FILED June 6, 2008

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **PETER L. THOTTAM,** A Member of the State Bar	)	Case No. **06-C-11344-DFM** **DECISION**

INTRODUCTION

This disciplinary proceeding arises out of the criminal conviction of respondent Peter L. Thottam on August 26, 2004, of a violation of Penal Code section 484, subdivision (a)/488 [petty theft], a misdemeanor involving moral turpitude.

After the record of conviction was eventually received by the State Bar Court, the Review Department filed the following order:

> Since respondent Peter Luke Thottam has been convicted of violating Penal Code section 484, subdivision (a)/488, a misdemeanor involving moral turpitude, and the judgment of conviction having become final, the above entitled matter is referred to the Hearing Department for a hearing and a decision recommending the discipline to be imposed.

On June 27, 2007, the matter was assigned to the undersigned, and on July 31, 2007, the matter was assigned a trial date of December 6, 2007. Trial was commenced

and completed that day, and was followed by a period of post-trial briefing.[1] The State Bar was represented at trial by Deputy Trial Counsel Eli Morgenstern; respondent acted as counsel for himself.

After considering the facts and circumstances surrounding respondent's conviction and the relevant case law and standards, the court recommends that respondent be disciplined as set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the joint stipulation filed by the parties and on the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to practice law in California in June 2000; was a member of the State Bar of California at all times pertinent to these charges; and is currently a member of the State Bar of California.

Factual Background

After becoming an attorney in 2000 and practicing law for several years, respondent made a decision to go back to school to obtain an MBA degree. He initially enrolled at the University of California, Irvine, where he participated in its MBA program for a year. He then decided to transfer to the business program at UCLA. Because he had already purchased at UC-Irvine hundreds of dollars worth of books that he felt he would not be able to use at UCLA, he went to the UC-Irvine bookstore on July 1, 2004, to request that the bookstore repurchase those textbooks at full price. When the

[1] The State Bar has requested that respondent's post-trial brief be stricken in its entirety because of its late filing. That motion is denied. However, the motion by the State Bar to strike those portions of respondent's brief referring to the substance of settlement discussions between the parties is granted.

bookstore refused this request, respondent got upset with its decision. At the time of this reaction, respondent was suffering from a great deal of stress and sleep deprivation due to the medical condition of his mother, who had been hospitalized for a number of weeks, had just had one leg amputated for gangrene, and was refusing to allow doctors to amputate the other diseased leg (although it was understood that her decision would result in her death).[2] While still upset at the bookstore, respondent was observed by security personnel on the first floor of the bookstore putting a book inside a newspaper he had carried into the bookstore with him. He then went to the second floor of the bookstore and placed a second book inside a black carrying case that he also had carried into the store. The two books had a total value of $71. Respondent then exited the store without paying for the books. Respondent now describes his thinking at the time as a "miscarriage of judgment." Two security officers stopped respondent outside the bookstore without incident. When questioned by the UC-Irvine Police Department, respondent admitted taking the books without paying for them. He also discussed with them the stress he was under as a result of his mother's medical condition.

On August 2, 2004, the Orange County District Attorney filed a one-count misdemeanor complaint against respondent, charging him with violating Penal Code §§ 484-488 [petty theft], in the matter titled *People of the State of California v. Peter Luke Thottam*, Orange County Case No. 04HM06325 (the "criminal matter").

On August 10, 2004, respondent failed to appear in court in the criminal matter. As a result, the Orange County court issued a bench warrant and set bail at $2,500. The

[2] Respondent's mother died on July 28, 2004. The death certificate lists her causes of death as septicemia, gangrene of the lower extremities, and peripheral vascular disease.

District Attorney also amended the original charges to add a second count of violating Penal Code section 853.7 [failure to appear].

On August 26, 2004, respondent appeared in court in the criminal matter and pled guilty to the misdemeanor petty theft count. The court recalled the bench warrant and dismissed the failure to appear count in the interest of justice. Respondent was placed on a one-year informal probation, ordered to complete 20 hours of community service, and required to pay fines and fees totaling $130. Respondent has now successfully completed the terms of the probation imposed in the criminal matter, including the 20 hours of community service. Although not ordered to do so, respondent also performed an additional 90 hours of volunteer work with the Ocean Park Community Center. In addition, since his conviction, respondent has devoted several thousand hours of unpaid time in support of various community and public policy causes.

Respondent never reported the petty conviction to the State Bar. Instead, the conviction was eventually brought to the attention of the State Bar by respondent's brother, with whom respondent had become embroiled in emotional litigation.[3] Nonetheless, after the conviction referral process was commenced, respondent has been candid and forthright in his acknowledgement of wrongdoing[4] and has repeatedly and credibly expressed his remorse.

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[3] Respondent complains that his brother reported the conviction to the State Bar in order to gain an advantage in the civil dispute between them and suggests that this matter be dismissed in order to prevent the court's resources from being improperly used by the brother for such a purpose. The court declines to adopt that suggestion. The matter is properly before this court. Respondent had his own obligation to report it. (Bus. & Prof. Code, § 6068(o)(5).)

[4] The State Bar's case-in-chief regarding culpability consisted solely of presenting a lengthy stipulation of undisputed facts executed by respondent.

Aggravating Circumstances

The State Bar of California must prove aggravation by clear and convincing evidence. (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b) ("standards" or "std.").)[5]

Respondent's failure to report his conviction to the State Bar is the only aggravating factor. (Bus. & Prof. Code, §6068(o)(5).)

The State Bar contends that there are "multiple acts" of wrongdoing under standard 1.2(b)(ii) because respondent took two books, each at a different location in the bookstore. This Court declines to make that finding. The misconduct here was leaving the store without paying for the books. Respondent did that only one time. Nor is there any evidence of any prior or subsequent pattern of misconduct.

There is also no basis for finding aggravation under any of the other remaining subparts of standard 1.2(b):

Although respondent's misconduct involved dishonesty, such dishonesty was inherent in the misconduct itself. As such, it will not be treated as an additional aggravating circumstance. Respondent readily acknowledged his offense when confronted by the store's personnel. Other than his subsequent failure to self-report his conviction to the State Bar,[6] there is no evidence of any subsequent attempted concealment of the offense by respondent or of any other dishonesty.

[5] All further references to standards are to this source**.**

[6] Respondent attributes his failure to report the conviction to the State Bar to his lack of knowledge that he owed that duty. The State Bar offered no contrary evidence.

There was no significant harm caused to a client, the public, or to the administration of justice. In fact, because respondent was apprehended so quickly, the stolen books appear to have been only momentarily out of the bookstore's possession.[7]

There is no evidence of any lack of remorse by respondent for his misconduct or any indifference toward rectification or atonement. Finally, there is no prior record of discipline of respondent by the State Bar.

Mitigating Circumstances

The respondent must prove mitigation by clear and convincing evidence. (Std. 1.2(e).) Respondent claims mitigation under most of the categories listed in standard 1.2(e). He is entitled to mitigation under many of them, but not all.

Although respondent has no prior record of State Bar discipline, he is not entitled to mitigation credit due the short time he has been an attorney. Having been admitted to the practice in June 2000, he had been a member of the State Bar for only slightly more than four years at the time of his conviction. During that four-year period, he had been voluntarily inactive for a year. Respondent's tenure in the bar does not qualify as "many years of practice" under standard 1.2(e)(i). (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752; *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 417; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473.) However, the evidence of respondent's prior practice without discipline, coupled with his "clean record" since his conviction, is relevant in proving the aberrational nature of his misconduct and the lack of any likelihood that such conduct will be repeated.

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[7] At the same time, respondent is not entitled to any mitigation credit under standard 1.2(e)(iii) for the lack of harm. (See discussion below.)

Although respondent seeks mitigation for the fact that no harm ultimately resulted to the bookstore, he is not entitled to any. As previously noted, the lack of harm resulted solely from the fact that respondent was apprehended immediately on leaving the bookstore. Returning the fruits of a crime only after being apprehended by authorities is not grounds for mitigation. (See *In re Basinger* (1988) 45 Cal.3d 1348, 1364; *In re Ford* (1988) 44 Cal.3d 810, 817; *Fitzpatrick v. State Bar* (1977) 20 Cal.3d 73, 88.)

The emotional stress and fatigue respondent was experiencing because of his mother's extreme medical condition is a significant mitigating factor. It was a factor contributing to his errant conduct on July 1, 2004. The source of the stress and fatigue was not one for which any concern or criticism can be directed at respondent; nor is it one about which there need be any significant concern of future repetition.

Respondent has displayed candor and cooperation about his misconduct since the time he was first stopped by the authorities outside the bookstore. That attitude has continued throughout the State Bar's investigation and this proceeding. He is entitled to mitigation credit for such attitude and behavior.

Respondent produced considerable evidence regarding his non-paid time and efforts in community service and public interest efforts. He is given some mitigation credit for these works. He made no effort, however, to call witnesses to attest to his good character.

While there was a delay between respondent's conviction and the initiation of this proceedings, that delay was attributable to respondent's failure to self-report the conviction and did not result in any prejudice to respondent. As a result, it provides no basis for any mitigation.

Respondent seeks mitigation credit for the fact that he participated for a period of time in the Lawyer's Assistance Program. However, respondent did not complete the program but, instead, voluntarily dropped out of it during the evaluation process. As a result, no mitigation credit will be afforded.

DISCUSSION

"Theft" is defined by Penal Code section 484 to include stealing personal property of another. Section 486 of the Penal Code divides theft into two categories: grand theft and petty theft. Grand theft is defined to include, *inter alia*, taking personal property of a value exceeding four hundred dollars. (Pen. Code, § 487.) Grand theft may be either a felony or a misdemeanor. With numerous exceptions not applicable here, the theft of personal property having a value of less than $400 is generally classified as petty theft, rather than grand theft. (Pen. Code, § 488.) Petty theft may be charged as either a misdemeanor or an infraction. (Pen. Code, § 490.1.)

It is well-settled that petty theft is a criminal offense involving moral turpitude. (See *In re Rothrock* (1944) 25 Cal.2d 588.) The record of conviction is conclusive evidence of guilt of the crime of which the respondent was convicted. (Bus. & Prof. Code, § 6101.) The convicted attorney is conclusively presumed to have committed all of the acts necessary to constitute the offense. (*In re Duggan* (1976) 17 Cal.3d 416, 423.) A plea of guilty is deemed to be a conviction. (*In re Rothrock, supra*, 25 Cal.3d at p. 589.)

Business and Professions Code section 6106 provides, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or

misdemeanor or not, constitutes a cause for disbarment or suspension." Similarly, section 6101 of the Business and Professions Code provides in pertinent part, "Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension."

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. In determining the appropriate level of discipline, the court looks first to the standards "as guidelines to determine the discipline necessary and appropriate to protect the public." (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; see also *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) In determining what discipline to recommend or impose, we also consider relevant decisional law. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.)

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."

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. (Std. 1.6(a).)

Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, both the Supreme Court and the Review Department have been explicit in stating that the courts are "'not bound to follow the standards in talismanic fashion." (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In assessing the discipline appropriate in a particular case, the courts are permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*Howard v. State Bar*, *supra*; *Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 454; *In the Matter of Van Sickle*, *supra; In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

With respect to the two-year minimum actual suspension provision of standard 3.2, that provision has previously been rejected by the courts as an absolute requirement, and there are numerous instances where discipline for crimes involving moral turpitude has been assessed at a lower level. (See, e.g., *In re Young* (1989) 49 Cal.3d. 257, 268-270; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737; *In the Matter of Moriarty* (Review Dept.) 1 Cal. State Bar Ct. Rptr. 245, 251.) As a consequence, it is incumbent on this Court to adhere to the oft-repeated admonition that, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 940.)

The State Bar does not contend that respondent should be disbarred for his single act of petty theft. Instead, it asks that a five-year stayed suspension and five-year

probation, conditioned on a two-year actual suspension, be recommended to the Supreme Court. Such an actual suspension would presumably also be accompanied by a requirement that respondent remain suspended until he petitions successfully for reinstatement under standard 1.4(c)(ii).

Such a substantial discipline is unnecessary and unwarranted in the instant case. The circumstances of respondent's act, the aberrational nature of it, and respondent's conduct since his conviction convince this Court that no such significant discipline is necessary to protect the public or the profession from future repetition by respondent of any such misconduct. The conduct did not occur in the context of respondent's activities as an attorney; it was not directed at a client; and it took place during a very brief period of time when respondent was emotionally off-balance for reasons not of his own making. The conduct took place nearly four years ago. There has been no indication of any subsequent misbehavior. Respondent has already successfully completed the one-year period of probation imposed by the criminal court. To now add a new five-year probation, enforced by a stayed five-year suspension, to monitor respondent's conduct is unnecessary and unwarranted. Nor is it necessary to assess an actual suspension for two years' duration.

It does not follow, however, that no significant discipline should be assessed. The courts have repeated emphasized that honesty is one of the most fundamental rules of ethics for attorneys. (See, e.g., *Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053; *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 596.) Attorney discipline serves to maintain the highest possible professional standards for all attorneys and to preserve public confidence in the

legal profession. (*In the Matter of DeMassa, supra,* 1 Cal. State Bar Ct. Rptr. at p. 752.) Where an attorney has been convicted of a crime involving moral turpitude, especially one involving theft, all authorities agree that at least some suspension should result.

In *DeMassa,* the Review Department recommended one year of stayed suspension, one year of probation, and 60-days actual suspension, for an attorney convicted of harboring a fugitive-client, although the attorney's act was noted by the court to have been aberrational, well-motivated, not for personal gain, and posing no risk of harm to the public, profession, or courts. In *Moriarity,* the Review Department recommended that an attorney convicted of filing three annual tax returns claiming fraudulent deductions be disciplined with two years stayed suspension, probation to correspond with that already ordered by the criminal court, and no additional actual suspension beyond the seven months the attorney had previously be subject to an interim suspension. In that case the attorney was given mitigation credit for being under emotional distress as a result of the amputation of the attorney's lower leg, the sickness and subsequent death of his mother, his candor and remorse, his community service, and evidence of good character. In reaching that recommendation, the court noted that a co-defendant/attorney had been disciplined by the Supreme Court with a two-year stayed suspension, two-year probation, and a 90-day actual suspension. (*In the Matter of Moriarty, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 252-3.)

It is this Court's recommendation that the discipline for respondent here be a one-year stayed suspension and one-year probation, conditioned on a 90-day actual suspension. Although the nature of respondent's crime, theft, is historically viewed as more serious than the offenses in *Moriarty* and *DeMassa,* that factor is offset by the many

mitigating factors existing here. At the same time, while the discipline recommended in *DeMassa* is less than that being recommended here, the discipline there was tempered by the fact that the attorney there was acting in what he thought at the time was an appropriate manner. So such conclusion can be applied to respondent's conduct here.

RECOMMENDATION

For all of the above reasons, it is recommended that respondent **PETER L. THOTTAM** be suspended from the practice of law in the State of California for one year, that execution of that suspension be stayed, and that respondent be placed on probation for one year on the following conditions:

1. Respondent must be actually suspended from the practice of law during the first ninety (90) days of probation.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.

3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the

first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for one year will be satisfied, and the suspension will be terminated.

It is also recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to pass the MPRE and to provide proof of such passage within the specified time will result in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage of the MPRE.

Rule 9.20 Obligations

It is further recommended that respondent be ordered to comply with rule 9.20 of the California Rules of Court and to perform the acts specified in paragraphs (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. Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers* v. *State Bar* (1988) 44 Cal.3d 337, 341.)

It is finally recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: May 23, 2008.

DONALD F. MILES
Judge of the State Bar Court