. State Bar Ct. Rptr. at p. 994.) We agree with the hearing judge that standard 1.7(a) is relevant to the present proceedings, but we find that standard 3.2 is inapplicable because the facts and circumstances of respondent’s 1998 and 2005 convictions do not involve moral turpitude. Instead, we apply standards 3.4 and 2.10.

Although standard 1.7(a) suggests that the discipline in this case should be greater than that imposed in respondent’s prior matter, the weight given to the discipline in *Williams I* is diminished somewhat since the misconduct underlying the 1998 trespass conviction happened contemporaneously with the misconduct in the prior matter. (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. 602 [where current misconduct contemporaneous with misconduct in prior record, consider totality of the findings to determine what the discipline would have been if

all misconduct was brought in one case].) However, as discussed *ante*, when we consider respondent's 2005 conviction in light of his prior disciplinary record, we have grave concerns about respondent's present fitness to practice. The underlying acts in respondent's 2005 conviction occurred 19 months after the State Bar filed the notice of disciplinary charges in that prior proceeding. Respondent's involvement in the disciplinary process apparently had no impact on his behavior, as evidenced by his inability to conform his conduct to ethical norms upon being put on notice.

Pursuant to standard 3.4, for a conviction involving misconduct warranting discipline, the appropriate sanction is determined by "the nature and extent of the misconduct . . . ." Thus, the appropriate degree of reproof or suspension depends, in part, on the gravity of the offense. (Std. 2.10.) The appropriate sanction also takes into account principles of protecting the public, maintaining high professional standards and balancing mitigating and aggravating circumstances. (Stds. 1.3 and 1.6(b).)

The facts surrounding respondent's 1998 trespass conviction involved an assault with property damage. Attorneys convicted of assault crimes have received actual suspensions of varying lengths. (See, e.g., *In re Stewart, supra*, 3 Cal State Bar Ct. Rptr. 52 [60 days' actual suspension for misdemeanor battery on a police officer, no prior record]; *In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406 [two years' stayed suspension, two years' probation for attorney serving ten and one-half months' interim suspension for felony conviction for assault with a firearm with enhancement that attorney discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another]; *In re Hickey, supra*, 50 Cal.3d 571 [30 days' actual suspension for repeated acts of violence toward wife and others coupled with failure to properly withdraw from legal representation in another matter, no prior record, conduct arose from repeated abuse of alcohol]; *In re Larkin, supra*, 48 Cal.3d 236 [one-

year actual suspension for attorney convicted of assault with a deadly weapon and conspiracy to commit it, strong mitigation including no prior record]; *In re Otto* (1989) 48 Cal.3d 970 [six months' actual suspension for felony conviction for serious assault and corporal injury on a cohabitant of the opposite sex].)

The underlying misconduct in respondent's 2005 conviction involves respondent resisting arrest by fleeing a park ranger. In *In the Matter of Stewart, supra*, 3 Cal. State Bar Ct. Rptr. 52, the attorney's resisting arrest resulted in a conviction for misdemeanor battery on a police officer. While under the influence of alcohol, the attorney trespassed on and refused to leave his wife's apartment without their 18-month-old son. He became physically resistive and verbally abusive toward the arresting officers. He placed an officer's upper body in a bear hug, and struggled as the officers attempted to handcuff him. The officer sustained cuts and bruises in the altercation. The one mitigating factor was the attorney's participation in the disciplinary proceedings. In aggravation, we found multiple acts of wrongdoing, lack of candor, indifference to the seriousness of the attorney's misconduct, and the potential misconduct that could have resulted from the attorney's refusal to follow the officer's directions. The attorney in *Stewart* also had a prior disciplinary proceeding but we did not apply standard 1.7(a) because the acts in the prior proceeding were a year before those in the current proceeding, were different in nature and the State Bar did not request greater discipline. We recommended a two-year stayed suspension, two-year probation, an actual suspension of 60 days and participation in the State Bar's substance abuse program.

The underlying facts of respondent's convictions do not rise to the level of the assault cases listed above or the battery found in *Stewart* where the attorney resisted arrest. Standing alone, respondent's convictions might well dictate a modest level of discipline. However, in assessing the appropriate level of discipline, we focus on the strong evidence in aggravation in

this case. “Aggravating Circumstance” under standard 1.2(b) is defined as “an event or factor established clearly and convincingly . . . as having surrounded a member’s professional misconduct and which demonstrates that a greater degree of sanction than set forth in these standards . . . is needed to adequately protect the public, courts, and legal profession.”

Underlying respondent’s misconduct are his admitted problems with anger and authority. These problems raise serious concerns regarding his fitness to practice law, particularly when considered in a client representation context. Although we found in *Williams I* that respondent was working on his mental health issues, the record here is devoid of any showing that he has those issues under control. If respondent is unable to gain control of his mental health issues, they could “spill over into [his] professional practice and adversely affect [his] representation of clients and [his] practice of law.” (*In re Kelley* (1990) 52 Cal.3d 487, 496.) Thus, we find it appropriate to recommend a greater degree of discipline than the discipline recommended in *Williams I* and add the protection of requiring respondent to establish his rehabilitation, present fitness to practice and present learning and ability in the general law by complying with standard 1.4(c)(ii) before he is entitled to practice law.<sup>5</sup> We believe that this added requirement affords the proper balance of protecting the public without disproportionately punishing respondent.

## V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent Mark Steven Williams be suspended from the practice of law in the State of California for two years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on the following conditions:

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<sup>5</sup>If the Supreme Court decides to lower or raise the level of discipline in *Williams I*, we still recommend two years’ actual suspension based on all factors, including the nature and extent of respondent’s misconduct in the prior actions.

1. That respondent be actually suspended from the practice of law in the State of California during the first two years of the period of his probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, with credit given for the period of respondent's interim suspension, which began on July 21, 2007.<sup>6</sup>
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of this probation.
3. Respondent must maintain, with the State Bar Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a)(1).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
4. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.
5. Subject to the proper or good faith assertions of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation [and any probation monitor assigned under these conditions] which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.
6. Within one year of the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE) requirement, and respondent shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).
7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for two years will be satisfied, and the suspension will be terminated.

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<sup>6</sup>We are not recommending a mental health condition in this proceeding since that condition is set forth in respondent's prior matter, which has not yet been imposed. Furthermore, pursuant to standard 1.4(c)(ii), respondent will remain suspended until he shows proof of his rehabilitation, including sufficient proof that his mental health issues are under control.

## **VI. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

## **VII. ORDER**

For the reasons expressed in this opinion and pursuant to the authority of Business and Professions Code section 6102, subdivision (a) and rule 9.10 of the California Rules of Court, it is ordered that the interim suspension of respondent be terminated. This termination order is effective the date this opinion is filed.

## **VII. RULE 9.20**

It is further recommended that respondent be ordered to comply with rule 9.20, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order herein. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

## **VIII. COSTS**

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

REMKE, P. J.

I concur:<sup>7</sup>

EPSTEIN, J.

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<sup>7</sup>In light of Judge Watai's retirement from the bench, effective June 27, 2008, she did not participate in this opinion. (See Rules Proc. of State Bar, rule 305(c).)