FILED MAY 2, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **ZACHARY ALEXANDER TORAN,** **Member No. 267822,** A Member of the State Bar.	)	Case No.: **11-C-17711-PEM** **DECISION**

Introduction[1]

This contested hearing is based upon the conviction of respondent Zachary Alexander Toran of a misdemeanor violation of Penal Code section 415 subdivision (2) (any person who maliciously and willfully disturbs another person by loud and unreasonable noise). The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented in this proceeding by Maria Oropeza. Respondent was represented by Donald T. Bergerson.

For the reasons stated below, this court finds that the facts and circumstances surrounding respondent's commission of the offense involved moral turpitude. After considering the facts and the law, the court recommends that respondent be suspended from the practice of law for a period of three years, that execution of such suspension be stayed and that respondent be placed on probation for three years on conditions including actual suspension for six months, among other things.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Significant Procedural History

On June 29, 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.

On July 12, 2012, the State Bar Court issued and properly served a Notice of Hearing on Conviction on respondent. Respondent filed a response on July 31, 2012.

A three-day hearing was held on January 31, February 1 and 12, 2013. The case was submitted following closing arguments and the submission of a transcript of a tape recording used in the proceeding on February 15, 2013.[2]

Findings of Fact and Conclusions of Law

Respondent's culpability in this proceeding is conclusively established by the record of his conviction. (Bus. & Prof. Code, §6101, subd. (a); *In re Crooks* (1990) 51 Cal. 3d 1090, 1097.) Respondent is presumed to have committed all of the elements of the crimes of which he was convicted. (*In re Duggan* (1976) 17 Cal.3d 416, 423; *In the Matter of Respondent O* (Review Dept. 1933) 2 Cal. State Bar Ct. Rptr. 581, 588.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 4, 2009, and has been a member of the State Bar of California at all times since that date.

[2] The State Bar did not have a transcript of a tape-recording it wanted admitted into evidence. The court made the determination that, pursuant to Cal. Rules of Court, rule 2.1040, in order for the tape to be admitted into evidence the State Bar had to provide the court and other parties with a transcript of the recording.

B. Findings of Fact

1. Respondent's Conviction

Pursuant to a four-count felony complaint filed October 14, 2011, in the Superior Court of the State of California, City and County of San Francisco, respondent was charged with felony violations of Penal Code §§ 524 (attempted extortion); 496 (receiving or buying stolen property); 487(a) (grand theft of personal property); and 487(c) (grand theft person).

On January 27, 2012, respondent entered into a plea of *nolo contendere* to one count of a misdemeanor violation of Penal Code § 415(2) (disturbing the peace) for willfully and maliciously disturbing another person by loud and unreasonable noise. To prove this crime, the following elements must be proved: (1) that a person willfully and maliciously caused loud and unreasonable noise; and (2) the loud and unreasonable noise caused another person to be disturbed. (CALJIC No. 16.260.) "Loud and unreasonable noise" means loud shouting and cheering where there is a clear and present danger of its giving rise to immediate violence or where it is used as a guise to disrupt lawful endeavors. (CALJIC No. 16.261.) The felony charges were dismissed.

Respondent was sentenced to one year of unsupervised probation; two days of county jail with credit for time served; and a $120 fine and other assessments, among other things.

2. Facts and Circumstances Surrounding Respondent's Conviction

On September 30, 2011, Samaria Peralta reported to the San Francisco Police Department (SFPD) that she lost her diamond bracelet that she estimated was worth $20,000. In addition to notifying the SFPD, Peralta notified pawn dealers and jewelry store owners in the greater San Francisco Bay Area about her loss by sending out an email describing her bracelet and attaching a photograph of it to the email. In the email, she said that she would buy it back.

Respondent found the bracelet that Peralta lost and, after a week, he decided to see if it had any value. On October 10, 2011, respondent went to David Clay Jewelers on Union Street in San Francisco seeking an appraisal of the bracelet he found. David Clay told him the bracelet had a street value of anywhere from $5,000 to $7,000 and that he estimated it weighed about 7.0 carats. Respondent asked if Clay were interested in buying it. Clay said he had no such interest but that he knew of a place called Circa who might buy it. Respondent left Clay's .

After respondent left the store, Clay recalled that he had received Peralta's email regarding her lost bracelet. Clay then called her and told her that a person called Zach came into his store with what appeared to be her bracelet. He explained that Zach understood the street value of the bracelet to be between $5,000 and $7,000. He suggested that she offer him a reward. Clay tracked respondent down on Union Street and showed him the email he had received from Peralta. He gave respondent Peralta's telephone and email address. Clay then sent Peralta an email telling her about respondent and expressing that he hoped it worked out for her.

On October 10, 2011, respondent called Peralta. They sent each other a number of text messages that day, including pictures of the bracelet. Peralta confirmed the bracelet was hers. Peralta testified that she agreed to pay $5,000 because that is what respondent requested. On the other hand, respondent testified that she offered $5,000 as a reward for the return of her bracelet. Peralta does not remember the exact words or who said what first. However, it is clear that she was left with the distinct impression that she was not going to get her bracelet back unless she gave respondent $5,000 and she wanted her bracelet back.

At some point, Peralta had her boyfriend intervene in her negotiations with respondent. He negotiated the amount of $4,000[3] for the return of the bracelet. Respondent admits to have written a contract entitled "Reward Agreement and Release" for the return of the bracelet.[4] After these negotiations, Peralta agreed to meet respondent at the University of San Francisco (USF) law library and exchange the bracelet for the reward of $4,000.

When Peralta told her relatives of the negotiations, they told her to contact the police. Peralta contacted the SFPD to explain the situation and told them when and where the exchange with respondent was to take place. The police informed Peralta that they did not have the resources to help her in the exchange and that she should stall the respondent and pick another date for the exchange. Peralta testified that she tried to stall the respondent in terms of the timing of the exchange, but she was unsuccessful. She was again left with the impression that if she did not do the exchange on the day respondent first contacted her, she was not going to get her bracelet back. Peralta told the SFPD that she was going to go ahead with the exchange.

The SFPD decided to help Peralta by conducting a sting. They outfitted Peralta's car with a wire. Moreover, six police, all undercover, met with Peralta near the place where she was to meet respondent. After speaking with her, they followed her to USF. The officers testified that all six of them were in the area of the USF library and, at times, were in the bushes. It is clear that, at the time, no one would have identified these undercover officers as police. Respondent testified that he noticed a number of "strange" men lurking about in the bushes and he became alarmed that Peralta might have brought men to rob him. The court finds that his belief was not unreasonable given that the undercover police admitted to being in the bushes at times and lurking about.

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[3] At trial there was conflicting testimony as to whether the negotiation was $4,800 or $4,000. However, for purposes of this hearing whether it was $4,800 or $4,000 is irrelevant.

[4] He wanted a contract because there was an exchange of money and he wanted a document in case anyone accused him of anything.

Peralta and respondent were in contact with each other by cell phone. Respondent conveyed to Peralta his suspicion that she had brought men to rob him and that he was now involved in a scam. Peralta convinced him that his suspicions were unfounded. Nevertheless, respondent changed the exchange site to a Chevron station. The undercover police followed Peralta, who was in her own car, and respondent, who was in his car with a friend, to the Chevron station. Respondent's suspicions were not allayed so he changed the site of the exchange to the Wells Fargo Bank across the street from the Chevron station.

Peralta met respondent in the parking lot of the Wells Fargo Bank. Both respondent and Peralta testified that the exchange took place in an awkward manner. He showed her the bracelet and he had her count the money. After she counted the money, respondent gave Peralta her bracelet and she gave him $3,000, as that is all she had. After the exchange took place, Peralta attempted to grab the $3,000. Respondent pushed back and Peralta was not able to get the $3,000. Peralta says that respondent did not strike her as reported in the police report. After the exchange was completed, the police moved in with their guns drawn and conducted a felony stop.

Respondent threw the $3,000 out of the car and screamed "do not shoot me!" The police pulled him out of his car and guided him to the ground. This court believes that respondent threw the money out of the car because he initially thought the police were going to shoot and kill him. This is not an unreasonable belief as the police were in plainclothes and one of the police cars that swerved in front of respondent's car was unmarked. Respondent was arrested and, at the police station, respondent stated he had a contract with Peralta to return the bracelet. He states that he had the contract because it was a money transaction and he did not know who Peralta was or if the bracelet was really hers. Peralta testified that respondent never discussed a

contract with her. This court believes that had the exchange taken at the USF library as planned, respondent would have had Peralta sign his contract.

C. **Conclusion of Law**

The final conviction of a member of the State Bar for a crime involving moral turpitude constitutes cause for suspension or disbarment. (Bus. & Prof. Code § 6101, subd.(a).) Although the term "moral turpitude" defies precise definition, it has been described "as an 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.) Crimes which necessarily involve an intent to defraud or dishonesty for personal gain, such as perjury (*In re Kristovich* (1976) 18 Cal.3d 468, 472), grand theft (*In re Basinger* (1988) 45 Cal.3d 1348, 1358) and embezzlement (*In re Ford* (1988) 44 Cal.3d 810, 813) involve moral turpitude.

As previously indicated, respondent is conclusively presumed to have committed all of the elements of the crime of which he was convicted. (*In re Duggan*, supra, 17 Cal.3d. at pg. 423). In the instant case, respondent pled guilty to a disturbing the peace. The fact that respondent pled guilty to disturbing the peace does not necessarily determine the outcome of the disciplinary matter. In examining the circumstances giving rise to the offense, the court is not restricted to examining the elements of the crime but may look to the whole course of an attorney's conduct which reflects upon his ability to practice law. In this instance, respondent's conduct constitutes a moral lapse. The bracelet was not his. He was informed of the identity of its owner. He should have returned it to its owner without recompense. (See, i.e., Civil Code § 2080.) Its owner should not have had to be bargaining for the return of her own property. Having said that, the court is cognizant that the reason respondent got a plea bargain for disturbing the peace is because the prosecution could not have proved the elements of attempted

extortion or grand theft, such as the intent to permanently deprive the owner of the property. But, respondent engaged in turpitudinous behavior in this case although he was only convicted of disturbing the peace. He had a moral lapse or a lapse of character on that day. It is a basic "accepted and customary rule of right and duty between man and man" that one does not keep what does not belong to him.

Aggravation[5]

There were no aggravating factors.

Mitigation

Good Faith (Std. 1.2(e)(ii).)

Respondent honestly, but erroneously, thought that getting a reward for returning the bracelet was acceptable. The jeweler showed him the bracelet owner's email, so he was aware of the reward and believed that he was entitled to it upon returning the bracelet. He did not know about the Civil Code provisions about lost and found property. During the three times he arranged to meet with the owner to exchange the bracelet for the money, he believed he was being set up to be mugged.

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

Respondent's father, a lawyer in good standing, mother and a childhood friend with whom he played soccer at city college testified to his good character. However, this does not represent an extraordinary demonstration of 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. Accordingly, the court declines to find this mitigating factor.

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

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

Respondent understands that what he did was morally wrong. He understands that he had no right to the bracelet. He candidly admitted that he when he found out what the bracelet was worth and that the owner would give a reward he thought he had hit the jackpot. He candidly admitted he did not research about his obligation under the Civil Code to return the bracelet to Peralta. The court believes him. He would never do this kind of thing again.

Community Service

Respondent has been active in pro bono and community service activities. He received an award for exceptional pro bono work assisting indigent tenants with the volunteer program of the Bar Association of San Francisco. He said that it made him feel good to fight for the underdog.

Carolyn Gold, the supervising attorney for BASF's volunteer legal services, credibly testified that respondent came as a new attorney and trained for both of the programs that she supervises: one in which low-income tenants are represented in the eviction process and the other in which tenants are represented in settlement conferences, a more limited scope program. Gold says that respondent did a great job for a first-year attorney. He wanted to learn but he also had the heart to want to help low-income tenants. He showed confidence and entered the process without fear. He was able to inspire confidence, utilize aggressive negotiating tactics and perhaps might take a matter to trial. He had to be able to exercise his judgment and negotiate for someone who is in a position of weakness.

Gold said that respondent signed up to assist quite frequently, two afternoons a week from 12:30 p.m. to 4:30 p.m. Respondent received the outstanding volunteer award because of the number of hours he volunteered. According to Gold, it is not easy to get volunteer attorneys.

Although she does not know him personally, Gold does not question his ethics or integrity. He is a good person who showed great heart and commitment. Respondent had

disclosed to her why he missed his volunteer shift at the court and gave him a copy of the SFPD report. If everything said there was true, it can be explained as overzealousness, bad judgment and immaturity by a beginning lawyer who thought he knew more about the law than he actually did. He will make a good attorney, but he is young and immature, not greedy. Gold believes that respondent should be allowed to practice law.

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.)

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. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Discipline is progressive; However, the standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.7(c).)

Standard 3.2 applies in this matter. It provides that the 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 shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate shall disbarment not be imposed. In those cases, the discipline shall not be less than a two-year actual suspension prospective to any interim suspension imposed, irrespective of mitigating circumstances.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urges respondent's disbarment. The court disagrees as that recommendation would be a disproportionate recommendation under the circumstances.

In a conviction referral proceeding, "discipline is imposed according to the gravity of the crime and the circumstances of the case."(*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.) An attorney's commission of a crime involving moral turpitude is always a matter of serious consequence but does not always result in disbarment; the sanction imposed is determined in each case depending on the nature of the crime and the circumstances presented by the record. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 103.) The standards can be tempered by "considerations peculiar to the offense and the offender" (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222; see also *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994). In cases such as this, the court must determine the appropriate sanction in light of the purposes of attorney discipline: protection of the public, preservation of public confidence in the legal profession and maintenance of high professional standards. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752.)

Respondent was convicted of a minor crime for which the criminal court only placed him on unsupervised probation for a year. His misconduct was not in the course of his duties as an attorney. He was extremely immature and lost his moral compass for a day. He, erroneously,

but in good faith, believed that he was entitled to a reward upon returning the bracelet and also believed that he was being set up to be mugged. He is very remorseful for his conduct and "gets" that he was wrong. He would never do anything of the sort again. Moreover, he has engaged in extensive, valuable pro bono work for which he was recognized by BASF. The court believes that six months' actual suspension is sufficient under these circumstances to protect the public, the courts and the legal profession.

Cases with serious misconduct have received similar discipline. For example, in *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, discipline was imposed consisting of two years' stayed suspension and two years' probation, on conditions including six months' actual suspension. Respondent was convicted of one count of violating Insurance Code section 750(a) which prohibits one from offering compensation for the referral of clients. The facts and circumstances surrounding the misconduct were found to involve moral turpitude because respondent had participated in prior related misconduct; solicited another to participate in the scheme; and agreed to pay for four client referrals and actually paid for two. Mitigating factors included no prior discipline in five years of practice (nominal weight) and some weight afforded for good character references. In aggravation, the court considered harm to the administration of justice and respondent's lack of full understanding of the wrongfulness of his conduct. The latter was balanced by respondent making clear that he would never again engage in such misconduct and his obvious remorse.

Also, in *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, the Review Department recommended the imposition of a six-month period of actual suspension as a result of two convictions for driving under the influence of alcohol and one conviction for driving under the influence of PCP. The attorney had been disciplined on three prior occasions as a result of his convictions of various drug possession and DUI offenses. In recommending an

actual suspension of six months, the Review Department noted that the attorney had been under continuous suspension for approximately five years as a result of his prior discipline and that he would not be able to return to the practice of law until he had established his rehabilitation pursuant to standard 1.4(c)(ii).

Accordingly, after considering the circumstances in this matter, the court recommends six months' actual suspension, among other things, as sufficient to protect the public, the courts and the legal profession.

Recommendations

It is recommended that respondent **Zachary Alexander Toran**, State Bar Number 267822, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that respondent be placed on probation[6] for a period of three years subject to the following conditions:

1. Respondent Zachary Alexander Toran is suspended from the practice of law for the first six months of probation.

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

3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

[6] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

8. Respondent must comply with all conditions of respondent's criminal probation and must so declare under penalty of perjury in any quarterly report required to be filed with the Office of Probation. If respondent has completed probation in the underlying criminal matter, or completes it during the period of his disciplinary probation, respondent must provide to the Office of Probation satisfactory documentary evidence of the successful completion of the criminal probation in the quarterly report due after such completion. If such satisfactory evidence is provided, respondent will be deemed to have fully satisfied this probation condition.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of respondent's suspension, whichever is longer and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, 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. Failure to do so may result in disbarment or suspension.

Costs

It is recommended 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.

Dated: May _____, 2013

PAT E. McELROY
Judge of the State Bar Court