PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed May 21, 2014

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

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| In the Matter of | ) | Case No. 12-O-13204 |
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| ANNA CHRISTINA YEE, | ) | OPINION AND ORDER |
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| A Member of the State Bar, No. 133959. | ) | |
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This case demonstrates the consequences of an attorney's failure to accurately report compliance with Minimum Continuing Legal Education (MCLE) requirements to the State Bar.

A hearing judge recommended that respondent Anna Christina Yee be disciplined for affirming her MCLE compliance when, in fact, she had not taken any courses during the relevant reporting period. Yee mistakenly recalled that she had completed the courses, and did not check or maintain any records to confirm if her recollection was accurate. When randomly audited by the State Bar, she corrected her error and submitted proper proof of compliance. The Office of the Chief Trial Counsel of the State Bar (OCTC) charged Yee with committing an act of moral turpitude by making an intentional misrepresentation or by gross negligence. The hearing judge found her culpable based on gross negligence, and recommended a stayed suspension and probation.

OCTC appeals, seeking a 30-day actual suspension. It argues: (1) Yee intentionally misrepresented her MCLE compliance; (2) harm to the State Bar is an aggravating factor; and (3) Yee's mitigation is not significant. Yee did not appeal.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that Yee's inaccurate compliance report was the result of gross negligence

amounting to moral turpitude; it was not an intentional misrepresentation. However, we believe a stayed suspension and probation is excessive discipline. Yee's wrongdoing was an aberrational event during her 22-year unblemished legal career, and she proved five factors in mitigation while OCTC proved none in aggravation. Further, Yee accepted responsibility for her misconduct and revised the way she tracks her MCLE proof of compliance. Accordingly, she poses no threat to the public, nor is a suspension or probation necessary to reinforce her understanding of her future ethical obligations. Even so, public discipline is necessary to make clear to Yee, members of the State Bar, and the public that attorneys face serious consequences for failing to accurately report compliance with their MCLE requirements.[1] We order that Yee be publicly reproved.

## I. FACTS[2]

Yee was admitted to the Bar in California in 1988. She has worked in non-attorney positions for several years and does not currently practice law. Because she maintains active membership with the State Bar, she must complete 25 MCLE hours every three years.

On January 31, 2011, Yee submitted her MCLE compliance card online for the period from February 1, 2008 to January 31, 2011. She marked it: "I affirm the following . . . I have complied with the 25-hour MCLE requirement." The online reporting process required her to "review and confirm," and "verify" the information before submitting it. The instructions further directed her to: "Retain your proof of compliance (certificates or attendance, etc.) for at least one

[1] The Supreme Court adopted California Rules of Court, rule 9.58 (renumbered as rule 9.31, effective January 1, 2007), which authorized the State Bar to establish and administer a "minimum continuing legal education program." Rules of the State Bar of California, title 2, Rights and Responsibilities of Members, rules 2.50-2.93 are the State Bar's governing rules for its MCLE program. All further references to rules are to this source unless otherwise noted.

[2] Yee entered a stipulation as to facts and admission of all documents. We summarize those undisputed facts as well as the hearing judge's factual findings. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's fact findings entitled to great weight]; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.)

year in case you are audited. The State Bar does not keep a record of your MCLE courses. It is your responsibility to maintain your own MCLE records."[3]

In October 2011, State Bar Member Services notified Yee that she had been randomly selected for an audit and requested proof of her MCLE compliance. Yee's practice had been to take a 25-hour bundle of online courses and store the attendance certificates on her computer. But when she checked after receiving the State Bar audit notification, she could not find her attendance records. Nor could she recall the name of the course provider or locate evidence showing she paid for any courses. Subsequently, in February 2012, Yee completed a 25-hour bundle of online courses, submitted proof to the State Bar Membership Records, and paid a $75 late fee.

Thereafter, OCTC began an investigation. On May 3, 2012, an investigator wrote to Yee requesting that she provide proof of completion of the MCLE courses listed in her compliance statement. Yee could not, and responded: "At the time I made the affirmation, I recalled and believed that I had complied. In reviewing my records, I now believe that I made a mistake." She explained, "I transitioned to a new job in mid-February 2009 and recall that I took classes prior to starting my new job. . . . I cannot find a record of those classes. [¶] . . . [¶] . . . [I]t is possible that I may have confused classes that I took to satisfy the prior compliance period with the current . . . period." Yee acknowledged that "my records were and are lacking" and accepted responsibility for her "error in memory and recordkeeping." She detailed corrective actions to avoid future problems, including "completing 13.5 credits on March 21-23, 2012 of the necessary 25 credits that will count toward my 2015 compliance reporting period" and

[3] We take judicial notice of the *current* online compliance card that requires an attorney to verify MCLE compliance under penalty of perjury rather than by affirmation. (Evid. Code, §§ 452, subd. (h), 459, subd. (a).)

"improving my recordkeeping for MCLE credits by keeping a concrete paper folder and not simply email and electronic records."

In October 2012, OCTC filed this disciplinary action. At trial, Yee admitted that she did not verify her records before submitting the compliance card, and testified that she regrets her conduct: "I wish I had checked my records before I submitted the form. If I had done that, I would have found out that I couldn't find my records, and then I would have done something about that." However, she explained she had a "vivid" recollection and a "distinct memory of doing my MCLE's" based on the young age of her children at the time, who were in the room while she took the online courses. She also presented evidence that she lost all data stored on her hard drive in 2009 due to a computer crash. Yee's 20-year partner corroborated her testimony.

## II. CULPABILITY

The Notice of Disciplinary Charges (NDC) charged one count alleging a violation of Business and Professions Code section 6106, which provides: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."[4] OCTC alleged that Yee reported to the State Bar that she was in full compliance with the MCLE requirements when she knew, or was grossly negligent in not knowing, that she was not in compliance. The hearing judge found her culpable of moral turpitude based on gross negligence, not intentional misrepresentation. We agree.

### A. Yee's Failure to Accurately Report MCLE Compliance Was an Act of Moral Turpitude by Gross Negligence

The Supreme Court has held that gross negligence amounts to moral turpitude when there "is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client." (*Lowe v. State Bar* (1953) 40 Cal.2d 564, 570.) In *Call v. State Bar* (1955) 45 Cal.2d 104, 109, the Court noted that "[s]ome cases have said that gross negligence

[4] All further references to sections are to this source.

involves moral turpitude in that such conduct is a breach of his fiduciary duty, but in each instance there was a misrepresentation or other improper action, and the statements must be read in light of the additional facts."[5] Cases that followed *Call* concluded that gross negligence constituted moral turpitude where an attorney breached his fiduciary duty owing to a particular individual. (See, e.g., *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-684 [habitual disregard of clients' interest through gross negligence is moral turpitude].) However, the Supreme Court has not excluded circumstances where gross negligence may affect the public in general. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 859 [attorney's grossly negligent supervision of office staff amounted to moral turpitude; Supreme Court noted: "In some instances, as in the matter before us, an attorney's gross negligence may also affect non-clients with whom he deals or even the public generally"].)

Requiring attorneys to submit accurate MCLE compliance affirmations is essential to maintaining public confidence in the legal profession. "The aim of continuing legal education is to provide continuing assurance to the public that all California attorneys, no matter how many years may have passed since their law school graduation and State Bar admission, have the knowledge and skills to provide their clients with high quality legal services." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 654 (dis. opn. of Kennard, J.).) Attorneys must accurately report compliance because the MCLE program is based on an honor system where random audits serve as the only enforcement check. In turn, the State Bar relies on self-reporting by attorneys to accurately represent to the public, the courts, and other members of the Bar that they are eligible to practice law.[6]

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[5] *Stephens v. State Bar* (1942) 19 Cal.2d 580, 582-583 (false representations); *Trusty v. State Bar* (1940) 16 Cal.2d 550, 553-554 (misrepresentations); *Waterman v. State Bar* (1936) 8 Cal.2d 17, 20 (habitual neglect and violation of Rules of Professional Conduct).

[6] A member who fails to comply with a notice of noncompliance is administratively enrolled as inactive without a hearing and is not eligible to practice law. (Rule 2.92.)

The record reveals that Yee *affirmed* her MCLE compliance without making any effort to confirm its accuracy. (See § 20 ["'oath' includes affirmation"]; Black's Law Dict. (8th ed. 2004) p. 64, col. 1 [to declare by affirmation means to "solemnly declare rather than swear under oath"].) Like other solemn declarations, an affirmation gives "the additional imprimatur of veracity," and reasonably notifies others that the statements are true and complete. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786 [describing impression given by pleadings signed under penalty of perjury].) Yee's compliance statement represented not only that she completed the required education but that she also had the records to prove it.[7] In fact, neither was true. Given the importance to the public that attorneys have current knowledge and skill through continuing education, we find that Yee's failure to verify her MCLE compliance before affirming it constitutes gross negligence amounting to moral turpitude for discipline purposes. Unlike our dissenting colleague, we believe case law supports our finding. (See, e.g., *Sanchez v. Bar* (1976) 18 Cal.3d 280, 283-285 [gross negligence amounting to moral turpitude where attorney who knew client's case was in danger of dismissal inaccurately reported case status to client without first checking client's file]; *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155 [gross negligence amounting to moral turpitude where attorney filed verification his clients were out of county without first confirming that fact].)

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Enrollment as inactive terminates when the member submits proof of MCLE compliance and pays a noncompliance fee. (Rule 2.93.)

[7] Rule 2.90 defines noncompliance as failure to: (a) complete the required education during the compliance period or an extension of it; (b) report compliance or claim exemption from MCLE requirements; (c) keep a record of MCLE compliance; or (d) pay fees for noncompliance. Further, rule 2.73 requires attorneys to keep a copy of their MCLE courses for a year after they report compliance and to provide it to the State Bar upon demand.

### B. Yee Did Not Intentionally Misrepresent Her MCLE Compliance

We reject OCTC's argument that Yee intentionally misrepresented her MCLE compliance. The hearing judge, who saw and heard Yee testify, concluded: "the court has not heard clear and convincing evidence that respondent intentionally misrepresented the status of her MCLE compliance." Since OCTC did not present evidence or witnesses to rebut Yee's testimony, "[w]e are reluctant, therefore, to ascribe to [Yee] a specific intent to deceive when the hearing judge who considered [her] testimony and that of other witnesses found none." (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; see *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241 [great weight afforded to hearing judge's findings on respondent's intent, state of mind, and reasonable beliefs].)

## III. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence under standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[8] Yee has the same burden to prove mitigation. Std. 1.6). The hearing judge found no aggravation, and credited Yee for five mitigating factors. We agree and find Yee's overall mitigation to be compelling.

### A. No Aggravating Factors

OCTC did not argue any factors in aggravation at trial. On review, it contends that Yee's misconduct caused significant harm to the administration of justice because OCTC expended resources to conduct an investigation. (Std. 1.5(f).) We reject this contention.

The record does not establish significant harm to OCTC, particularly since Yee immediately acknowledged her wrongdoing to the investigator, submitted proof of compliance, and paid a late fee. Further, section 6086.10 permits OCTC to recover its costs. But most

[8] All further references to standards are to this source.

importantly, OCTC waived the issue on review by failing to claim harm as an aggravating factor at trial. (See *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422-423 [points not raised in trial court not considered on appeal]; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589 [OCTC's request for finding in aggravation denied when raised for first time on review].)

**B. Five Mitigating Factors**

**1. No Prior Record of Discipline (Std. 1.6(a))**

Standard 1.6(a) permits mitigation for the absence of any prior record of discipline over many years of practice. Yee was a licensed attorney for 22 and one-half years before she committed misconduct. Since she worked in non-attorney positions for 12 years, we credit her with 10 and one-half years of discipline-free practice, which is a significant mitigating factor. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [appropriate to depreciate years of practice by time not spent practicing law]; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight for more than ten years of practice].)

**2. Candor/Cooperation (Std. 1.6(e))**

Spontaneous candor and cooperation with the State Bar is a mitigating circumstance. (Std. 1.6(e).) Yee is entitled to mitigation credit for admitting her misconduct to the investigator before trial and at the hearing below, and for stipulating to certain facts and to admission of all exhibits. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to relevant facts assists prosecution and is mitigating].)

**3. Good Character (Std. 1.6(f))**

Standard 1.6(f) permits mitigation for "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 the misconduct." Eleven witnesses from varied backgrounds testified about Yee's many qualities,

but particularly her character for honesty. Most witnesses knew her personally or professionally for more than a decade, and described her as driven, honest, and trustworthy to a fault. These witnesses included six chief executives from private institutions, a reverend, a former member of the State Bar Board of Trustees, a pro tem judge, and two attorneys. The quality and quantity of Yee's character evidence warrants significant mitigating weight, especially because we give serious consideration to the testimony of attorney and judge witnesses who 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.)

**4. Remorse/Recognition of Wrongdoing (Std. 1.6(g))**

"[P]rompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing" is entitled to mitigation. (Std. 1.6(g).) Yee acknowledged that her MCLE attendance records were lacking. She also changed her record-keeping practices, and stated that she "significantly regrets and intends never to repeat" her mistake. We assign mitigation credit to Yee's remorse and recognition of wrongdoing.

**5. Pro Bono Work and Community Service**

Pro bono work and community service may mitigate an attorney's misconduct. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) We agree with the hearing judge that Yee's extensive community service is compelling mitigation. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation assigned for demonstrated legal abilities and zeal in undertaking pro bono work].)

Several witnesses corroborated Yee's testimony about her longstanding commitment to the public. Since the mid-1990s, Yee has volunteered to better the quality of life in neglected communities. She sits on numerous non-profit boards of organizations endeavoring to improve community welfare, child development, employment, and affordable housing. She has also provided pro bono services with the Volunteer Legal Services Referral Panel and has worked

with the Asian Pacific Islander Wellness Center, the San Francisco Enterprise Community Board, and the Mayor's Welfare Reform Task Force. Even her career path for more than a decade has involved public service work on issues of community development for low-income and vulnerable communities.

## 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. 1.1.) We begin with the standards, which the Supreme Court instructs us to follow whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) But they do not mandate a particular discipline (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994), nor must they be followed in "talismanic fashion." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Instead, we balance all relevant factors, including aggravation and mitigation, on an individual case basis. (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 618.)

Standard 2.7 is most applicable to Yee's misconduct. It instructs that "[d]isbarment or actual suspension is appropriate for an act of moral turpitude" and that the "degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member's practice of law."[9] OCTC urges us to recommend a 30-day suspension under standard 2.7, but offers no California case that addresses the standard's application to the unique factual circumstances before us.

Considering these circumstances, we find that a lesser discipline than called for in standard 2.7 is appropriate. As to Yee's wrongdoing, her failure to accurately report MCLE

[9] Effective January 1, 2014, standard 2.7 replaced standard 2.3. Since this case was submitted after the effective date, we apply the new version. The amendments do not conflict with the former standards.

compliance was a one-time error, although it was related to the practice of law. As to other relevant considerations, we note that Yee maintained an active law practice for 10 and a half years without discipline, has an exemplary record of pro bono and community service, and her misconduct caused no harm to the public or the judicial system. But the most significant feature of this case is that Yee immediately accepted responsibility for her wrongdoing, rectified the situation, and implemented a corrective plan to avoid future problems.

Standard 1.7(c) provides that a lesser discipline than called for in the applicable standard is appropriate in "cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future." Such are the circumstances here. Given Yee's compelling mitigation, the lack of aggravating circumstances, and her genuine recognition of wrongdoing, a public reproval will adequately serve the goals of attorney discipline and at the same time inform the public and members of the State Bar that failing to comply with MCLE requirements may result in discipline.[10]

## V. ORDER

Anna Christina Yee is ordered publicly reproved, effective on the date our opinion in this matter becomes final. (Rules Proc. of State Bar, rule 5.127(B).)

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[10] Comparable case law supports a public reproval as the proper discipline. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409 [public reprimand where attorney was grossly negligent amounting to moral turpitude for failing to investigate and declare conflicts in criminal case; 30-year discipline-free record weighed heavily]; *Vaughn v. State Bar*, *supra*, 6 Cal.3d 847 [public reproval where attorney was grossly negligent amounting to moral turpitude for failing to supervise work of associate attorney and clerical staff]; see also *Kentucky Bar Ass'n. v. Keesee* (Ky. 1995) 892 S.W.2d 578 [public reprimand where attorney earned only 5 of 15 MCLE credits, ignored notices, and did not seek extension to complete his MCLE requirements]; *In re Shelhorse* (Mo. 2004) 147 S.W.3d 79 [public reprimand where attorney failed to comply with MCLE requirements or respond to inquiries by disciplinary authorities; no prior disciplinary history and misconduct did not directly harm client or public].)

## VI. COSTS

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

PURCELL, J.

I CONCUR:

EPSTEIN, J.

REMKE, P. J.

I respectfully dissent.

The sole issue is whether an attorney who *honestly but mistakenly* affirms compliance with her Minimum Continuing Legal Education (MCLE) requirements committed an act of moral turpitude subject to attorney discipline. Based on the record in this case, the answer is no.

I agree with the majority and the hearing judge that Anna Christina Yee did not intentionally misrepresent her compliance with the MCLE requirements, but disagree with the conclusion that her "inaccurate compliance report was the result of gross negligence amounting to moral turpitude." As stated by our Supreme Court and cited by the majority, "[s]ome cases have said that gross negligence involves moral turpitude in that such conduct is a breach of his fiduciary duty, but in each instance there was a misrepresentation or other improper action, and the statements must be read in light of the additional facts." (*Call v. State Bar* (1955) 45 Cal.2d 104, 109.) In this case, no such additional facts render Yee's conduct an act of *moral turpitude*, e.g., fraud, dishonesty, or an intentional breach of a duty owed to a client. (*Ibid*; see *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321 [attorney's misappropriation constituted rule violation but not Bus. & Prof. Code, § 6106 violation where no dishonesty].)

Yee mistakenly recalled that she had completed the MCLE courses. When randomly audited by the State Bar, she admitted her mistake, corrected her error, and submitted proper proof of compliance. In other words, the process worked. To turn this matter into a discipline case, and worse yet, a case of moral turpitude, is a disservice to the attorney discipline system. Accordingly, I would dismiss this proceeding.