

PROCEDURAL HISTORY

April 21, 2016, Petitioner filed the instant verified petition for relief from actual suspension. On April 26, 2016, the parties were given notice that any hearing on the petition would be held on June 30, 2016.

On June 1, 2016, the State Bar filed an opposition to the petition, stating various grounds in opposition.

The hearing on the petition was held on June 30, 2016, during which Petitioner testified on his own behalf. Petitioner acted as counsel for himself. Deputy Trial Counsel Drew Massey appeared for the State Bar. At the conclusion of the hearing, the court took the petition under submission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Petitioner was admitted to the practice of law in California on June 8, 1992, and has been a member of the State Bar since that time.

Petitioner's Record of Prior Discipline

Petitioner was suspended in 2014 in case No. 11-C-10329. In that conviction referral matter, Petitioner stipulated that, on eight occasions during March and April 2012, he surreptitiously photographed women in various states of undress at a tanning salon. An attorney then for 17 years, he pled guilty in the criminal proceeding and was convicted of four misdemeanor Penal Code violations — two counts of secretly filming a person and two counts of peeking through a private area.

After a hearing and decision by a judge of the Hearing Department of this court, the disciplinary matter was appealed to this court's Review Department. On April 1, 2014, a decision was filed by that department, concluding that Petitioner's criminal misconduct involved

moral turpitude and recommending that he be suspended for a minimum of two years and until he proves his rehabilitation, fitness to practice, and learning and ability in the general law. (Std. 1.2(c)(1).) This recommendation was accepted and ordered by the Supreme Court, effective August 30, 2014.

Rehabilitation and Present Fitness to Practice

To determine whether a petitioner has established his rehabilitation and present fitness to practice law, the court first looks to the nature of the misconduct underlying the ongoing actual suspension, as well as the aggravating and mitigating circumstances surrounding that misconduct, to determine the amount of evidence required to provide persuasive evidence of that individual's rehabilitation and present fitness to practice. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 578.) The amount of evidence required to justify the termination of an attorney's actual suspension varies according to the seriousness of the misconduct underlying the suspension. (*Ibid.*) In this case, the Review Department provides some guidance on that issue, indicating in its decision that Petitioner's suspension should continue until he "proves his rehabilitation and fitness to practice law — a heavy burden given his egregious misconduct."

Next, the court examines the petitioner's actions since the prior discipline to determine whether the person's actions, in light of the prior misconduct, sufficiently demonstrate rehabilitation by a preponderance of the evidence. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.) As expressly stated by this court in the *Murphy* decision, the petitioner must show at a minimum: (1) that he has strictly complied with the terms of probation imposed on him under the Supreme Court's disciplinary order; (2) that he has engaged in exemplary conduct since being suspended; and (3) that misconduct by the petitioner is not likely to recur. (*Ibid.*) Here, the court finds that Petitioner has failed to meet any of these requirements.

In support of his contention that he has been rehabilitated and now has the present fitness to practice law, Petitioner attached to his petition the reports of the two psychological assessments done in 2011 in conjunction with the underlying criminal case. Those reports were entered into evidence in the prior disciplinary action resulting in the requirement that Petitioner now demonstrate to this court his rehabilitation before being allowed to resume the practice of law. In its opinion, the Review Department described those reports as follows:

After his arrest, Kaye hired Dr. Francesca Lehman, a psychologist, to assess his propensity to re-offend sexually. Following his sentencing, the superior court ordered that Kaye also be evaluated by Dr. James Reavis, a psychologist for the criminal court's Probation Department, to determine Kaye's risk of re-offense. Both psychologists' reports were admitted into evidence by stipulation.

1. Dr. Lehman's Report

Dr. Lehman conducted a sex-offender-specific psychological evaluation, which included interviews and psychological testing. Dr. Lehman reported that Kaye is 43 years old, had no substance abuse issues, and worked as a private attorney specializing in family and criminal law.

Kaye told Dr. Lehman that he decided to take the first surreptitious photograph after he observed an attractive, scantily clad woman entering an adjacent tanning booth. Upon hearing the woman disrobe, he realized that the partition separating the rooms did not reach the ceiling. When he did not get caught the first time, he decided to photograph other women. Kaye described his behavior as "opportunistic" rather than premeditated, and acknowledged that some type of sexual offense may have been committed. He characterized his offense as "the worst mistake [he] ever made." Although Dr. Lehman found that Kaye's approach to some of the testing suggested a "reluctance to admit problems or shortcomings," she concluded he did not meet the criteria for having a sexual disorder such as voyeurism, and deemed him a "low risk" to re-offend if he were in fact convicted of a sexual offense.

2. Dr. Reavis's Report

Dr. Reavis performed a post-conviction evaluation for the Probation Department to determine Kaye's risk of sexual re-offense, including whether community safety required any interventions. He noted that his report should not be considered a "complete psychosocial evaluation," and he did not "conduct a clinical interview." Instead, he relied on Dr. Lehman's report and other documents including the: (1)

Presentence Investigative Report; (2) Criminal History; (3) Substance Abuse History; (4) Static 99-R [measurement of a perpetrator's risk of committing new sexual crime]; (5) Structured Risk Assessment; and (6) Psychopathy Checklist.

Dr. Reavis concluded that "Mr. Kaye appears to have engaged in 'hypersexual' behavior, albeit over a relatively short time period." He opined that "for an 8-week time period Mr. Kaye's behavior rose above a threshold at which a diagnosis of Voyeurism was met." Ultimately, Dr. Reavis determined that Kaye: (1) was a "low-moderate risk" for sexual re-offense; (2) did not have a sexual interest in children; and (3) did not receive pleasure from sadistic sexual activity. He concluded that no interventions were necessary to ensure the safety of the community.

The Review Department did not view these reports as evidencing any rehabilitation by Petitioner or providing any assurance that Petitioner was then rehabilitated and fit to practice law. That assessment was not only implicit in the Review Department's recommendation that Petitioner remain suspended until he provides proof of his rehabilitation and fitness to practice but also was expressly stated by the Review Department in its opinion:

His misconduct was not the result of an identified emotional problem, he offered no explanation for repeatedly committing the offenses, and Dr. Reavis opined that Kaye was a "low-moderate" risk of sexual re-offense. Thus, we cannot say Kaye's misconduct was aberrational, caused by transient emotional problems, or unlikely to recur.

(State Bar Ex. 1, pp. 8-9.)

Petitioner relies to some significant degree in his petition on the same character declarations that were written and submitted to this court in 2012 as part of the original disciplinary proceeding. None of those declarations include any statement or other persuasive evidence that Petitioner has been rehabilitated or has the present requisite fitness to practice. Instead, the declarations only express the various declarants' opinions in 2012 that Petitioner had always been a person of good character, despite his eight unexplained acts of moral turpitude. That provides little or no assurance that the misconduct will not recur. Further, whether any of those same individuals would offer comparable opinions today or make any comments regarding

Petitioner's rehabilitation is left by Petitioner for this court to speculate. Such speculation does not provide persuasive evidence on an issue for which Petitioner has the burden of proof.

Further, Petitioner has not provided any explanation regarding the cause of his repeated lapses of moral judgment; he has never undergone any therapeutic or psychological counseling as a result of those prior transgressions; and he has expressed in this proceeding an unwillingness to participate in any such counseling or therapy, based on his view that any such therapy would serve no purpose. Instead, he merely provides his personal assurance to this court that the eight transgressions were aberrant occurrences and will not be repeated. More is required before this court can be so confident. When the cause of an individual's prior depravity remains unknown, it is difficult for this court to conclude that such depravity has been either cured or permanently controlled. As stated by Dr. Reavis in his 2011 report: "Since the defendant does not currently understand his own behavior, it seems he is at some risk of reoffending." (Pet., Ex. A, p. 4.) This is especially true given the indications in Dr. Reavis's report that Petitioner's improper activities and interests were far more extensive than what he had admitted to Dr. Lehman – and possibly even to himself.

The evidence also fails to demonstrate that Petitioner has lived an exemplary life since his prior misconduct. In his petition, Petitioner offers no evidence of any community service, charitable work, or other good deeds. He merely points to the lack of any arrests or record of other deviant misconduct since 2010. The absence of problems, without more, fails to provide proof that Petitioner has lived an exemplary life since being suspended or has the requisite present fitness to practice. This is especially true here where Petitioner was on either criminal or disciplinary probation throughout most of that same time, including being subject to random checks including polygraph exams.

Moreover, the State Bar presented proof that Petitioner has actually failed to live an exemplary life since being suspended in 2014, because he violated the statutory prohibition against holding himself out as an attorney by maintaining two websites until mid-April 2016 in which he identified himself as an attorney and indicated his ongoing availability to do trial work. Such representations by Petitioner while he was actually suspended constitute a violation by him of sections 6125, 6126, and 6068, subdivision (a), of the State Bar Act. (Bus. & Prof. Code, § 6000 et seq.) It cannot be said that Petitioner was unaware of his websites during the period of his actual suspension or had forgotten about them. Instead, he has acknowledged receiving inquiries from potential clients as a result of the websites at various times during his actual suspension. Rather than notify those inquiring individuals that he was not eligible to practice and close down the websites during the period of his suspension (or at least add a notice in them that he was currently not eligible to practice), Petitioner merely elected to ignore the inquiries by these members of the public, who were obviously being misled by the websites. It was not until Petitioner became aware during the pendency of this proceeding that the State Bar intended to use the content of the websites as evidence to defeat his petition that Petitioner acted to close down the websites in April 2016.

Finally, because Petitioner's actions in holding himself out as an attorney violated the prohibition of the State Bar Act against the unauthorized practice of law (see, e.g., *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90-91, citing *In re Naney* (1990) 51 Cal.3d 186; *Arm v. State Bar* (1990) 50 Cal.3d 763, 775; and *In re Cadwell* (1975) 15 Cal.3d 762, 770), the State Bar argues correctly that he has not strictly complied with the conditions of his probation, which required him to comply with the provisions of the State Bar Act. It also points out that Petitioner routinely misrepresented to the Office of Probation in his quarterly reports that he had complied with both the conditions of his probation and the State Bar Act.

For all of the above reasons, this court concludes that Petitioner has failed to present persuasive evidence that he has been rehabilitated and has the present fitness to practice law.

Petitioner's Present Learning and Ability in the General Law

The court also concludes that Petitioner has failed to provide sufficient evidence that he now has the requisite present learning and ability in the general law.

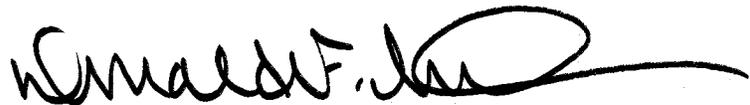
Since even before he was suspended from the practice of the law in 2014, Petitioner has not worked in any sort of job that keeps him abreast of legal issues and/or procedures. Nor is there evidence that Petitioner has undertaken sufficient studies or made other efforts in the last 18 months to remain conversant with the general law. Instead, the only evidence offered by Petitioner on that issue is the fact that he passed the MPRE “on the first attempt;” that he took and successfully completed the State Bar’s Ethics School in October 2014; and his statement, uncorroborated by any documentation, that he complied with his 25-hour MCLE requirement for the three-year period ending January 31, 2015. Such evidence is not sufficient to provide satisfactory evidence of Petitioner’s present knowledge and ability in the general law. The State Bar’s Ethics School and the MPRE are focused entirely on issues of legal ethics and provide little evidence that Petitioner has any present knowledge or ability regarding the general law. While Petitioner’s completion of 25-hours of MCLE training during the three-year period ending in January of 2015, might provide some evidence of his present knowledge, there was very little evidence provided by Petitioner regarding either the nature of the classes taken by him or when those classes were taken during the three-year period. In sum, Petitioner’s meager showing falls far short of providing satisfactory evidence of his present learning and ability in the general law. (*In the Matter of Henschel* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 867, 881-882 [100 hours of CLE did not establish proof of present learning and ability]; *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 225, 228 [50 hours of CLE did not constitute

proof of requisite general knowledge in reinstatement case]; see also *In the Matter of Ainsworth* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 894, 900; *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373, 385.); cf. *In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 577 [attorney established legal learning and ability by completing 52 hours in MCLE courses and working as a paralegal while on actual suspension]; *In the Matter of Terrones, supra*, 4 Cal. State Bar Ct. Rptr. at p. 301 [100 hours of educational programs and 200 hours studying estate planning, taxation, and other business related laws was adequate education regarding general law].)

CONCLUSION

While there is reason to believe that petitioner **David Taylor Kaye** may be able in the future to provide proof of his meeting the standards set forth in standard 1.2(c)(1), this court finds that he has not yet done so. Accordingly, his petition for relief from actual suspension is DENIED.

Dated: July 8, 2016



DONALD F. MILES
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar, rule 5.400(B); Code Civ. Proc., §§ 1011, 1013]

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. Following standard court practices, in the City and County of Los Angeles, I served a true copy of the following document(s):

DECISION DENYING PETITION FOR RELIEF FROM ACTUAL SUSPENSION

as follows:

- By OVERNIGHT MAIL by enclosing the documents in a sealed envelope or package designated by an overnight delivery carrier and placing the envelope or package for collection and delivery with delivery fees paid or provided for, addressed as follows:

**DAVID TAYLOR KAYE
1892 MATIN CIRCLE #173
SAN MARCOS, CA 92069**

**COURTESY COPY USPS:
DAVID T. KAYE
LAW OFC DAVID T KAYE
PO BOX 461473
ESCONDIDO, CA 92046**

- By PERSONAL MAIL 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:

**DREW MASSEY
STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
845 S. FIGUEROA STREET
LOS ANGELES, CA 90017-2515**

I hereby certify that the foregoing is true and correct. Executed at Los Angeles, California, on July 8, 2016.



Tammy Cleaver
Case Administrator
State Bar Court