FILED FEBRUARY 13, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **ROBERT DAVID WYATT,** **Member No. 73240,** A Member of the State Bar.	)	Case No.: **11-C-17662-LMA** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. Introduction

Respondent Robert David Wyatt (respondent) was convicted of violating Penal Code section 191.5, subdivision (b) (vehicular manslaughter while intoxicated), felony which may or may not involve moral turpitude or constitute other misconduct warranting discipline. Upon finality of the conviction, the review department issued an order referring this matter to the hearing department for a hearing and decision recommending the discipline to be imposed if the facts and circumstances surrounding the violations involved moral turpitude or other misconduct warranting discipline.

After having thoroughly reviewed the record, the court finds that the facts and circumstances surrounding respondent's conviction involved moral turpitude warranting discipline, and recommends that respondent be disbarred.

II. Pertinent Procedural History

On April 30, 2012, respondent pled nolo contendere to a felony violation of Penal Code section 191.5, subdivision (b) (vehicular manslaughter while intoxicated).

On July 17, 2012, the review department of the State Bar Court issued an order, referring this matter to the hearing department for a hearing and decision recommending the discipline to be imposed if the hearing department finds that the facts and circumstances surrounding respondent's criminal violation involved moral turpitude or other misconduct warranting discipline. The review department placed respondent on interim suspension from the practice of law effective August 13, 2012, pending final disposition of this proceeding. (Bus. & Prof. Code, § 6102; Rules Proc. of State Bar, rule 5.342.)

On July 25, 2012, the State Bar Court issued and properly served a notice of hearing on conviction on respondent. Respondent filed a response on August 1, 2012. (Rules Proc. of State Bar, rule 5.345.)

Trial was held on November 14-16, 2012. The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Senior Trial Counsel Donald R. Steedman. Attorney Jerome Fishkin represented respondent. The court took the matter under submission for decision on December 3, 2012, following the filing of the parties' closing briefs.

III. Findings of Fact and Conclusions of Law

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crime of which he was convicted. (*In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423.)

A. Credibility Determinations

After carefully considering, inter alia, each witness's demeanor while testifying; the manner in which each witness testified; the character of each witness's testimony; each witness's

interest in the outcome in this proceeding, if any; and each witness's capacity to perceive, recollect, and communicate the matters on which he or she testified, the court finds that the testimony of the witnesses to be credible, except respondent.

The court finds certain portions of respondent's testimony lack credibility. For example, respondent's contentions that his high blood alcohol level was caused by his medications and that the victim who was 85 years old jumped out in front of his car are incredulous.

B. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 22, 1976, and has since been a member of the State Bar of California.

C. Findings of Fact

On December 10, 2010, between 4:00 and 5:00 p.m., respondent, age 70, drank vodka and then got into his Bentley. He drove to a restaurant where he ate dinner and drank a beer. Around 6:30 p.m., respondent drove home to Rossmoor Community, a gated senior community located in Walnut Creek, California.

Moments later, while driving, respondent struck and hit an 85-year old pedestrian, a fellow Rossmoor resident, Edward Phillips. Carrying a ceramic platter and a cane, Phillips was on his way to a bus stop, where he would often take the bus to a downtown restaurant for dinner. Phillips was a slow walker.

Respondent's car's windshield was smashed. As a result of the impact, Phillips suffered a severe head wound and was bleeding profusely.

Respondent got out of his car, found that Phillips was not responsive, and decided to get back in his car and drive to the guard station about one mile away. He left the scene of the accident. The security guard at the guard station called the paramedics and the police. At the guard station, respondent had coffee and water.

Another nearby resident, Antoinette Stevens, age 80, happened to pass by and noticed "a bag on the street." She thought it was trash. Upon a closer look, she realized it was a gentleman who was hit by something. She immediately called security and went home to get a blanket to cover him. By then, the bus driver also appeared. Phillips was moaning with pain and was able to identify himself.

On the night of the accident, a police officer asked respondent if he had been drinking and respondent answered that he had only one beer at dinner. Respondent never mentioned the vodka he had also drank before dinner. Respondent failed field sobriety tests and was arrested. He also told police that Phillips jumped out in his path, that Phillips streaked by moving quickly in a light jog, and that he did not have an opportunity to stop.

Respondent's blood was tested at 8:30 p.m. His blood alcohol level was reported at a blood alcohol concentration (BAC) of .18%, more than twice the legal limit (.08%).[1]

Three days later as a result of the accident, Phillips died.

In his December 16, 2010 interview with the police, respondent claimed that Phillips suddenly was "running as he came into my field of vision" across the street, "a sort of a hobbled sprint." He then told police officers that he had also been drinking vodka, in addition to the beer, on that day of the accident.

In November 2011, respondent settled the civil suit with Phillips' two adult daughters. In the settlement agreement, the heirs agreed "that they will not urge a judge to impose any particular sentence of physical incarceration upon Robert Wyatt."

On April 30, 2012, respondent pled nolo contendere to vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)). Respondent's sentence included 90 days in a work

[1] Respondent's contention that blood pressure and cholesterol medications may have attributed to such a high reading is not credible.

alternative program or electronic home detention, a DUI fine of $1,076 and restitution fine of $240, and 50 hours of volunteer community service.

D. Conclusions of Law

In light of the foregoing facts, the issue before the court is whether the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline.

The term moral turpitude is defined broadly. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 49 Cal.3d 804, 815, fn. 3.) An act of moral turpitude is any "act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. [Citation.]" (*In re Craig* (1938) 12 Cal.2d 93, 97.) "It is measured by the morals of the day [citation] and may vary according to the community or the times. [Citation.]" (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 214.)

In *In re Alkow* (1966) 64 Cal.2d 838, the Supreme Court found that the circumstances surrounding a vehicular manslaughter conviction of an attorney involved moral turpitude because of his complete disregard of the law, the conditions of a prior criminal probation order and the safety of the public. "Although he did not intend the accident, he knew his vision was defective and reasonably must have known that injury to others was a possible if not a probable result of his driving." (*Id.* at p. 840.)

As the Supreme Court stated in *In re Lesansky* (2001) 25 Cal.4th 11, 16:

> [W]e can provide this guidance: Criminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows 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 this proceeding, respondent continued to argue: (1) that he left the scene of the accident to get help from the security guard, when in fact, he was surrounded by residential homes and had abandoned the victim whom a passerby thought was trash; (2) that the victim's walking speed was somewhat faster than an average 85 year old, when people who knew Phillips attested to his slow walking and needing assistance with a cane; (3) that he had no notice that he was impaired, when his BAC was more than twice the legal limit and when he knew or should have known that drinking and then driving are prohibited; and (4) that he did not lie to the police about how much he had to drink, when he tried to conceal his vodka consumption and then failed the field sobriety tests.

The court finds these and other arguments without merit.

Here, the accident was clearly tragic and respondent did not intentionally hit Phillips with his car. But, he knew he drank vodka and beer. He knew or should have known that one does not drink and then drive and that drinking would impair his driving skills and judgment. And, he reasonably should have known that injury to others was a possible if not a probable result of his driving while intoxicated, particularly in a senior community.

Respondent's alcohol consumption may have impaired his moral judgment and physical alertness. Nevertheless, he was not candid. Respondent attempted to justify his serious mistake and misrepresented to the police at the time of the accident that he only had one beer and that the victim streaked across in front of his car. And even six days after the accident, respondent still told the police that Phillips was "running," "a sort of a hobbled sprint," and that his medications heightened his BAC. He continued to maintain that he did not feel any impairment at the time when in fact, he was impaired, as evidenced by his failed sobriety tests.

Therefore, the court finds that the circumstances surrounding respondent's vehicular manslaughter conviction involved moral turpitude because of his disregard of the law and the

safety of the public by drinking and then driving with a BAC of .18%, thus causing the death of Phillips; because he left the victim alone in the street[2]; and because of his misrepresentations to the police that he only had one beer and that an 85-year-old pedestrian with a cane suddenly streaked across in front of his car.

IV. Mitigating and Aggravating Circumstances

Aggravation[3]

Misconduct Surrounded/Followed by Bad Faith, Dishonesty, Concealment, Overreaching or Other Violations of State Bar Act/ Rules of Professional Conduct; If Trust Funds/Property Involved, Refusal/Inability to Account to Client/Other Person for Improper Conduct Toward Funds/Property (Std. 1.2(b)(iii).)

Since the court has determined that respondent's misconduct involved moral turpitude, based on his concealment and false statements to the police, no additional aggravating factor of bad faith or concealment is found here.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's vehicular manslaughter while intoxicated grievously harmed the victim and his family and friends, causing the death of Phillips and consequently, depriving others of Phillips's love, companionship and friendship, and significantly harmed the bystanders who witnessed the aftermath of the accident.

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[2] While there is no clear and convincing evidence that respondent fled the scene, it is clear that he left the scene of the accident, leaving the victim on the road. In his intoxicated state of mind, respondent claimed he was going to the security shack to get help and saw no other options. At the same time, he did not believe that he was impaired by alcohol. He could have easily knocked on the neighbors' doors for assistance. In fact, when passerby Stevens found Phillips lying on the street, she went home – a few feet away – to retrieve a blanket for the dying victim.

[3] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Respondent has practiced law without discipline for 34 years at the time of the accident. Significant mitigating weight is usually assigned to this factor. However, due to the serious nature of respondent's misconduct, the weight given is diminished.

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

Respondent presented the testimony and declarations of ten character witnesses, including four attorneys and six business associates/friends, who testified to his good character and honesty. Favorable character testimony from attorneys is entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Because attorneys have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.)

Several witnesses have known respondent for more than 30 years professionally and personally. Most said he enjoys drinking but does not drink to excess. They testified that he is an accomplished and extremely competent lawyer and expert in environmental law. They attested that he possesses the highest integrity and is respectful and thoughtful of others. Their testimony demonstrates not an extraordinary but a sufficient showing of respondent's good character as mitigation.

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

Respondent has learned from the accident that he cannot drink and then drive. One witness declared: "I have never heard him sound so sad and concerned for the victim of the accident, and the impact to the victim's family and friends…I know that this is a scar that Bob will carry with him for the rest of his life."

Although he promises never to drink and drive again, respondent noted that he will continue to drink once he is allowed to again.

While respondent thinks about Phillips and the accident every day, he did not pay any restitution out-of-pocket to the victim's family. His insurance company paid all settlement monies and the settlement agreement made sure that he did no jail time. In contrast, as a result of this tragic accident, Phillips lost his life.

Respondent's remorsefulness is given some weight in mitigation.

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

The final conviction of a member of the State Bar of a crime involving moral turpitude constitutes cause for suspension or disbarment. (Bus. & Prof. Code, § 6101, subd. (a).)

Standard 1.6(b) provides, in pertinent part, that the specific sanction for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

Standard 3.2 provides that final conviction of an attorney of a crime which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission must result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, will disbarment not be imposed, in which case the discipline must not be less than two years' actual suspension, prospective to any interim suspension, regardless of mitigating circumstances. Here, there are no compelling mitigating circumstances that clearly predominate.

Respondent argues that his misconduct did not involve moral turpitude and that the appropriate disposition in this case is either a dismissal or at most, an actual suspension of six months, citing, among others, *In re Kelley* (1990) 52 Cal.3d 487 and *In re Alkow, supra*, 64 Cal.2d 838 in support of his argument.

The State Bar urges that disbarment is warranted, contending that *Alkow*'s low level of discipline imposed in 1966 is no longer appropriate, in light of current societal rejection of impaired driving, especially drunken driving, and the standards for attorney sanctions that were adopted in 1986, some 20 years after *Alkow* (i.e., standard 3.2).

In *Alkow*, the attorney was suspended from the practice of law for six months for striking and killing a pedestrian while driving without a license. The cause of the accident was due, in part, to his defective vision, and not to driving while intoxicated.

In *Kelley*, the Supreme Court publicly reproved an attorney who was twice convicted of drunk driving over a 31-month period. The second conviction occurred while she was still on probation for the first conviction. The Supreme Court found her behavior evidencing lack of respect for the legal system and an alcohol abuse problem. Both problems, if not checked, could spill over into her professional practice and adversely affect her representation of clients and her practice of law. No one was injured by her drunk driving.

Standard 3.2 "guides strongly to disbarment for crimes which involve moral turpitude." (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 941 [disbarment for capping and fee splitting.) "[D]isbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude." (*In re Crooks* (1990) 51 Cal.3d 1090, 1101.)

The court recognizes that respondent's crime was an accident and his dishonesty was arguably not as egregious as that of the attorneys who conspired to defraud the Internal Revenue

Service (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469 [disbarment]) or who were involved in widespread capping and defrauding insurance companies (*Kitsis v. State Bar* (1979) 23 Cal.3d 857 [disbarment]; *In the Matter of Oheb, supra*, 4 Cal. State Bar Ct. Rptr. 920 [disbarment]). Respondent's dishonesty does not rise to the same level of deceit and dishonesty as found in those cases.

Yet, in *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, an attorney who was convicted of welfare fraud of about $10,240, a misdemeanor involving moral turpitude, in order to feed his nine minor children was actually suspended for two years.

In this case, respondent was convicted of a felony. His crime itself – the unlawful killing of a human being while drunk driving – is more reprehensible than defrauding an entity of money and too serious to be dismissed as an aberrational act or a mere accident without grave consequences. Unlike misappropriating client funds or cheating the government, the taking of a human life is irreplaceable. Respondent's denial of impairment is suspect, when he was clearly under the influence of alcohol. His leaving the scene of the accident and informing the police that he only had one beer are acts involving moral turpitude. Undeniably, this case is a lose-lose. But the purpose of discipline is not to seek redress or compensate those who are harmed. It is but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. Imposing a period of two years' actual suspension is insufficient to fulfill the goals of attorney discipline under the facts and circumstances surrounding respondent's criminal offense and absent any compelling mitigating circumstances. Accordingly, disbarment is the only appropriate disposition under standard 3.2.

VI. Recommendations

It is recommended that respondent Robert David Wyatt, State Bar Number 73240, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of the California Rules of Court, rule 9.20, and to 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 proceeding.

Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: February _____, 2013

LUCY ARMENDARIZ
Judge of the State Bar Court