STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ERNEST LINFORD ANDERSON

A Member of the State Bar

Nos. 88-C-14303, 88-C-14545

Filed September 21, 1992; as modified, March 10, 1993

SUMMARY

After a consolidated hearing on respondent's two conviction referrals for drunk driving in 1985 and 1988, one of which had been remanded by the review department, the hearing judge concluded that the facts and circumstances of the convictions, including respondent's three prior drunk driving convictions, did not involve moral turpitude but did involve other misconduct warranting discipline. The hearing judge recommended that respondent be suspended for one year, stayed, with probation for three years and a thirty-day actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

The examiner sought review, contending that respondent's most recent criminal actions, viewed in light of his past record, involved moral turpitude, and that respondent should be actually suspended for a minimum of one year. The review department affirmed the findings and legal analysis in the hearing judge's decision, holding that while respondent's conduct was very serious, posed a danger to society, and warranted discipline, it did not fall within the definition of moral turpitude. Although not applying standard 1.7(b) strictly to require disbarment of respondent for his third disciplinary matter, the review department considered as an aggravating circumstance respondent's prior disciplinary record, consisting of two reprovals for inattention to clients' needs. The department concluded that the seriousness of respondent's misconduct merited a greater actual suspension than 30 days. It recommended a 60-day actual suspension and adopted the remainder of the hearing judge's discipline recommendation.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Tom Low, James L. Crew

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1528 Conviction Matters—Moral Turpitude—Definition
Although drunk drivers pose a extreme danger to society, the Supreme Court has held that an attorney's conviction for drunk driving does not per se establish moral turpitude, even when the attorney has prior convictions for that offense. The Court has also determined that the more serious crime of gross vehicular manslaughter while intoxicated does not per se involve moral turpitude.

[2] **1528 Conviction Matters—Moral Turpitude—Definition**
The determination whether the facts and circumstances of an attorney's criminal conviction involved moral turpitude is a matter of law. The concept of moral turpitude does not fit a precise definition; it is a commonsense concept, designed to protect the public. It is measured by the morals of the day and may vary according to the community or the times.

[3 a, b] **1528 Conviction Matters—Moral Turpitude—Definition**
1691 Conviction Cases—Record in Criminal Proceeding
The determination of whether an attorney's conviction of certain crimes not involving moral turpitude per se should give rise to discipline, and on what basis, is not always an easy task. When the State Bar Court is asked to decide after hearing whether moral turpitude is involved in an attorney's conviction, the determination must be based on the facts and circumstances surrounding the conviction.

[4] **691 Aggravation—Other—Found**
1699 Conviction Cases—Miscellaneous Issues
An attorney's criminal misconduct is aggravated when the attorney's previous experiences demonstrate that the attorney was aware of the issues involved in the criminal behavior.

[5] **720.30 Mitigation—Lack of Harm—Found but Discounted**
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1528 Conviction Matters—Moral Turpitude—Definition
In order to determine that a crime involved moral turpitude, specific resulting harm need not be shown. Conduct which poses a danger to the public, such as drunk driving, is no less serious because it did not result in death or injury.

[6 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1527 Conviction Matters—Moral Turpitude—Not Found
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found
In analyzing whether a conviction for drunk driving involves moral turpitude, such factors as a prior conviction for drunk driving, a violation of criminal probation, and a high blood alcohol level have been held insufficient to warrant a moral turpitude finding. Where respondent had several drunk driving convictions and was aware of the problems of drunk driving due to past prosecutorial experience, and where the circumstances of respondent's crimes involved threats to peace and safety and confrontations with law enforcement officers, respondent's misconduct approached but did not cross the moral turpitude line, but did constitute misconduct warranting discipline.

[7 a-c] **511 Aggravation—Prior Record—Found**
691 Aggravation—Other—Found
740.10 Mitigation—Good Character—Found
750.10 Mitigation—Rehabilitation—Found
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
Where respondent's drunk driving convictions involved more serious misconduct than in prior reported disciplinary cases involving drunk driving, including repeated abusive conduct with law enforcement officers, and respondent had two prior disciplinary reprovals, but respondent presented favorable evidence of professional ability and character references as well as efforts toward overcoming his addiction to alcohol, a 60-day actual suspension was appropriate to serve the aims of attorney discipline and, coupled with three years of probation, to assist in convincing respondent to deal with his alcohol abuse problems seriously.

[8 a, b] **511 Aggravation—Prior Record—Found**
801.41 Standards—Deviation From—Justified
806.59 Standards—Disbarment After Two Priors
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
A literal application of standard 1.7(b) would call for disbarment of any attorney who is found culpable in a third disciplinary proceeding, unless compelling mitigating circumstances predominate. However, this standard must be applied in light of the nature and extent of the prior record. Where respondent's prior record of two reprovals involved inattention to the needs of clients, misconduct of a different nature than the drunk driving convictions involved in respondent's third proceeding, respondent's prior disciplinary record did not warrant disbarment, but did constitute a proper aggravating factor.

ADDITIONAL ANALYSIS

Aggravation
Found
561 Uncharged Violations
Mitigation
Found
725.11 Disability/Illness
Discipline
1613.06 Stayed Suspension—1 Year
1615.02 Actual Suspension—2 Months
1617.09 Probation—3 Years
Probation Conditions
1024 Ethics Exam/School

OPINION

STOVITZ, J.:

These matters return to us on the State Bar examiner's request for review after our remand for consolidation of two conviction referrals involving respondent, Ernest L. Anderson. (See *In the Matter of Anderson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 39.) As a result of the record made on remand in the consolidated proceeding, we have detailed findings of fact by the hearing judge on four specific instances of respondent's drunk driving: two in 1983, and one each in 1985 and 1988. In addition, on remand, the judge considered carefully the issue of moral turpitude and all issues bearing on the aggregate degree of discipline. She concluded that the facts and circumstances surrounding respondent's conduct did not involve moral turpitude, but showed conduct warranting discipline under *In re Kelley* (1990) 52 Cal.3d 487. She recommended a one-year suspension, stayed on conditions of a three-year probation and a thirty-day actual suspension.

The State Bar's request for review contends that respondent's most recent actions, viewed in light of his past record, involved moral turpitude and that, at a minimum, respondent should be actually suspended for one year. Before us, respondent urges that we affirm the hearing department findings, conclusion and recommended discipline. While we affirm the hearing judge's findings and legal analysis, we have determined on balance that respondent's conduct merits a longer actual suspension than that recommended by the hearing judge, given respondent's record of prior discipline and the serious nature of the misconduct at issue in the consolidated cases before us. We will, therefore, recommend to the Supreme Court a one-year stayed suspension, a three-year probation term on the conditions outlined in the hearing judge's decision and a sixty-day actual suspension.

I. FACTS

In this conviction referral proceeding, neither party has disputed the hearing judge's thorough findings. They are fully supported by the record. We adopt them and summarize them briefly.

A. 1979 Incident

The parties stipulated that on January 15, 1979, respondent was arrested and charged in the Municipal Court, San Leandro-Hayward Judicial District, with drunk driving.[1] In April 1979, he pled guilty to speeding (Veh. Code, § 22350) and was fined approximately $750.

B. 1983 Incidents

In July 1983, an Alameda County deputy sheriff responded to a disturbance call placed by a business in the Hayward area. He noticed respondent inside the business. He was exuding a heavy odor of alcohol and his speech was slurred. Respondent gave the deputy his attorney-at-law business card. He possessed an expired driver's license. The deputy told respondent he appeared to be intoxicated and that he should not drive. The deputy directed respondent to a telephone and told him to call a friend or taxi. Respondent and the deputy left the business separately. A short time later, the deputy observed respondent enter his car and drive away. Unable to follow respondent's car in heavy traffic, the deputy radioed for police assistance. About five minutes later, the deputy learned that a California Highway Patrol unit had stopped respondent's car. The deputy drove to the scene of the stop and observed that respondent was verbally abusive to and uncooperative with the highway patrol officer.

After negotiations, in October 1984, respondent was convicted in the Municipal Court, San Leandro-Hayward Judicial District on plea of nolo contendere to two counts of drunk driving, one arising out of the July 1983 incident, discussed herein, and another arrest arising out of a December 1983 incident, the circumstances of which are not part of our record because the parties did not submit any additional evidence. Also, in October 1984, respondent was convicted of one count of driving without a valid license in July 1983. Based on his pleas, he was

1. We follow the Supreme Court's use of the term "drunk driving" 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. 494, fn. 3.)

sentenced to two days in county jail, with credit for time served, three years of court probation and fined $674.

C. 1985 Incident

On January 31, 1985, respondent had 10 to 12 alcoholic drinks after work. He then drove and was stopped by a Hayward police officer who saw respondent's car drift into the next traffic lane, causing a car in that lane to swerve across a double yellow line to avoid a collision. When exiting his car, respondent stumbled and fell against it. The officer smelled alcohol on respondent's breath and noticed that respondent's eyes were glassy and bloodshot and his speech slurred. As the officer was preparing to administer a sobriety test to respondent, respondent pushed the officer backwards, causing him to fall. Respondent got back into his car and, when the officer tried to turn off the car's ignition, respondent pushed the officer's hand away, put the car in gear and drove off into the night at high speed without headlights. The officer suffered a minor cut to his hand during this incident.

Unable to pursue respondent, the officer obtained his home address and arrested him there without incident. A later chemical test showed respondent's blood alcohol level was 0.20 and respondent knew when he was driving that he was drunk. When stopped, he was still on probation from his 1983 drunk driving incidents. From the 1985 incident, respondent pled guilty to drunk driving, was sentenced to three years probation and fined $900. Specific probation conditions included that respondent not drive with any measurable blood alcohol level and that he not refuse to submit to a chemical test of blood alcohol if arrested for drunk driving. In 1986, respondent's formal probation was converted to an unsupervised community release.

D. 1988 Incident

In April 1988, after a felony trial was unexpectedly continued in which respondent was representing the defendant in San Jose, respondent returned to the area of his law office near Hayward. It was lunch time. Respondent had been up since very early in the morning and had no further appointments that day. He went to two nearby restaurants to have lunch but instead drank several glasses of wine in each. He does not recall getting into his car in the shopping center parking lot in which the restaurants were located, but several citizens saw him do that and telephoned the Hayward police. There is no evidence that respondent's vehicle left the shopping center. The responding officer saw that respondent's eyes were watery and bloodshot, smelled alcohol about him and noticed he swayed while standing and his speech was slurred. The officer concluded that respondent was unable to safely care for himself and was subject to arrest for public intoxication. (Pen. Code, § 647, subd. (f).) While the two were talking, respondent reached out and touched the officer's holstered service revolver. The officer told respondent not to do that again. After further discussion, respondent appeared to start leaving the scene and the officer arrested respondent. During the arrest, respondent struggled with the officer who had to place respondent on the ground to handcuff him. An assisting officer observed respondent kicking the arresting officer.

Respondent was transported to jail and on the way threatened to have the officer's job and home, then started to cry and said he was suicidal. Respondent was uncooperative and aggressive during part of the booking process. When asked to take a chemical test, respondent changed his mind three or four times as to the type of test he would take or whether he would take a test at all. During this process, he again had to be brought to the ground to be handcuffed so that he could be transported for testing. He later ceased his uncooperative behavior, but displayed conduct which resulted in his admission to a psychiatric facility for observation.

From this incident, in 1989 respondent pled nolo contendere to drunk driving. He was sentenced to 120 days in county jail with credit for 5 days and the balance stayed. He was also given three years conditional release and the 1988 revocation of his 1985 probation was rescinded and his probation restored.

II. MITIGATING AND AGGRAVATING EVIDENCE IN THE RECORD

In about 1970 or 1971, just after his admission to practice law, respondent was employed by the

Alameda County District Attorney's office. At that time, he prosecuted 30 to 40 drunk driving cases to jury trial. He was aware of what a person driving under influence of alcohol could do to himself or to others. At times, during mid-day, respondent would call his office after having three to five alcoholic drinks and cancel one or two client appointments. Although not the subject of findings, the record also shows that respondent drove while intoxicated on more occasions than the incidents set forth above, but was not arrested.

As part of his sentencing in 1985, respondent participated in a drunk driving program. He took the drug Antabuse for about six months. After completing that program, he fell back into a pattern of drinking alcoholic beverages after work, but switched to drinking only wine. Since June 1988, respondent has stopped consuming alcohol.[2] Respondent has had regular psychiatric counseling for major depression as well as alcoholism. As found by the hearing judge, respondent's treating psychiatrist, Dr. Whitten, concluded that respondent's alcoholism and depression were so joined that it was not possible to treat one without treating the other. Respondent has maintained weekly sessions with Dr. Whitten.

Respondent testified at length about the events surrounding his 1988 arrest. He recalled his drinking wine at the restaurant, being arrested, a few details about his booking and jail stay, but few other details.

At the time of the evidentiary hearings, respondent was not participating in an alcohol treatment program. He had attended Alcoholics Anonymous meetings only three to four times in the six months prior to those hearings. One of respondent's witnesses, Lee Estep, a recovering attorney with 20 years of experience in assisting in the recovery from substance abuse of other attorneys, emphasized the need for ongoing involvement in an alcohol recovery program to insure a successful recovery. Although one is never "cured" of alcohol addiction, Estep testified that respondent's maintenance of sobriety past the one and one-half year point was very significant in his favor.

In aggravation, this is respondent's third disciplinary proceeding. He was privately reproved in 1983 and publicly reproved in 1984. Both prior reprovals were by stipulated disposition. Respondent's private reproval was based on his admissions in substance that in representing a client in a construction dispute in 1977, respondent performed initial services and conducted legal research, but wilfully failed to perform services despite his client's written and telephonic requests to proceed. In aggravation, respondent wilfully failed to respond to a local bar association client relations committee inquiry and initially failed to respond to the State Bar inquiries of respondent on his client's behalf. In mitigation, respondent had agreed to restore all attorney fees he had received from this client. He offered to prove that some of his failures to communicate were inadvertent and that he had since improved his office practices.

Respondent's public reproval was based on his admissions that he failed to: communicate with his clients, use reasonable diligence on their behalf and promptly deliver their papers after conduct tantamount to withdrawal. As factors bearing on discipline, the parties agreed that respondent had attempted to assist his clients in several other ways and had improved his office practices.

The hearing judge found the circumstances surrounding respondent's arrests in 1985 and 1988 also aggravating, particularly the altercation with the officer in 1985 and his erratic behavior and refusal to cooperate with the officers in the 1988 incident. Further aggravation was respondent's continued drunk driving, given his experience in having prosecuted drunk driving cases, his prior drunk driving arrests and knowledge of the dangers of drunk driving.

In mitigation, respondent offered impressive character evidence. Live witnesses had testified in

2. Finding of fact 67 (decision p. 18) implies that respondent ceased his regular consumption of alcohol in April 1988. Respondent's own testimony was that he occasionally tasted wine at dinner parties until June 1988. (R.T., Sept. 30, 1990, p. 48.)

his favor at the earlier hearing and he introduced several character letters in evidence on remand. None of these witnesses alleged that any problem respondent might have had with alcohol ever interfered with his representation of clients. Three of respondent's character letters were from superior court and municipal court judges in Alameda County who attested to his legal skills and competence. None of the judges expressed the view that respondent had shown any impairment on behalf of clients and two of the judges were surprised to learn that he had a problem with alcohol abuse. The hearing judge considered this character evidence mitigating.

III. CULPABILITY DETERMINATION

[1] There is no question as to the extreme risk of danger to our society posed by the drunk driver. In our earlier opinion in this proceeding, we cited the Supreme Court's own expression of concern in this regard. (*In the Matter of Anderson*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 44, fn.10.) Yet despite this risk to society, in recent times, our Supreme Court has held that an attorney's conviction of drunk driving even with prior convictions of that offense does "not per se establish moral turpitude." (*In re Kelley*, *supra*, 52 Cal.3d at pp. 492, 494.) The Supreme Court has also determined that the more serious crime of gross vehicular manslaughter while intoxicated is not one per se involving moral turpitude. (See *In re Conviction of Van Dusen* (S009736) min. order filed October 10, 1990 [conviction of Pen. Code, §191.5].)

Since respondent's offenses do not involve moral turpitude per se, our first step of analysis of the culpability issue is whether the facts and circumstances surrounding respondent's convictions involved moral turpitude or other misconduct warranting discipline. The principles and definitions of moral turpitude for attorney convictions of crime have been discussed and applied often by our Supreme Court over many years.

[2] Moral turpitude determinations are a matter of law. (*In re Higbie* (1972) 6 Cal.3d 562, 569.) Moral turpitude is not a concept that fits a precise definition (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110), but has been consistently described as an "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." (*In re Craig* (1938) 12 Cal.2d 93, 97.) The Court has characterized the moral turpitude prohibition as a flexible, "commonsense" standard (*In re Mostman* (1989) 47 Cal.3d 725, 738) with its purpose not the punishment of attorneys, but the protection of the public and the legal community against unsuitable practitioners. (*In re Scott* (1991) 52 Cal.3d 968, 978.) It is measured by the morals of the day (*In re Higbie*, *supra*, 6 Cal.3d at p. 572) and may vary according to the community or the times. (*In re Hatch* (1937) 10 Cal.2d 147, 151.)

[3a] Although the Supreme Court's definitions of moral turpitude have been consistent over time, the determination of whether an attorney's conviction of certain crimes not involving moral turpitude per se should give rise to discipline, and on what basis, has not always been an easy task. Indeed, it has been one of the few issues of attorney regulation to sharply divide our Supreme Court over the years. (*In re Kelley*, *supra*, 52 Cal.3d 487 [drunk driving]; *In re Rohan* (1978) 21 Cal.3d 195 [wilful failure to file income tax returns].) The parties to this proceeding and this department recognize that the hearing judge appreciated the difficulty of this question, devoting over eight pages of her decision to its analysis.

[3b] When we are asked by the Supreme Court to decide after hearing whether an attorney's conviction is one involving moral turpitude, we must base our determination on the facts and circumstances surrounding the conviction. (*In re Carr* (1988) 46 Cal.3d 1089, 1091.) As noted by the hearing judge, there are few Supreme Court disciplinary opinions to guide us on this question in the area of vehicle-related criminal convictions. We recognize that the specific facts in a case may influence the legal analysis and make drawing general principles for future cases much more difficult. The hearing judge's careful delineation of the similarities and contrasts of this case to *In re Alkow* (1966) 64 Cal.2d 838; *In re Kelley*, *supra*, 52 Cal.3d 487, and *In re Carr*, *supra*, 46 Cal.3d 1089, demonstrates the struggle entailed in arriving at a reasoned determination of the issue of moral turpitude.

When we remanded this case for consolidation and rehearing, we noted in passing some apparent similarities between the stipulated facts and the facts in the *Alkow* case and suggested there might be some differences as well which the hearing judge might take into account. (*In the Matter of Anderson, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 44-45, fns. 10, 12.) After our remand, the Supreme Court decided *In re Kelley, supra*, 52 Cal.3d 487, holding that the facts and circumstances of that attorney's conviction of drunk driving, with a prior such conviction, did not involve moral turpitude, but did involve misconduct warranting discipline. The hearing judge concluded that the facts of the present case were closer to *Kelley* than to *Alkow*. As we shall discuss, we agree with the hearing judge.

In *Alkow*, the attorney was convicted of vehicular manslaughter after running down a pedestrian, an accident which was caused in part by Alkow's defective vision. Prior to the accident, Alkow had been denied renewal of his driver's license because of his impaired vision, and in the little more than three years from his license expiration to the fatal accident, Alkow was convicted of more than 20 traffic violations. At the time of the accident, Alkow was on probation for three separate incidents, all three finding that Alkow drove without a license and in two cases, he failed to observe a right of way or a stop sign. Alkow was subject to probation conditions requiring him to obey the law and not to drive without a license. The Supreme Court determined that Alkow showed "a complete disregard for the conditions of his probation, the law and the safety of the public" and concluded that under its applicable definitions, respondent's criminal conduct involved moral turpitude. (*In re Alkow, supra*, 64 Cal.2d at p. 841.)

Respondent also had a prior conviction record of three driving offenses, one in 1979 and two in 1983, all involving alcohol. In contrast, they are not as numerous as the more than twenty citations in the *Alkow* case, they are not as proximate to each other (over five years from January 1979 to December 1983) and there is more time between them and the incidents here.

[4] Both Alkow and respondent were aware of the circumstances which should have prevented either from driving and thus endangering the public. Alkow's impaired vision was well known to him and resulted in the denial of his driving privileges. He was cited repeatedly for driving without a license, the last time two months before he killed the pedestrian. Respondent had prosecuted drunk drivers early in his legal career, demonstrating his general awareness of the issue and exacerbating the impact of his own misconduct. (See *Seide* v. *State Bar* (1989) 49 Cal.3d 933, 938 [applicant's conduct surrounding conviction for drug trafficking more egregious due to prior law enforcement background]; *In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 251 [prior employment of attorney as deputy district attorney and FBI agent aggravated tax fraud conviction].) Further, respondent was conscious of his own drinking and driving problem because of his arrests; but, as noted by the hearing judge, alcohol use impairs judgment. Respondent's decision on occasion to drive when intoxicated is neither condoned nor excused, but it differs to a significant degree from Alkow's conscious, unimpaired decision to continue to drive with inadequate eyesight and without a license after *numerous* motor vehicle citations.

[5] The fact that respondent's drunk driving did not result in serious injury or death to another was merely fortuitous. It does not render respondent's conduct any less serious. While the death of the pedestrian appears to have been a factor in the moral turpitude determination in the *Alkow* case, we would not state that specific harm must always be shown to support a moral turpitude conclusion. As we found in *In the Matter of Frascinella* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 543, 550, physical harm was not required to show moral turpitude where an attorney brandished a replica firearm in a life-threatening manner, through deliberate conduct demonstrating his flagrant disregard for human life.[3]

3. In contrast, in *In the Matter of Carr* (1992) 2 Cal. State Bar Ct. Rptr. 108, there were insufficient facts in the record regarding the circumstances of the offenses to conclude that moral turpitude was involved. (*Id.* at p. 116.)

The Court's limited discussion in *In re Carr*, *supra*, 46 Cal.3d 1089, a 1988 consolidated case of two convictions for drunk driving, provides little guidance. In that case, there is little factual recitation or discussion, and, on the issue of moral turpitude, a succinct adoption of the State Bar Court's recommended conclusion that moral turpitude was not involved. Carr was on criminal probation at the time of his second drunk driving offense. Respondent was on unsupervised probation at the time of his 1988 arrest. Carr had prior discipline from two consolidated cases of recent vintage, which was considered by the Court on the issue of degree of discipline. The Court adopted the review department's recommended discipline of six months actual suspension consecutive to Carr's then-current suspension. Respondent's prior attorney misconduct was proximate to his drunk driving arrests in 1983 and was not as serious, resulting only in reprovals.

As we stated, *ante*, since our remand of this matter, the Supreme Court has issued its opinion in *In re Kelley*, *supra*, 52 Cal.3d 487. We believe the present case to be closer to *Kelley* than to *Alkow*. In *Kelley*, an attorney was referred for State Bar hearing after she had been convicted twice of drunk driving within a 31-month period and had violated her probation in the first case by virtue of her second arrest. On her first arrest, Kelley had driven her car into an embankment and was arrested at the scene. Her probation conditions included obeying all laws and participating in an alcohol abuse program. While on probation, she was stopped by a police officer while driving home, initially refused a field sobriety test, and attempted to try to talk the officer out of that arrest. A second officer was called to the scene, assisted in the field sobriety test of Kelley, and arrested Kelley when she failed it. Her blood alcohol on the second arrest was noticeably above legal limits (in the range of 0.16 to 0.17). No one was injured in either of her drunk driving offenses.

At the discipline hearing, Kelley presented evidence that she lacked any prior discipline or criminal record, had participated in extensive community service and complied with all her probationary terms since her second conviction. The Court found that Kelley's conduct did not involve moral turpitude, but rather constituted other misconduct warranting disciplinary action. In response to Kelley's challenge to discipline for conduct not constituting moral turpitude, the Court found the circumstances of her misconduct were linked in two ways to her fitness to practice law. Kelley acted in violation of a court order setting forth the conditions of her probation in the first case by her second arrest and conviction, actions which the Court found were contrary to her duties as an officer of the court and as a practitioner. The circumstances of her two arrests and convictions within 31 months demonstrated to the Court's satisfaction an alcohol abuse problem which had entered into Kelley's personal life and which the Court found to have a potentially damaging effect on Kelley's practice and clients. These two grounds were sufficient support for the Court's exercise of disciplinary authority to protect the public. Noting that there had been no specific harm caused to the public or the courts, as well as Kelley's significant mitigating evidence, the Court ordered Kelley publicly reproved and directed her to participate in the State Bar's program on alcohol abuse.

[6a] The criminal violations in *Kelley*, *Carr* and the instant matter are the same, and such factors as a prior conviction for drunk driving, the violation of court-ordered probation and a high blood alcohol level at arrest, were insufficient in the Court's view to warrant a finding of moral turpitude. But the nature of the incidents and their greater number in this case indicate a more serious threat to the public and to respondent's fitness to practice and pose a closer question than in *Kelley* as to whether moral turpitude might be involved. Kelley's history of alcohol abuse is much shorter than respondent's and was not coupled with a prior awareness of the problem through professional, prosecutorial experience, as is the case with respondent. Kelley's crash into the embankment on her first arrest and her refusal to

cooperate with arresting officers in her second arrest were not as threatening to the peace and safety nor as confrontational as in three of respondent's arrests.[4]

[6b] On balance, we agree with the hearing judge that this case, while more serious than the *Kelley* and *Carr* matters, approaches, but does not yet cross, the moral turpitude line. For the reasons we have discussed, *ante*, we have concluded on balance that this case is more akin to the Supreme Court's more recent *Kelley* decision than to its *Alkow* case. We therefore adopt the hearing judge's conclusion that the facts and circumstances surrounding respondent's drunk driving convictions involved other misconduct warranting discipline.

IV. DEGREE OF DISCIPLINE

[7a] The examiner has requested an increase in discipline from the recommended thirty days actual suspension, as a condition of probation, to a one-year actual suspension. We agree with the examiner that respondent's criminal conduct is more serious than in the *Kelley* and *Carr* cases. Six months of prospective actual suspension as part of a probationary suspension was imposed in *Carr*. No details appear in the Supreme Court's *Carr* opinion as to the surrounding facts of the convictions of drunk driving, but *Carr* did have a recently-imposed suspension in another matter. No moral turpitude was found to surround Carr's offenses. In *In re Kelley*, *supra*, 52 Cal.3d 487, the attorney's drunk driving convictions were notably less aggravated and fewer in number than the current case and Kelley had no previous discipline. Kelley also presented extensive evidence concerning her community service. Public reproval on conditions was ordered. Respondent's evidence of professional ability and character references presented in mitigation is favorable, although it does not appear as impressive as in *Kelley*. As to his rehabilitation, it is evident that respondent has made important efforts toward overcoming his addiction to alcohol, but has had no participation in any ongoing program of alcohol rehabilitation.

[8a] In the analysis of the aggravating evidence, the hearing judge did not discuss the weight to be given respondent's prior record of discipline. Since this is respondent's third disciplinary proceeding, literal application of the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("standards") would call for disbarment unless the most compelling mitigating circumstances predominate. (Std. 1.7(b).) However, under guiding case law, we look to the standards not reflexively, but, with regard to standard 1.7, with an eye to the nature and extent of the prior record. (See *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 778-780; *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 539.) In that light, respondent's priors were not remote in time, but they were of a different character—inattention to the needs of clients. **[7b]** Respondent's current convictions show no direct harm to clients' needs, but do show that he repeatedly failed to adhere to the law, jeopardized public safety, engaged in repeated abusive conduct with law enforcement officers and disregarded court probation orders. **[8b]** As a result, respondent's prior discipline is a proper factor for some aggravation.

[7c] In *In re Alkow*, *supra*, 64 Cal.2d 838, the attorney had one prior suspension for serious misconduct resulting in a three-year suspension. For his manslaughter conviction which involved moral turpitude, the Court imposed a six-month actual suspension. The prior misconduct in *In re Carr*, *supra*, 46 Cal.3d 1089, resulted in a suspension as well. For his criminal conduct, Carr was given an actual suspension of six months subsequent to his prior suspension. Respondent's prior reprovals do not carry aggravating weight equal to those matters. However, we conclude that a lengthier actual sus-

4. As we have recited, in July 1983, respondent disregarded a police officer's warning not to enter his car and drive. In 1985, his driving almost caused a collision with a car in the opposite lane of traffic. When he was stopped, he engaged in an altercation with the arresting officer, causing a minor injury to the officer, and fled the scene at high-speed flight without headlights at night. As to respondent's 1988 arrest, his conduct appeared so seriously threatening to safety that citizens who saw respondent get in his car called the police and were ready to make a citizens' arrest. Respondent tried to place his hand on the arresting officer's revolver, then tried to elude him; and, when finally arrested, resisted, requiring another officer to intervene. On his way to jail, respondent threatened one of the officers and was uncooperative.

pension of 60 days will serve the aims of attorney discipline: protection of the public, the courts and the bar; and, coupled with the conditions of probation we adopt in full from the hearing judge's decision, will assist in convincing respondent to deal at this juncture with his alcohol abuse problems seriously.

V. RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent Ernest Linford Anderson be suspended from the practice of law in this state for a period of one year; that execution of said suspension be stayed; and respondent be placed on probation for three years on the following conditions: that during the first 60 days of said period of probation, respondent shall be actually suspended from the practice of law in the state of California; and that he comply with the remaining conditions of probation numbered 2 through 14 recommended by the hearing judge in her decision filed September 30, 1991.[5]

Since we are recommending suspension, we also recommend that respondent be required to take and pass the California Professional Responsibility Examination administered by the State Bar's Committee of Bar Examiners within one year of the effective date of the Supreme Court's order in this case. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 890-891.) Finally, we adopt the hearing judge's recommendation that costs be awarded the State Bar, pursuant to Business and Professions Code section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

5. We correct what appears to be a typographical error in numbered paragraph 12, at page 41, line 2, of the hearing judge's decision. The number "10" is deleted, and the number "11" is substituted in its stead.