

Filed April 10, 2020

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of) 17-C-03687
)
DEAN EDWARD SMART,) OPINION AND ORDER
)
State Bar No. 130410.)
_____)

On November 29, 2017, Dean Edward Smart pled guilty in Orange County Superior Court to felony violations of Penal Code section 245, subdivision (a)(4) (assault with force likely to produce great bodily injury), and Penal Code section 246.3, subdivision (a) (discharging firearm with gross negligence). After his convictions were transmitted to us, we placed him on interim suspension¹ and referred the case to the Hearing Department to determine if the facts and circumstances surrounding the convictions involved moral turpitude or other misconduct warranting discipline.

The hearing judge determined that the facts and circumstances surrounding Smart’s convictions involved moral turpitude and, finding no compelling mitigation, recommended disbarment. Smart appeals. He argues that the facts and circumstances surrounding his crimes did not involve moral turpitude and his mitigating circumstances are compelling. He also requests that we reverse the judge’s findings that he lacks insight into his conduct and that his testimony was not credible, along with her reliance on hearsay statements contained in police reports that were admitted into evidence. He contends that an 18-month actual suspension would

¹ Smart’s interim suspension began on February 26, 2018, ended on March 15, and then began again on May 1. The suspension was lifted from March 16 to April 30 to allow Smart to try a case that had previously been set for trial.

be sufficient. The Office of Chief Trial Counsel of the State Bar (OCTC) requests that we affirm the disbarment recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that the circumstances surrounding Smart's convictions involve moral turpitude. While we reach different conclusions than the judge did on some of her aggravation and mitigation findings, we see no reason to disturb her credibility findings or her reliance on the hearsay statements contained in the admitted police reports. Smart has failed to establish that his actions did not amount to moral turpitude or that his mitigating circumstances are compelling, and we can discern no reason from this record to deviate from the presumptive discipline of disbarment under standard 2.15.² Accordingly, we affirm the disbarment recommendation.

I. FACTUAL BACKGROUND³

Smart was admitted to the practice of law in California on December 14, 1987, and he has been continuously licensed to practice since that time. In 2013, he moved from California to Texas. Although a Texas resident, he maintained a law office in Mission Viejo, California. From 2013 to 2015, when traveling to California to practice law, he stayed with his brother, John Smart,⁴ at his brother's home in Lake Forest, California.

² All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

³ The facts are based on the parties' pretrial written stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules of Procedure of the State Bar, rule 5.155(A).) All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.)

⁴ Further references to John Smart are to his first name only to differentiate him from his brother; no disrespect is intended.

A. Smart’s Ongoing Problems with Alcoholism Leading up to Incident

For several years prior to the events that led directly to this disciplinary proceeding, Smart suffered from alcoholism and had engaged in multiple assaults.⁵ His psychotherapist, Mel Glass, Ph.D., testified that Smart has an alcohol dependence and had been drinking heavily since 1987. He has been a patient of Dr. Glass since 2012 as a result of court-ordered psychotherapy after the 2011 assault charge. Dr. Glass diagnosed Smart with major depressive disorder, post-traumatic stress disorder, generalized anxiety, and an alcohol use disorder. Dr. Glass further testified that Smart initially underwent therapy on a weekly basis, which increased to twice a week beginning eight months prior to Smart’s disciplinary trial. At the disciplinary trial, Smart admitted that he is an alcoholic and that, while being under the influence of alcohol, he has “made the worst judgments I’ve ever made in my life.”

B. Smart Commits Assault and Discharges Firearm with Gross Negligence While Impaired

In January 2015, Smart traveled to California to try a case and stayed with John. On the night of January 16, he drank approximately 14-21 glasses of wine (around four bottles) between 5:30 p.m. and midnight. At some point after 11:00 p.m., he called a massage service that he used about every two to three weeks. That night, he secured the services of Sherri Kench.

Upon arriving at the Lake Forest residence with her driver and security guard, Joshua Reagan,⁶ Kench was greeted at the front door by Smart, whom she later described to police as not sober. Smart advised Kench to be quiet since John was sleeping. She was concerned about

⁵ Smart’s medical records establish that he was charged with assault with a deadly weapon after he threatened to kill a man who rang his doorbell on Christmas Eve in 2011; he “groped” a woman on her buttocks in 2012; and a SWAT team was called to Smart’s residence after he drew a gun on a tow-truck operator in 2013.

⁶ Neither Reagan nor Kench testified during the disciplinary trial. However, as noted by the hearing judge, both Reagan’s and Kench’s recollection of the events were detailed in the Orange County Sheriff Department’s crime reports—which were admitted into evidence at the disciplinary trial without objection or limitation.

Smart's inebriated state and the fact that an unknown third person was in the residence, but she followed him to an upstairs bedroom where he handed her \$220 in cash. Kench then took the money downstairs and gave it to Reagan who was waiting outside by the front door. She deliberately left the front door unlocked before returning upstairs to Smart's bedroom where she intended to dance for him.

What happened next is sharply disputed. According to Kench's and Reagan's statements to the police, Smart undressed and wanted sex. She refused and explained that she was there only to dance for him. Smart then grabbed her, threw her on the bed, and got on top of her. Fearing sexual assault, she screamed out to Reagan for help. Hearing her screams, Reagan began pounding on the front door. When Kench continued to scream, Reagan pounded on the front door again. Smart then ran downstairs naked, opened the front door, and attacked Reagan, yelling that he was going to kill him. A violent fight ensued.

At trial, Smart denied that he asked for sex or touched Kench. According to Smart, he said something like, "You're not the lady in the picture" to Kench, which he says offended her. She then told Smart that she wanted to leave. He replied, "Fine, but give me my money back." Kench then told him she would text her driver saying that he was assaulting her. Smart claims that he then feared someone would break into the house in response to her text, so he ran down the stairs toward the front door. When Smart was about six feet from the door, Reagan came charging in, spraying him with pepper spray, and running toward the bottom of the stairs. According to Smart, he tackled Reagan because he believed that he and his brother were in danger.

Kench viewed the fight from the upstairs landing where she was joined by John, who had been awakened by Smart's yelling that Kench and Reagan were going to rob him. Kench told John they were not there to rob anyone, Reagan was her security, and they wanted to leave. She described John's look as dumbfounded. During the altercation, Smart, a third-degree black belt in

martial arts, placed Reagan in a “body-triangle,” immobilizing him. He also held Reagan in a chokehold that caused him to go in and out of consciousness. While Reagan was struggling to breathe, Smart attempted to gouge out one of Reagan’s eyes. Smart told John, “This guy is going to kill me,” and instructed him to get his gun and call 911, which John did. Meanwhile, Kench descended the stairs, climbed over the two combatants, exited out the front door, and also called 911.

At trial, OCTC proffered the recordings of both John’s and Kench’s 911 calls, which the hearing judge admitted into evidence without limitation or hearsay objection. While John called 911, Reagan was struggling to escape from Smart’s chokehold. On John’s 911 recording, Smart can be heard angrily screaming, “we’re being attacked in our home;” “we need help;” “I’m being f---ing attacked;” and “get your f---ing gun.” Several times during that call, the 911 operator asked questions, which John would repeat to Smart. John would then relay Smart’s answer to the operator. During this three-way question and answer session, Reagan was able to pepper spray Smart, escape the chokehold, and run out the front door to his car and Kench. Once Reagan got away, Smart took the phone from John and spoke directly with the operator. When asked how Reagan got into the house, Smart responded that “he broke into my house.”

During her 911 call, Kench told the operator that Smart called her because he “wanted companionship” and that she was there “to hang out.” She stated that Smart had “completely hurt her friend” and “choked him out.” She also asserted that Smart “literally tried to force himself on me” and “tried to take advantage of me upstairs.” At one point, she informed the operator that Smart was getting a gun. A review of Kench’s 911 call clearly reveals that she was upset and frightened about the situation.

When Kench and Reagan ran from the house, Smart followed and fired the gun once from the front yard. When the police arrived, they were met by John and Smart standing in the

front yard. Smart was completely naked, had a bloody face, was covered with pepper spray, and was moaning in pain. Upon being questioned, John told the officers that the gun was in his garage. Both brothers acknowledged that Smart had fired it, and Smart reported to the investigating officer that he had fired the weapon into the ground. He later claimed that he shot the gun to “scare” Reagan and Kench and to teach them that “something bad could have happened” to them. An extensive police search of the front lawn failed to reveal where the weapon had actually been discharged.

Smart later passed out and was taken to the hospital. He was interviewed there by a deputy sheriff who believed that Smart was a victim of a home-invasion robbery based on information he and John had given to the 911 operator. Smart asked the deputy, “Did you see who beat me up and sprayed my balls [with pepper spray]?” When asked by the deputy if he wanted to prosecute the matter, Smart replied, “Of course.” In response to a request for a description of the assailant suspects, Smart replied, “I don't talk to you motherf---ers. You can talk to my lawyer.” When the deputy explained that the department could only assist him as a victim if he provided a detailed statement, he displayed his middle finger and said, “F--- you.”

A police investigator who also interviewed Smart testified that he was defiant, angry, and uncooperative. The investigator further testified that he interviewed Kench and Reagan separately twice. He found Kench to be fairly credible, though she did not tell the whole truth during her initial interview, and he found Reagan to be forthcoming and his story consistent.⁷

On the afternoon following the incident, the police were summoned to the home of one of John's neighbors, who discovered a bullet hole in his garage door. The police determined the bullet was fired from John's gun, went through the neighbor's garage door, and lodged in a piece

⁷ The investigator also determined that Kench and Reagan had not been truthful about photos they claimed were taken shortly after their encounter with Smart to document their injuries. According to a forensic investigation conducted on both Kench's and Regan's phones, the photos were taken many days later.

of wood inside the garage. The neighbor testified to Smart's rude reaction to his request that Smart repair the garage door. Smart visited the neighbor's house on June 9, 2015, to see the bullet hole damage. He initially offered to pay \$50, then \$100. When the neighbor rejected the offers, Smart suddenly became enraged, raised his voice, and aggressively denied any responsibility for the damage. On two later occasions, Smart would call out "How are you, asshole?" when he saw the neighbor. Ultimately, the neighbor was reimbursed \$600 in restitution from the sheriff's department.

C. Smart Pled Guilty to and Was Convicted of Two Felonies

On December 7, 2015, the Orange County District Attorney's Office filed a six-count complaint against Smart charging him with one felony count for violating Penal Code section 245, subdivision (a)(4) (assault with force likely to produce great bodily injury); two felony counts for violating Penal Code section 245, subdivision (a)(2) (assault with a firearm); one felony count for violating Penal Code section 422, subdivision (a) (criminal threats); one felony count for violating Penal Code section 246 (shooting at inhabited dwelling house); and one felony count for violating Penal Code section 246.3, subdivision (a) (discharging firearm with gross negligence). In addition, two enhancements were charged: (1) Penal Code section 12022.7, subdivision (a) (personally inflicting great bodily injury on another during the commission of a crime) and (2) Penal Code section 12022.5, subdivision (a) (personal use of a firearm in the commission of a crime).

Smart initially pleaded not guilty to all six felony counts, but later he pleaded guilty to two of them: assault likely to produce great bodily injury and discharging a firearm with gross negligence. The remaining four counts and the two enhancements were dismissed. Smart was sentenced to three years of probation and 10 days in county jail with credit for five days served and five days' good conduct.

II. STATE BAR COURT PROCEEDINGS

After OCTC transmitted the felony conviction records to this court, we placed Smart on interim suspension from the practice of law effective February 26, 2018, ending on March 15, and beginning again on May 1 and continuing until the final disposition of this proceeding. (Bus. & Prof. Code §§ 6101, 6102;⁸ Cal. Rules of Court, rule 9.10; rules 5.341 & 5.342.) Smart waived evidence of finality, and we referred the matter to the Hearing Department to determine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (§ 6102, subd. (e); rule 5.344.)

On January 28, 2019, the parties filed a stipulation as to facts and admission of documents. Following a trial and posttrial briefing, the hearing judge issued her decision on May 9, 2019. She found that several of the facts and circumstances surrounding Smart's felony convictions revealed moral turpitude: Smart not allowing Kench to leave when she asked; his use of excessive force against Reagan; his gratuitous firing of a handgun; and his deliberate misrepresentations to John and the police regarding the events on January 17, 2015, and that he was "of course" going to prosecute Kench and Reagan. Because Smart failed to establish compelling mitigating circumstances, the judge recommended disbarment. (Std. 2.15(b) [disbarment is presumed sanction for felony conviction in which facts and circumstances surrounding offense involve moral turpitude, unless most compelling mitigation circumstances clearly predominate].)⁹

⁸ All further references to sections are to the Business and Professions Code unless otherwise noted.

⁹ The hearing judge erroneously cited standard 2.5 when she meant standard 2.15, as evident by her analysis. Her analysis was properly conducted under a version of standard 2.15 that existed at the time of the disciplinary trial.

III. SMART'S CRIMINAL CONVICTIONS INVOLVED MORAL TURPITUDE

The issue before us is whether the facts and circumstances surrounding Smart's criminal convictions, which were not committed in the practice of law, constitute moral turpitude. We are guided by the Supreme Court's definition of moral turpitude: "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We find that the facts and circumstances surrounding Smart's two felony offenses meet this definition of moral turpitude, as discussed below.

A. Smart's Conduct Was Violent, Excessive, and Lacked Respect for the Law

Smart argues that he should not be found culpable of moral turpitude and contends that he never threatened nor physically restrained Kench from leaving John's house. However, as noted previously, the facts are disputed. Kench's statements in the police report claim that he pinned her on the bed and that he was on top of her while naked. She stated that she was scared and screamed to Reagan because Smart would not let her leave. Her 911 call reflects similar statements and her real fear about what transpired. The hearing judge found Kench's statements to the police credible and Smart's testimony not credible in determining that his acts against Kench involved moral turpitude.

Smart asserts that the hearing judge improperly relied on Kench's hearsay statements as evidence to support her findings. We reject Smart's argument. Under rule 5.104(D), "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." In this case, the police reports were admitted into evidence

through the stipulation without any objection or limitation by Smart. While his counsel may have objected at trial to the questions asked of the investigator, which would have elicited Kench's hearsay statements, sustaining of those objections by the trial judge has no effect on the admitted police reports and Kench's statements therein. (*In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 857 [where attorney did not object to admission of evidence, it is well settled that any objection on that point is waived]; see also *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388, fn. 5 [declarations admitted into evidence without limitation in lieu of live testimony for all purposes, including for truth of matter asserted].)

Moreover, the hearing judge is in a better position to assess the nature and quality of a witness's testimony. Here, the judge reasoned that Smart lacked credibility due to his demeanor while testifying, the character of his testimony, and his capacity to perceive and recollect events. These findings are entitled to great weight. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand".]) We find that the record lacks sufficient evidence for us to contradict either of the judge's credibility conclusions.

Smart also asserts that the physical altercation with Reagan did not involve moral turpitude because it was instinctive and that he "reacted for survival." Smart maintains that he urged John to get his gun because he was seriously injured during the altercation with Reagan and had to defend his brother and himself. The hearing judge rejected his claims of self-defense as lacking credibility. Even assuming that Smart feared for his safety after being pepper sprayed by Reagan, we do not consider Smart's belated self-defense claim because it would negate the

elements of the assault to which he pled guilty. (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588 [court may not reach conclusions inconsistent with conclusive effect of attorney's convictions].)¹⁰

The hearing judge found that Smart's refusal to let Kench leave after she expressed her wish to do so was an act of moral turpitude. We agree, but also find that his act of pinning her to the bed while he was naked and giving her cause for fear also equates to moral turpitude. (*In re Craig* (1938) 12 Cal.2d 93, 97 [moral turpitude is act of baseness, vileness, or depravity in duties owed to others or society in general and is contrary to accepted and customary rule of right and duty between people].)

Next, Smart argues that his gratuitous firing of John's gun did not involve moral turpitude. He relies on *In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406 to argue that, unlike the attorney in *Burns* who shot a firearm into an occupied moving vehicle, Smart did not shoot in Kench's or Reagan's direction. In *Burns*, we noted that the attorney's actions did not involve moral turpitude, but involved other misconduct warranting discipline. Central to that conclusion was that the attorney's actions were done in good faith because he fired his weapon "as safely as he could, and that he honestly believed he was in imminent danger of being shot at again." (*Id.*, at p. 410.)

Here, Smart did not act in good faith when discharging his brother's gun, which distinguishes *Burns* and renders it unnecessary to apply its conclusion to the facts in this matter. We find that Smart's gratuitous firing of the gun was excessive, dangerous, and disproportional to any plausible threat. Smart concedes that Kench and Reagan were out of his sight when he shot the gun, proving that he could not have honestly believed he was in imminent danger to

¹⁰ Further, we find that the judge's adverse credibility determination is supported by the factual basis Smart proffered with his guilty plea: "In Orange County, California, on 1/17/15 I willfully and unlawfully committed an assault upon John Doe by means of force likely to produce great bodily injury."

justify firing the handgun. We find that Smart's firing of the weapon in the front yard of a residential neighborhood ostensibly to scare Kench and Reagan was reckless and extremely dangerous not only to them, but to others in the neighborhood as well. The fact that the stray bullet traveled through a neighbor's garage door into the garage is evidence of how dangerous Smart's action was; it could have caused serious injury or worse had the piece of wood not stopped the bullet. Thus, we find that Smart's behavior exhibited contempt for the law and disregard of the safety of others, which demonstrates moral turpitude. (See *In re Gross* (1983) 33 Cal.3d 561, 566 [misconduct, not conviction, warrants discipline]; see also *In the Matter of Miller* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 110, 115 ["wide ambit of facts surrounding the commission of a crime is appropriate to consider in a conviction referral proceeding"].)¹¹

B. Smart Was Not Deceitful with His Brother, the 911 Operator, or the Police

The hearing judge found that Smart deliberately lied or told half-truths to his brother when he stated that Kench and Reagan were trying to rob him and that Reagan was going to kill him. She also found that Smart made misrepresentations to the 911 operator or the deputy sheriff four times: (1) when he said Reagan had broken into John's house; (2) when he said Kench and Reagan were in John's home to rob him; (3) when he led them to believe that he and John were victims of a home-invasion robbery; and (4) when he answered the deputy sheriff's

¹¹ Smart also points to two other assault-related cases, where moral turpitude was not found, to support his position that his acts do not amount to moral turpitude: *In re Otto* (1989) 48 Cal.3d 970 and *In re Larkin* (1989) 48 Cal.3d 236. Similar to our discussion regarding Smart's assault on Kench and his reckless and extremely dangerous act in using a gun, we find *Otto* (infliction of corporal punishment) and *Larkin* (use of flashlight to strike victim's chin, causing minor injury) unpersuasive as well.

question of whether he wanted to prosecute Kench and Reagan with “Of course.” We do not find clear and convincing evidence to support the hearing judge’s findings.¹²

During the physical altercation with Reagan, Smart told John to call the police. From John’s 911 call, Smart can be heard instructing John to “get the f---ing gun,” and, when Smart got on the phone with the 911 operator, he stated, “He [Reagan] broke into my house.” Based on the record, the evidence is insufficient to support the finding that Smart intended to mislead his brother or the 911 operator when he made these statements. Smart and Reagan were engaged in mutual combat where both sustained injuries; therefore, it was reasonable for Smart to be fearful of what would ensue and to instruct his brother to call 911. Additionally, we did not find sufficient evidence in the record to clearly establish that Smart told his brother that Kench and Reagan were trying to rob him, and OCTC has failed to cite in its brief where in the record such evidence exists.

As for Smart’s additional statements to the 911 operator and the deputy sheriff, our review of the record indicates that the statements are generally vague, made in the heat of the moment of combat, and insufficient to support a conclusion that Smart deliberately misled the 911 operator or the deputy sheriff. OCTC argues that, when Smart indicated that he wanted to prosecute the matter, he deliberately misled the deputy into believing that he and John were victims of a home-invasion robbery. The police reports include inferences that the officers were responding to what they believed to be a home-invasion robbery. Beyond that, the reports contain no specific details or direct evidence to establish that Smart falsely asserted that a home-invasion robbery actually occurred. We also note that Smart was highly intoxicated and suffering from a head injury at the time. Therefore, even if his statements were not wholly

¹² Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

accurate, we are unable from our review of the record, without clear evidence of an intention to mislead, to establish that Smart made deliberate misrepresentations to satisfy the clear and convincing standard of proof. (See *Ballard v. State Bar* (1983) 35 Cal.3d 274, 291 [all reasonable doubts resolved in favor of attorney].) Thus, we do not find that Smart's statements involved moral turpitude.

IV. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence.

(Std. 1.5.) Smart has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

No Aggravation for Indifference (Lack of Insight) (Std. 1.5(k))

Smart requests that we reject the hearing judge's finding that he exhibited a lack of insight into his misconduct by his refusal to pay John's neighbor for the damage to his garage from the stray bullet, thus showing Smart's failure to accept responsibility for his actions. We agree, as we fail to see how this conduct three and a half years before his disciplinary trial began negates his assertions at trial that he is remorseful.

An attorney who fails to accept responsibility for his actions and instead seeks to shift responsibility to others demonstrates indifference and lack of remorse. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.) Unlike the attorney in *Wolff*, Smart testified that he regrets his actions and takes full responsibility for everything that he did wrong. Further, he is an admitted alcoholic and stated that he should not have called Kench for services that night, especially given his significant impairment from his 0.232 percent blood-alcohol content level. He also admitted that he started the fight with Reagan. He has joined the State Bar's Lawyer Assistance Program (LAP) as a step to beginning his recovery and not as a matter of expediency as the judge believed. Finally, as the judge herself observed, Smart was in

“extreme agony” when hearing Dr. Glass’s testimony about him. We find that Smart’s testimony during his disciplinary trial was an unequivocal acknowledgment of his wrongdoing and acceptance of responsibility, and, thus, we decline to assign indifference.

B. Mitigation

1. No Prior Record (Std. 1.6(a))

Smart was admitted to practice law in 1987 and has no prior record of discipline. The “absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur” is a mitigating circumstance. (Std. 1.6(a).) The hearing judge assigned extensive mitigating weight to Smart’s discipline-free career, but she concluded that it was not compelling because of the absence of a showing that his misconduct is “not likely to recur.” We agree with OCTC that this circumstance should only be given some weight.

While Smart had 27 years of discipline-free practice, a significant period, he has not shown that his alcohol abuse problems are resolved. When misconduct is serious, as the Supreme Court explained in *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, a prior record of discipline-free practice is most relevant for mitigation where the misconduct is aberrational, which is clearly not the case here. While we applaud Smart’s efforts by voluntarily joining LAP, we find that he has not completed rehabilitation, after considering his decades-long history of abuse coupled with multiple assaults. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 664 [attorney must demonstrate “a meaningful and sustained period of successful rehabilitation”].) Absent this evidence, we are unable to find that his misconduct is unlikely to recur.

2. Extreme Emotional Difficulties or Physical or Mental Disabilities (Std. 1.6(d))

Standard 1.6(d) provides that mitigation may be assigned for extreme emotional difficulties or physical or mental disabilities if (1) the attorney suffered from them at the time of the misconduct, (2) they are established by expert testimony as being directly responsible for the

misconduct, and (3) they no longer pose a risk that the attorney will commit future misconduct. The hearing judge did not afford Smart any mitigating credit for his emotional problems because she found that the record does not clearly establish that his difficulties or disabilities no longer pose a risk of future misconduct. We agree.

At trial, Dr. Glass testified about Smart's alcoholism and other disorders. He further testified that Smart has continuously abused alcohol for more than 30 years and has only recently maintained sobriety for a six-month period prior to the disciplinary trial. According to Dr. Glass, Smart's altercation with Reagan triggered an extreme emotional reaction which, combined with his intoxication, caused him to have an irrational fear for his life. He opined that Smart's emotional condition was directly responsible for his violent behavior on the night of the incident and that he no longer poses a risk of future misconduct. However, he testified that Smart could commit misconduct again if he fails to maintain his sobriety. We agree with the hearing judge in finding that Dr. Glass's testimony does not clearly and convincingly satisfy this mitigation standard given Smart's brief period of sobriety. (*Slavkin v. State Bar* (1989) 49 Cal.3d 894, 905 [attorney suffering from drug or alcohol dependence generally must establish that addiction is permanently under control].)

3. Cooperation (Std. 1.6(e))

Smart asserts that he is entitled to mitigation credit for his cooperation with the State Bar by entering into a stipulation of facts and admission of documents. (Std. 1.6(e) [mitigation credit permitted for spontaneous candor and cooperation displayed to State Bar].) We agree. Overall, he demonstrated cooperation through his waiver of finality and stipulation to facts and admission of documents—with several of the documents being the evidentiary basis of the moral turpitude finding. Such action merits substantial mitigation. (See *In the Matter of Johnson* (Review Dept.

2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for admission of culpability and facts].)

4. Good Character (Std. 1.6(f))

Smart is entitled to mitigation if he establishes extraordinary good character attested to by a wide range of references in the legal and general communities who are aware of the full extent of his misconduct. (Std. 1.6(f).) The hearing judge noted that Smart established good character evidence through eight witnesses, including three attorneys, who were aware of the full extent of his misconduct. The judge gave extensive mitigating weight to the declarations, which OCTC does not challenge. We agree and assign substantial weight. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant mitigation for good character for three witnesses, two attorneys, and fire chief, who had long-standing familiarity with attorney and broad knowledge of good character, work habits, and professional skills].)

V. DISBARMENT IS THE APPROPRIATE DISCIPLINE

Our role is not to punish Smart for his felonious crimes—the superior court has already done so—but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 [“aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards”]; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.) At the time of the misconduct and the hearing judge’s decision, disbarment was the presumed sanction for a felony conviction in which the surrounding

facts and circumstances involve moral turpitude, unless the “most compelling mitigating circumstances clearly predominate.” (Std. 2.15(b).)¹³

We agree with the hearing judge and OCTC that no case law exists that is substantially comparable to this case. Smart asks us to consider the *Burns*, *Otto*, and *Larkin* cases, discussed previously, in formulating our discipline recommendation. We decline to do so, as the discipline in each of those three cases, unlike this one, rested on the conclusion that no moral turpitude was found. Smart also recommends a fourth case, *In re Mostman* (1989) 47 Cal.3d 725, in which moral turpitude was found, where Mostman was convicted of assault by means of force likely to produce great bodily injury, and where he had attempted to take revenge against an acquaintance who had threatened both his family and him by asking a client to kill that acquaintance. The Supreme Court imposed a two-year actual suspension, relying on the standard’s requirement that “the most compelling mitigating circumstances [that] clearly predominate.”

Our reading of *Mostman* leads us to conclude that since it was an extraordinary case of mitigating circumstances, it does not guide us to the same disciplinary conclusion here. The Supreme Court found more extensive mitigation for Mostman than is warranted for Smart, particularly the great emotional stress of the acquaintance’s threats against himself and his family, along with the illness and death of other close family members and a bitter custody battle with his ex-wife over their son. The Supreme Court also found as mitigating evidence the fact that the acquaintance had, early in their relationship, asked Mostman to engage in unethical conduct on more than one occasion, but Mostman had refused. Finally, the Supreme Court also

¹³ This version of the applicable standard applied at the time of the hearing judge’s decision. The standards were revised on July 1, 2019, to provide that summary disbarment is the sanction for a final felony conviction in which, inter alia, the facts and circumstances of the offense involved moral turpitude. Because the revised standard is based on revisions made to section 6102, subdivision (c), effective in 2019 and is not retroactive, we apply the standard that existed at the time the misconduct occurred (See *In the Matter of Jebbia* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 51, 55 [changes to § 6102 may not be applied retroactively to attorney’s criminal conviction that predated those changes].)

found a “strong suggestion in the record” that the client and the acquaintance had acted together in a plan to compromise Mostman, suggesting that the acquaintance was never in danger of harm from Mostman’s expressed intent.

Applying former standard 2.15(b), we find that Smart has failed to establish that the most compelling mitigating circumstances clearly predominate, especially considering the nature of his misconduct. (See *In re Strick* (1987) 43 Cal.3d 644, 656 [in conviction involving moral turpitude, level of discipline must correspond to reasonable degree with gravity of misconduct].) Smart’s actions toward Kench were deplorable, and he showed a flagrant disregard for the law and for public safety when he unlawfully fired a gun from the front yard as Kench and Regan ran from the house.

While Smart established much mitigation for good character, cooperation, and several years of a discipline-free career prior to his convictions, without aggravation, those factors fail to constitute the most compelling, as required by former standard 2.15(b), in light of the seriousness of his criminal misconduct. Notably, we find that Smart’s rehabilitation is in its early phase; he has not presented persuasive evidence that he is truly on the path to full sobriety and that he fully understands the extent of his alcohol problem. For the same reason, Smart’s misconduct is not mitigated by his mental disabilities and emotional problems. Based on the facts of this case, we conclude that anything less than disbarment would fail to protect the public and the courts, and would undermine the confidence in the legal profession that our high standards are meant to maintain. Accordingly, Smart should be required to demonstrate by clear and convincing evidence in a reinstatement proceeding that he is fully rehabilitated over an extended period of time before he is entitled to resume practicing law.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Dean Edward Smart be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice law in California.

We further recommend that Smart comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

VII. ORDER

The order by the hearing judge that Dean Edward Smart be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective May 12, 2019, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.