PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed February 7, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 11-C-17662
	)	
ROBERT DAVID WYATT,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 73240.	)	
	)	

Respondent Robert David Wyatt was driving while intoxicated when he accidently struck and killed a pedestrian. He told the police he had only one drink prior to the accident, yet his blood alcohol concentration (BAC) was .18%—more than double the legal limit. Wyatt pled nolo contendere to a felony violation of Penal Code section 191.5, subdivision (b) (vehicular manslaughter while intoxicated—ordinary negligence). After his conviction was transmitted to us, we placed him on interim suspension and referred the case to the hearing department to determine if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline.

The hearing judge determined that the conviction involved moral turpitude because Wyatt: (1) disregarded the law and public safety by drinking and driving, resulting in the loss of life; (2) left the victim alone in the street; and (3) made misrepresentations to the police about how much he drank and the circumstances of the accident. Applying the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct,

standard 3.2,[1] and finding no compelling mitigating circumstances, the hearing judge recommended disbarment.

Wyatt appeals the hearing judge's decision. He contends that the hearing judge evaluated the facts under the wrong legal standard, asserts that the circumstances surrounding his conviction did not involve moral turpitude, disagrees with the aggravation findings, and requests additional mitigation credit. He argues that compelling mitigation exists, and that based on the relevant case law, the discipline recommendation should be reduced to a one-year suspension with credit for the time he has been on interim suspension. The Office of the Chief Trial Counsel of the State Bar (State Bar) urges us to adopt the hearing judge's disbarment recommendation.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree that the facts surrounding Wyatt's conviction involve moral turpitude. We also agree with the three mitigating factors found by the hearing judge (no prior record, good character, and remorse), but assign greater weight to Wyatt's 34 years of discipline-free practice. However, we do not find the additional mitigation urged by Wyatt and instead find one additional factor in aggravation (lack of candor). Wyatt failed to establish that the most compelling mitigation clearly predominates in this case, and there is no other reason to deviate from the presumptive discipline of disbarment under standard 3.2. Accordingly, we affirm the hearing judge's recommendation.

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[1] Standard 3.2 provides, "Final conviction of a member of a crime which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission, shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a two-year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances." Effective January 1, 2014, standard 2.11 replaced standard 3.2. Since this case was submitted for ruling in 2013, we apply the former standards, and all further references to standards are to the earlier version. However, the new standards do not conflict with the former ones applicable to this case.

I. FACTS

Wyatt, an attorney since 1976, lives in Rossmoor, a gated senior community. On December 10, 2010, between 4:00 and 5:00 p.m., Wyatt drank vodka at home and then drove to a restaurant in a neighboring town where he ate dinner and drank one beer.

Meanwhile, Edward Phillips, an 85-year-old Rossmoor resident, was waiting near his home for a bus. It was his nightly routine to call for a Rossmoor shuttle bus to take him to P.F. Chang's restaurant for dinner. At the time, Phillips was carrying his cane, which he occasionally used to assist him with walking.

Around 6:30 p.m., as Wyatt was driving home from the restaurant, he struck Phillips. Upon impact, Phillips smashed Wyatt's windshield, was thrown between 38 and 52 feet, and landed with his head near the curb and his feet extending toward the middle of the road. Phillips was bleeding profusely from a severe head wound. Wyatt did not have a cellular phone. He got out of his car, found Phillips nonresponsive, returned to his vehicle, and drove one mile to the guard station at the front gate to get help, leaving Phillips alone. He reported the accident to the security guard, who told him to wait in the guard station. Wyatt drank coffee and water while he waited. The security guard called the paramedics and police.

Officer Bryan Duncan arrived within a half hour and interviewed Wyatt at the guard station. During questioning, Wyatt explained that he was on his way home from dinner when Phillips "streaked" in front of his car, claiming he did not have an opportunity to stop to avoid hitting Phillips. When asked if he had anything to drink at the restaurant, Wyatt acknowledged he had one beer. While questioning Wyatt, Officer Duncan detected an odor of alcohol, and noticed that his speech was slurred and his eyes were red. Suspecting that Wyatt may have been driving under the influence of alcohol (DUI), Officer Duncan administered field sobriety tests, which Wyatt failed. With each test, Wyatt made multiple mistakes and was unable to follow

instructions. For example, he could not stand with one leg lifted and his arms at his sides. He repeatedly dropped his foot to the ground and had to use his arms for balance. Officer Duncan was concerned Wyatt would fall, and stopped the test for his safety.

Using the list of questions officers are taught to ask during a DUI investigation, the officer asked Wyatt additional questions, including "what and how much did you have to drink?" and "when was your first drink?" Wyatt responded, one beer at 6:00 p.m. He never mentioned the vodka he drank before dinner. Officer Duncan concluded that Wyatt was significantly impaired and unable to drive safely. Wyatt was arrested, and a blood test taken two hours later at 8:30 p.m. revealed his BAC was .18%. Phillips died from his injuries 60 hours after the accident.

Wyatt was interviewed by the police again on December 16, 2010. He stated that he did not feel he was impaired on the evening of the accident. After Wyatt learned that Phillips was 85, he changed his depiction of Phillips's movement to a "hobbled sprint." He also admitted that he drank "a finger or two" of vodka between 4:00 and 5:00 p.m. at home before going to dinner.

On April 30, 2012, Wyatt pled nolo contendere to a felony violation of Penal Code section 191.5, subdivision (b), vehicular manslaughter while intoxicated. The court suspended imposition of Wyatt's sentence for three years. He was placed on three years' formal probation and ordered to serve 90 days in county jail. He served all but two days by Electronic Home Detention. He also was ordered to pay a $1,706 DUI fine.[2]

II. THE FACTS SURROUNDING WYATT'S CONVICTION OF VEHICULAR MANSLAUGHTER WHILE INTOXICATED INVOLVE MORAL TURPITUDE

For purposes of attorney discipline, Wyatt's conviction proves his guilt of all requisite elements of his crime. (Bus. & Prof. Code, § 6101, subd. (a).) Our Supreme Court has classified

[2] Prior to his plea, in November of 2011, Wyatt settled a civil lawsuit with Phillips's two adult daughters.

a conviction for vehicular manslaughter while intoxicated as a crime that does not inherently involve moral turpitude. (See *In re Alkow* (1966) 64 Cal.2d 838, 840-841 [vehicular manslaughter conviction involved moral turpitude where attorney had history of driving while visually impaired and probation violation].) Therefore, we look to the surrounding facts and circumstances to determine whether the crime involved moral turpitude or other misconduct warranting discipline and, if so, the proper level of discipline. (§ 6102, subd. (e); *In re Kelley* (1990) 52 Cal.3d 487, 494.) The hearing judge found the facts surrounding Wyatt's conviction involved moral turpitude. We agree.

"Criminal conduct not committed in the practice of law or against a client reveals moral turpitude . . . 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. [Citations.]" (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) As our Supreme Court has stated, "[t]he drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation." (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 262, superseded by statute on other grounds.) And the prior observation that " '[d]runken drivers are extremely dangerous people' seems almost to understate the horrific risk posed by those who drink and drive." (*Ibid.*, citations omitted.) In this case, Wyatt's decision to take that risk resulted in tragic consequences—the death of Phillips.

After consuming vodka and beer, Wyatt chose to drive in a senior community inhabited by vulnerable individuals. He was significantly impaired, as established by his BAC that was twice the legal limit, his failure of multiple field sobriety tests, and his physical appearance. Wyatt had red eyes, he slurred his speech, and he was unable to maintain his balance. His decision to drive was not a close call. His conduct demonstrates a reckless willingness to

disregard the safety of others and break the law even knowing his actions were extremely dangerous.

Not only did Wyatt disregard the laws and public safety, but his conviction involved concealment and dishonesty. We find clear and convincing evidence[3] that he lied to conceal the amount of alcohol he drank on the night of the accident. When he was first questioned by the police about his alcohol consumption before the accident, Wyatt disclosed he had a single beer with his dinner. But he failed to divulge that he also drank vodka earlier. Wyatt asserts that he was only asked whether he had a drink at the restaurant, not what he had to drink that night. However, Officer Duncan testified that he asked Wyatt a list of questions routinely asked during a DUI investigation to ascertain the full extent of alcohol he consumed that day. Wyatt only admitted to having one beer at 6:00 p.m. The hearing judge found that Officer Duncan's testimony was credible and Wyatt's was not. This credibility determination is supported by Officer Duncan's testimony at the preliminary hearing and is entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.) Thus, we find that Wyatt's answer was intended to mislead the officer about his sobriety.

Wyatt continued to conceal the amount he drank when questioned a second time by the police six days after the accident. He told the police that he had "a finger or two" of vodka in addition to the beer at the restaurant on the night of the accident. As established during his disciplinary trial, Wyatt represented that he had slightly less than three ounces of vodka or no more than three drinks at least an hour before he consumed the beer at the restaurant.[4] If this

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[3] 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.)

[4] According to the BAC chart prepared by the Department of Motor Vehicles, which was admitted without objection, one drink is one and one-fourth ounces of 80-proof liquor, four

were true, according to the BAC chart, his BAC would have been under .05% when his blood was tested at 8:30 p.m. It was .18%—over twice the legal limit. Clearly, Wyatt drank considerably more on that night than he admits.

In sum, Wyatt concealed the amount of alcohol he drank the night he hit Phillips, and his later statement that he had "a finger or two" of vodka and one beer prior to the accident was dishonest. Such deceit involves moral turpitude. (*Cutler v. State Bar* (1969) 71 Cal.2d 241, 253 ["[a]n attorney's practice of deceit involves moral turpitude"]; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 120 [attorney who deceived sheriffs about child custody order engaged in act of moral turpitude].)

III. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravation and mitigation. The State Bar must establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).) Wyatt has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

A. Two Aggravating Factors

The hearing judge found one aggravating factor—significant harm. We agree. We also find Wyatt's lack of candor during the disciplinary hearing is an additional aggravating factor.

1. Harm to Others (Std. 1.2(b)(iv))

Wyatt's vehicular manslaughter while intoxicated greatly harmed Phillips's family and friends. Phillips's daughters suffered cognizable emotional harm by the death of their father under such horrific circumstances. Although the harm does not fall directly within standard 1.2(b)(iv), the loss of a loved one under such senseless, unexpected circumstances is a significant aggravating factor that cannot be ignored.

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ounces of wine, or 10 ounces of 5.7% beer. Taking into consideration a person's weight, the chart shows the BAC zones based on the number of drinks and the time since the first drink.

2. Lack of Candor (Std. 1.2(b)(vi))

We find clear and convincing evidence that Wyatt displayed a lack of candor during these proceedings. In an attempt to diminish his misconduct, he continued to assert that he had no more than "two fingers" of vodka and one beer on the night he hit Phillips. Officer Duncan's observations of Wyatt's impairment and his .18% BAC clearly demonstrate that his testimony was not truthful. Thus, Wyatt's lack of candor during these proceedings is a considerable aggravating factor. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 791-792 [attorneys lacked candor where record at complete odds with hearing testimony].)

B. Three Mitigating Factors

The hearing judge found mitigating factors in Wyatt's lack of prior discipline, good character, and remorse. We agree, but assign more weight than the hearing judge did to Wyatt's discipline-free record.

1. No Prior Record of Discipline (Std. 1.2(e)(i))

At the time of the accident, Wyatt had practiced law for 34 years without discipline. The hearing judge reduced the weight of this factor because Wyatt's misconduct was serious. Wyatt asserts that the hearing judge erred and urges us to assign full mitigation credit. We find that his 34 years of discipline-free practice is entitled to significant weight.

Standard 1.2(e)(i) provides for mitigation in the absence of discipline over many years coupled with present misconduct that is not serious. When the 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. That is the case here. Wyatt's conviction for vehicular manslaughter while intoxicated is serious. However, he has no prior DUI convictions, probation violations, or problems with the law, and

he is adamant that he will never drink and drive again. Furthermore, there is no evidence that he had or has an alcohol abuse problem. Although this is a tragic case and Wyatt's misconduct was serious, it is also clear it is unlikely to recur.

2. Good Character (Std 1.2(e)(vi))

Standard 1.2(e)(vi) provides mitigation for "an extraordinary demonstration of good character . . . attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." Wyatt presented the testimony of four witnesses and declarations from six individuals who attested to his good character. They included four attorneys, four business associates from the environmental community, a restaurant owner who formerly taught with Wyatt at San Francisco State University, and the owner of an attorney recruitment firm. The witnesses knew Wyatt for lengthy periods of time—five of them knew him personally and professionally from 25 to 50 years. They expressed that he was kind and thoughtful of others. No one ever witnessed him intoxicated or drinking to excess. All of them were aware of Wyatt's conviction, yet maintained their high opinion of his moral character.

The attorneys described Wyatt as reliable and trustworthy with the highest integrity and good character. He is a leading environmental practitioner and is "respected as one of the 'deans' of the California environmental bar." We give significant consideration to attorney witnesses because they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 319.) The hearing judge found the evidence demonstrated a sufficient, but not extraordinary, showing of Wyatt's good character. We agree.

3. Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii))

Wyatt testified that he feels "horrible" about the accident and is sorry that it happened. He has vowed never to drink and drive again. A colleague and friend declared that Wyatt is

"deeply saddened" that Phillips was killed and "he is very concerned about the family of the gentleman who lost his life." This is evidence of remorse and recognition of wrongdoing, but an attorney's misconduct is mitigated for "objective steps promptly taken by the member spontaneously demonstrating remorse [and] recognition of wrongdoing . . . which steps are designed to timely atone for any consequences of the member's misconduct." (Std. 1.2(e)(vii).) Wyatt's sorrow did not result in objective steps promptly taken by him to atone for his misconduct, which at a minimum would have included his honesty about how much he drank. As noted by our Supreme Court, "expressing remorse for one's misconduct is an elementary moral precept which, standing alone, deserves no special consideration in determining the appropriate discipline." (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2.) Therefore, the weight we give this evidence is limited.

4. No Additional Mitigating Factors

Wyatt argues that he established additional mitigating factors—a "lenient" 90-day jail term and the fact that his crime is not directly related to the practice of law. We afford no mitigation credit for the criminal sentence imposed because "[w]hile criminal punishment is relevant to the determination of appropriate discipline, criminal punishment and attorney discipline serve two different purposes. [Citation.] For our purpose, [respondent's] criminal sentence is of limited import." (*In re Nevill* (1985) 39 Cal.3d 729, 737.) Moreover, although his crime was not directly related to the practice of law, the facts and circumstances surrounding it did involve deceit, which reflects a "disregard of the fundamental rule of ethics—that of common honesty—without which the [legal] profession is worse than valueless in the place it holds in the administration of justice. [Citation.]" (*Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053.)

IV. DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession, to preserve public confidence in the profession, and to maintain high professional standards for attorneys. (Std. 1.3.) Ultimately, we balance 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.)

We begin our analysis with the standards, which the Supreme Court instructs us to follow "whenever possible." (*In re Young*, *supra*, 49 Cal.3d at p. 267, fn. 11.) We give them great weight to " ' "promote the consistent and uniform application of disciplinary measures." ' [Citation.]" (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Standard 3.2 is the most relevant standard. It instructs that an attorney who is convicted of a crime of moral turpitude should be disbarred unless the most compelling mitigating circumstances clearly predominate, in which case at least a two-year actual suspension should be imposed. "[A] recommendation arising from application of the Standards [should not be rejected] unless [there are] grave doubts as to the propriety of the recommended discipline. [Citation.]" (*In re Young*, *supra*, 49 Cal.3d at p. 268.) We have no such doubts regarding the hearing judge's disbarment recommendation.

Wyatt's conviction of vehicular manslaughter while intoxicated is a serious crime. But his misconduct is not limited to his grievous criminal conduct—he was not honest with the police or the State Bar Court about the amount of alcohol he consumed. "[D]ishonest conduct is inimical to both the high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession. [Citations.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 567.)

Moreover, there is an absence of compelling mitigation. The fact that Wyatt does not have a prior discipline (or criminal) record is a significant factor. And in the absence of any evidence to the contrary, we must accept that his criminal conduct was aberrational. However, even considering his lengthy discipline-free practice and the other mitigating factors, we cannot conclude that the mitigation is so compelling that it clearly predominates over the serious misconduct and aggravation in this case.

In seeking a period of suspension rather than disbarment, Wyatt contends that we should rely on *In re Alkow, supra,* 64 Cal.2d 838. In *Alkow*, an attorney with defective vision was on probation for driving without a license when he struck and killed a pedestrian. He was convicted of manslaughter in the driving of a vehicle. Our Supreme Court determined that Alkow's conviction involved moral turpitude because his conduct showed a disregard for his prior probation conditions, the law, and the safety of the public. His misconduct was aggravated by a prior record of discipline and lack of candor. The Court ordered that Alkow be suspended for six months. We find that *Alkow* offers little guidance as to the appropriate level of discipline in this case because it did not involve the serious crime of drinking alcohol and driving or repeated acts of dishonesty.

Wyatt also relies on out-of-state case law to support that suspension rather than disbarment is the appropriate discipline for accidentally killing someone while driving intoxicated. (See *In re Small* (D. C. 2000) 760 A.2d 612 [three years and requirement to show fitness to practice as condition of reinstatement]; *Matter of Disciplinary Proceeding Against Curran* (1990) 115 Wash.2d 747 [801 P.2d 962] [six months due to 18 months already spent on interim suspension]; *Office of Disciplinary Counsel v. Michaels* (1988) 38 Ohio St.3d 248 [527 N.E.2d 299] [18 months]; *Office of Disciplinary Counsel v. Patchel* (1995) 539 Pa. 497 [653 A.2d 625] [four years]; see also *Kentucky Bar Ass'n. v. Jones* (Ky. 1988) 759 S.W.2d 61 [two

years].) However, the cases differ entirely from Wyatt's because there was no finding that the convictions involved moral turpitude and no evidence of dishonesty. Instead, we consider more on point the cases where attorneys have been disbarred for lying to the authorities as an act of moral turpitude. (See *In re Tidwell* (D. C. 2003) 831 A.2d 953 [attorney with alcohol problems disbarred after conviction for leaving scene of accident resulting in fatality where facts surrounding conviction included dishonesty]; *Tate v. State Bar* (Tex. 1996) 920 S.W.2d 727 [attorney disbarred for conviction of failing to stop and render assistance; crime involved drinking and driving, death of one young boy and the injury of two others, and dishonesty].)

In recommending disbarment, we must consider the tragic results of Wyatt's decision to drink and drive—the loss of life. He assumed those risks and thus must face the consequences. In the context of convictions involving moral turpitude, "the degree of discipline must correspond to some reasonable degree with the gravity of the misconduct. [Citation.]" (*In re Strick* (1987) 43 Cal.3d 644, 656.) Based on the facts of this case, we believe that anything short of disbarment would cast serious doubt on the public's confidence in the legal profession. Accordingly, before Wyatt is entitled to resume the practice of law, he should be required to demonstrate in a reinstatement proceeding his rehabilitation and exemplary conduct over an extended period of time.

V. RECOMMENDATION

We recommend that Robert David Wyatt be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that he must 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 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

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

VI. ORDER

The order that Wyatt be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective February 16, 2013, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

REMKE, P. J.

WE CONCUR:

PURCELL, J.

HONN, J. (sitting in place of Judge Epstein, who was recused)