

**STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of	)	<b>Case Nos. 04-C-10375; 04-C-14350</b>
<b>ROBERT G. McConnell,</b>	)	
<b>Member No. 203555,</b>	)	<b>DECISION AND ORDER SEALING</b>
A Member of the State Bar.	)	<b>DOCUMENTS</b>
_____	)	

**I. Introduction**

As set forth below in greater detail, respondent **Robert McConnell** has successfully completed the State Bar Court’s Alternative Discipline Program (ADP).<sup>1</sup> (Rules Proc. of State Bar, rules 800-807.) Accordingly, pursuant to rule 803 of the Rules of Procedure of the State Bar of California,<sup>2</sup> the court recommends that respondent be suspended from the practice of law for three years, that execution of such suspension be stayed and that respondent be placed on probation for three years, and that respondent be actually suspended for the first 90 days of the period of probation, with credit for the period of his interim suspension.

**II. Significant Procedural History**

Following the execution of a Contract and Waiver for Participation in the State Bar Court’s Alternative Discipline Program (contract), this court accepted respondent into the ADP on March 21, 2005. On October 1, 2007, this court found that respondent successfully completed the ADP and

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<sup>1</sup>Also known as the State Bar Court’s Program for Respondents with Substance Abuse and Mental Health Issues.

<sup>2</sup>References to rule are to the Rules of Procedure of the State Bar, unless otherwise noted.

ordered that the March 21, 2005 Stipulation Re Facts and Conclusions of Law (stipulation) approved by the court be filed.

### **III. Findings of Fact and Conclusions of Law**

The stipulation filed on October 1, 2007, is attached and incorporated by reference as if set forth fully herein.

In summary, respondent stipulated that he used false identification to purchase a home stereo and obtained a temporary credit card from a store.

There are no aggravating factors. Respondent has the following mitigation: 1) has no record of prior discipline since being admitted in 1999; 2) took steps to demonstrate remorse and recognition of his wrongdoing in that he made restitution to the Walnut Creek store for the home stereo he fraudulently obtained and he filed a statement of his non-opposition to his interim suspension; 3) was candid and cooperative with the State Bar during the investigation and resolution of these matters; 4) suffered from family problems which contributed to his drug addiction.

Of particular importance, however, is respondent's successful completion of the State Bar's Lawyer Assistance Program (LAP). Due to various family problems and issues regarding his sexual orientation respondent became addicted to methamphetamines in 2000. By 2002 respondent had depleted his savings and resorted to illegal means to obtain drugs. Following his 2003 arrest respondent voluntarily entered into a residential drug treatment program and consulted LAP. Based upon respondent's declaration and the evaluation of Dr. Wayne Thurston, Psy.D., dated January 8, 2004, the court found there was suffering from a substance abuse problem and that there was a causal connection between that problem and the misconduct which gave rise to his convictions. On June 2, 2004, respondent entered into the long-term participation plan with LAP, a five-year commitment. He has remained in full compliance with LAP ever since.

On August 30, 2007, the LAP formally notified respondent of his successful completion of the LAP and presented him with a Certificate of Successful Completion. (Rules Proc. of State Bar, rule 804.)

In addition to participating in LAP, respondent was accepted into the ADP as a result of his misconduct in this matter. Respondent fully complied with all terms and conditions of the program.

Rule 804 provides that a respondent must participate in the ADP for a period of 36 months, and that the court may shorten the time to not less than 18 months with earned incentives. Based on his compliance with all aspects of his recovery program, the court found it appropriate to reduce the length of time that respondent was required to participate in the ADP from 36 months to 30 months. Accordingly, on October 1, 2007, the court found that respondent successfully completed the ADP.

Respondent is entitled to significant mitigating credit for his successful completion of LAP and ADP.

#### **IV. Degree of Discipline**

In determining the appropriate disposition of this proceeding, the Court must consider the purposes of disciplinary proceedings and sanctions. The purpose of a disciplinary proceeding is not to punish the attorney, but to protect the public, preserve public confidence in the profession and 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; Standard 1.3.) Standard 1.6(b) provides that the specified discipline for a 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 the final conviction of a member of a crime that involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission shall result in disbarment unless the most compelling mitigating circumstances clearly predominate, in which case discipline of at least two years actual suspension shall be imposed.<sup>1</sup> The crimes of which Respondent has been convicted involve moral turpitude.

In its letter brief submitted to the Court on February 9, 2005, the State Bar recommended that, if Respondent successfully completed ADP, he should be suspended from the practice of law for a period of three years, execution of the suspension should be stayed and Respondent should be

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<sup>1</sup>However, in *In re Young* (1989) 49 Cal.3d 257, 267, the Supreme Court rejected a strict application of Standard 3.2 because it resulted in "an unduly harsh recommendation of discipline" because it precluded the State Bar Court from considering the time that the attorney had spent on interim suspension.

placed on probation for three years conditions which include his actual suspension for one year, with credit for the period of his interim suspension. However, if Respondent did not successfully complete ADP, the State Bar recommends that he be disbarred. In support of its recommendations, the State Bar cites *In re Rothrock* (1944) 25 Cal.2d 588 and *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297.

In his discipline briefs submitted on February 23, 2005, and March 9, 2005, Respondent recommended that, if he successfully completed ADP, he should receive a three-month stayed suspension, one year probation and three months actual suspension, with credit for the period of his interim suspension. Alternatively, Respondent recommended that, if he failed to successfully complete ADP, he should receive a one-year stayed suspension, three years probation and an actual suspension of nine months, with credit for the period of his interim suspension. Respondent cites a number of cases in support of his disciplinary recommendations, including *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Tenner v. State Bar* (1980) 28 Cal.3d 202; *Chadwick v. State Bar* (1989) 49 Cal.3d 103; and *In re Kristovich* (1976) 18 Cal.3d 468.

The Court concludes that the discipline recommended by the State Bar is too severe, but that the discipline recommended by Respondent is insufficient.

There are a multitude of cases that reiterate the well-settled proposition that the conviction of an attorney of grand theft, forgery or other crimes involving moral turpitude warrants disbarment in the absence of mitigating circumstances. (See, e.g., *In re Bogart* (1973) 9 Cal.3d 743, 748; *In re Dedman* (1976) 17 Cal.3d 229, 233; *In re Petty* (1981) 29 Cal.3d 356, 361.)

Respondent was convicted of misdemeanor offenses rather than felonies. Additionally, Respondent successfully completed ADP, his rehabilitation from a serious substance abuse problem involving methamphetamine is entitled to significant weight in mitigation. Nevertheless, the crimes of which Respondent was convicted involved moral turpitude and, even considering the mitigating circumstances, warrant the imposition of substantial discipline.

In *In re Duchow* (1988) 44 Cal.3d 268, the attorney was convicted of four counts of theft of public money in violation of 18 United States Code section 641 by, in essence, defrauding the Social

Security Administration and the Veterans Administration of more than \$10,000 that he misappropriated to his own use. The Supreme Court ordered a three-year stayed suspension, three years probation and an actual suspension of one year. At the time of his conviction, the attorney had been admitted to practice for almost 25 years and had no prior record of discipline.

In *In re Cadwell* (1975) 15 Cal.3d 762, the attorney was convicted of two counts of grand theft in violation of Penal Code sections 484 and 487<sup>2</sup> and, in a separate disciplinary proceeding, was found culpable of engaging in the unauthorized practice of law while on interim suspension as a result of his criminal conviction. The attorney had been admitted to practice for about 10 years at the time of his misconduct and had no record of prior discipline. In addition, the Supreme Court found that, at the time of his offenses, the attorney was suffering "considerable emotional stress" as a result of his wife's drug addiction and severe emotional problems, including attempted suicide. As a result of the additional time he was required to spend caring for his wife and children, the attorney had limited funds and apparently used the misappropriated funds for the support of his family. Because the attorney had been on interim suspension for more than five and one-half years at the time the Court issued its opinion, the Court concluded that no additional period of actual suspension was required.

In *In the Matter of Lybbert*, supra, the attorney was convicted of welfare fraud in violation of Welfare and Institutions Code section 10980, subdivision (c) as a result of his failure over a period of about 15 months to report income of \$7,400 from part time employment to the Riverside County Department of Public Social Services, from whom he and his wife were receiving public assistance for themselves and their nine children. In mitigation, the Review Department found that the attorney had made restitution of most of the funds despite his limited ability to pay and that he was cooperative and remorseful and had accepted full responsibility for the fraud. In addition, the Review Department found that the attorney had engaged in significant volunteer and community work and

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<sup>2</sup>Although the Supreme Court's opinion does not specifically indicate the amount of the funds involved in the grand theft convictions, it appears from the opinion that the amount was approximately \$5,000. (See *In re Cadwell*, supra, 15 Cal.3d at pp. 766-767.)

that numerous character witnesses attested to his good moral character. Nevertheless, in light of the seriousness of the misconduct, the Review Department recommended a three-year stayed suspension, three years probation and an actual suspension of two years and until the attorney complied with Standard 1.4(c)(ii). The Review Department also recommended that the attorney be given credit for the period of his interim suspension.

The Court finds *Waysman v. State Bar, supra*, to be clearly distinguishable. Although the attorney in *Waysman* had overcome a serious problem with alcohol and was given mitigating credit for that recovery, the Supreme Court specifically noted that the attorney's misconduct involved a single offense that appeared to be the result of negligence rather than fraud. In the current proceeding, Respondent has specifically acknowledged that his conduct involved moral turpitude and that he stole the home stereo equipment to support his drug habit, pay rent and buy food.

Finally, *Tenner v. State Bar, supra*, involves misappropriation of funds by an attorney who was suffering from a severe alcohol problem. At the time the Supreme Court's opinion was filed, the attorney had stopped drinking for more than four years. In light of the evidence of his rehabilitation, as well as his remorse and acknowledgment of wrongdoing and repayment of the misappropriated funds, the Supreme Court ordered a four-year period of probation but no period of actual suspension.

After consideration of the relevant Supreme Court and Review Department case law in the context of Respondent's admitted misconduct in this proceeding, the Court concludes that Respondent's convictions of crimes involving moral turpitude warrants a period of actual suspension, but that the suspension should be less than the suspensions imposed in either *Cadwell* or *Lybbert*.

Applicable Supreme Court case law states that an attorney's rehabilitation from substance abuse problems can be accorded significant mitigating weight if it is established that (1) the abuse was addictive in nature; (2) the abuse causally contributed to the misconduct; and (3) the attorney has undergone a meaningful and sustained period of rehabilitation. (*Hanford v. State Bar* (1990) 52 Cal.3d 93, 101; *In re Billings* (1990) 50 Cal.3d 358, 367.) The evaluation report prepared by Wayne Thurston, Psy.D. on January 8, 2004 confirms that respondent had a substance abuse problem involving methamphetamine that was addictive in nature and that there was a causal connection

between Respondent's drug addiction and the misconduct that resulted in his criminal convictions for violations of Penal Code sections 459/460(a) and 470, subdivision (a) and Vehicle Code section 10851, subdivision (a). Respondent's successful completion of the Alternative Discipline Program qualifies as the "meaningful and sustained period of rehabilitation" required by the third prong of the Supreme Court's test.

Respondent's successful completion of the ADP, which required his compliance with all provisions and conditions of his Participation Agreement with the LAP, and his successful completion of the LAP, qualify as clear and convincing evidence of his rehabilitation from his drug addiction. He has demonstrated that he has undergone a meaningful and sustained period of rehabilitation from chemical dependency. Therefore, his rehabilitation satisfied the third prong of the Supreme Court's test.

In light of the facts and circumstances surrounding respondent's misconduct, the mitigating and aggravating factors and analogous case law, the court will make the following disciplinary recommendation to the California Supreme Court.

#### **V. Discipline Recommendation**

IT IS RECOMMENDED that Respondent ROBERT MATTHEW McCONNELL be suspended from the practice of law in the State of California for a period of three years, the execution of such suspension be stayed, and that Respondent be placed on probation for a period of three years on the following conditions:

1. Respondent must be actually suspended from the practice of law in the State of California for , the first 90 days of the period of probation, with credit for the period of interim suspension which was in effect from May 26, 2004 through October 1, 2004;
2. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
3. Within 10 calendar days of any change in the information required to be maintained on the State Bar's membership records pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, Respondent

must report such change in writing to the Membership Records Office of the State Bar and to the Office of Probation;

4. Respondent must comply with all provisions and conditions of his Participation Agreement with the LAP and must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this Court with information regarding the terms and conditions of his participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition;
5. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of these conditions during the preceding Calendar quarter. If the first report will cover less than 30 calendar days, that report must be submitted no later than the reporting due date for the next calendar quarter and must cover the extended period. In addition to all quarterly reports, Respondent must submit a final report, containing the same information required by the quarterly reports. The final report must, be submitted no earlier than 20 calendar days before the last day of the probation period and no later than the last day of said period;
6. Within 30 calendar days from the effective date of the Supreme Court's final disciplinary order in this proceeding, Respondent must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these probation conditions. At the direction of the Office of Probation, Respondent must meet with the probation deputy either in person or by telephone. During the probation period, Respondent must promptly meet with the probation deputy as directed and upon request;



7. Respondent must comply with all conditions of probation in the underlying criminal matters and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation;
8. Within 10 calendar days of their occurrence, Respondent must report in writing to the Office of Probation any of the following events: (a) his arrest; (b) the issuance of a criminal complaint in which he is a named defendant; (c) his conviction of any crime, whether by guilty verdict or by a plea of guilty or of nolo contendere; or (d) the imposition of any sentence after conviction;
9. Subject to the assertion of applicable privileges, Respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to him personally or in writing, relating to whether he is complying or has complied with these conditions;
10. Within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding, Respondent must provide to the Office of Probation satisfactory proof of his attendance at a session of State Bar Ethics School, and of passage of the test given at the end of that session;
11. The period of probation will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding.

The Court recommends that Respondent be required, within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding, to take and pass the Multistate Professional Responsibility Examination ("MPRE") administered by the National Conference of Bar Examiners, and that he be ordered to provide satisfactory proof of his passage of the MPRE to the Office of Probation within the one-year period.

Respondent timely complied with rule 955 of the California Rules of Court on June 21, 2004, after he was interimly suspended by the State Bar Court Review Department. Although his interim suspension was terminated effective October 1, 2004, he has not been entitled to practice law at anytime since May 26, 2004, and has been on involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (b)(3) since September 10, 2004. In addition, this Court

has recommended that Respondent receive credit for the period of his interim suspension towards the period of actual suspension recommended in this proceeding. If the Supreme Court adopts this Court's disciplinary recommendation, Respondent will not be required to serve any prospective period of actual suspension. As a result, this Court does not recommend that Respondent be required to further comply with rule 955 of the California Rules of Court.

Finally, the Court recommends that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and that such costs be made payable and enforceable in accordance with Business and Professions Code sections 6086.10, subdivision (a) and 6140.7.

## **VI. Order Sealing Documents**

In the course of determining respondent's eligibility for participation in the ADP, and while respondent was participating in the ADP, various documents were submitted to the court for review under confidential cover, including reports and evaluations by mental health professionals and respondent's recommended treatment for participation in the LAP. Pursuant to Business and Professions Code section 6234, subdivision (a), and rule 806 of the Rules of Procedure of the State Bar of California, all information concerning the nature and extent of a respondent's treatment is absolutely confidential and is not to be disclosed to the public absent an express written waiver by the respondent.

**ACCORDINGLY**, the court orders this Order Sealing Documents be filed. Thereafter, pursuant to rule 806(c) of the Rules of Procedure, all other documents not previously filed in this matter will be sealed under rule 23 of the Rules of Procedure.

**FURTHERMORE**, the following documents are to remain confidential and sealed:

1. All reports and evaluations by mental health professionals that were submitted to the court as part of respondent's participation in the Alternative Discipline Program;
2. All information concerning the nature and extent of respondent's treatment provided by the LAP, including, but not limited to, participation reports, application agreements and participation agreements; and

3. The Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program.

**IT IS FURTHER ORDERED** that the foregoing protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their official duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosure. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

**IT IS SO ORDERED.**

Dated: September , 2007

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**PAT McELROY**

Judge of the State Bar Court