STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ERNEST L. ANDERSON

A Member of the State Bar

[No. 88-C-14303]

Filed April 17, 1990

SUMMARY

Respondent was referred for State Bar disciplinary proceedings following his second criminal conviction for driving under the influence. After a hearing on the referral, the State Bar examiner requested review, contending that the hearing referee's recommended discipline was inadequate. (Hon. Robert K. Barber (retired), Hearing Referee.)

In the matter before the review department, the State Bar examiner had conceded that moral turpitude was not involved in respondent's misconduct, and the hearing department had therefore concluded that no moral turpitude was involved. Because neither the parties nor the hearing referee had focused on the issue of moral turpitude in accordance with the Supreme Court's referral order, the review department remanded the matter to the hearing department to determine whether the facts and circumstances surrounding respondent's convictions involved moral turpitude and to determine the appropriate degree of discipline.

At the time of the review department's consideration of the matter on review, a second referral proceeding, arising out of respondent's third conviction for driving under the influence, was pending before the hearing department. The review department remanded the matter on review to the hearing judge before whom the second matter was pending, and directed that judge, on remand, to consolidate the two matters unless consolidation would result in prejudice to substantial rights of either party, in order to give the Supreme Court a single record analyzing all facts and circumstances surrounding the referred convictions and a single recommendation of discipline.

COUNSEL FOR PARTIES

For Office of Trials: Hans M. Uthe

For Respondent: James L. Crew, Tom Low

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
Although the examiner sought review on the issue of degree of discipline, once the review department had jurisdiction over the proceeding, all issues were subject to its independent review. (Trans. Rules Proc. of State Bar, rule 453(a).) The review department's review of the record is an independent one and not limited by the examiner's position.

[2 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
The question whether criminal conduct involved moral turpitude is one of law ultimately for the Supreme Court to decide, based on all of the facts and circumstances surrounding the conviction. Moral turpitude may be found in a driving under the influence matter depending on possible aggravating factors.

[3] **119 Procedure—Other Pretrial Matters**
135 Procedure—Rules of Procedure
Stipulations by both parties in the interests of justice on a wide variety of issues, including the entire proposed disposition of disciplinary matters, are encouraged and are provided for in State Bar procedural rules. (Trans. Rules Proc. of State Bar, rules 401, 405-408.)

[4 a, b] **161 Duty to Present Evidence**
162.20 Proof—Respondent's Burden
166 Independent Review of Record
It is the duty of any accused member of the bar to present at the evidentiary hearing in the disciplinary proceeding all evidence favorable to him or her. The respondent cannot necessarily rely on the State Bar examiner's position conceding an issue in the case. The review department's review of the record is independent and not limited by the examiner's position, and the Supreme Court, in turn, is not limited by the recommendation of the review department or that of the hearing department in assessing the record.

[5] **110 Procedure—Consolidation/Severance**
130 Procedure—Procedure on Review
Where a related proceeding was pending in the hearing department, the respondent's argument in favor of a remand by the review department carried more weight, because the pendency of the related proceeding created an opportunity for a fuller record to be prepared in the remanded matter without undue delay.

[6 a-c] **110 Procedure—Consolidation/Severance**
139 Procedure—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues
Where respondent's two convictions were interconnected in their surrounding facts and circumstances, and where the record in the earlier matter lacked information regarding respondent's compliance with his criminal probation and his subsequent rehabilitation, a remand of the first matter and consolidation with the subsequent, related matter would be appropriate, in order to give the Supreme Court a single, more complete record and a single recommendation of discipline, if any.

[7 a, b] **110 Procedure—Consolidation/Severance**
135 Procedure—Rules of Procedure

Consolidation may be ordered on the Presiding Judge's own motion, if no substantial rights will be prejudiced. (Trans. Rules Proc. of State Bar, rules 2.22, 2.25 and 262.) Consolidation is encouraged at the hearing department level where feasible to avoid substantial duplicate effort expended by counsel and the hearing department to create trial records. Consolidation was appropriate where at most a brief delay would result, and a substantial savings of time would result from a single proceeding on review.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

The State Bar's Office of Trial Counsel, by its examiner ("examiner") has requested that we review[1] the decision of a hearing referee of the State Bar Court in this matter recommending that Ernest L. Anderson ("respondent") be suspended from the practice of law in this state for five years, stayed, on conditions of probation including a three-month actual suspension. This matter is a "conviction referral" originated by the Supreme Court[2] after respondent was convicted in 1985 of Vehicle Code section 23152, subdivision (a) (driving under the influence). In his 1985 conviction, respondent admitted his prior conviction in 1984 of driving under the influence.[3] A third such conviction occurred in 1989 which is now the subject of a second proceeding pending before the hearing department on referral by the Supreme Court.

For reasons we shall detail below, we have concluded that the appropriate disposition of this matter is to remand it to the hearing department of the State Bar Court with directions to consider whether the facts and circumstances surrounding respondent's 1985 conviction involved moral turpitude, particularly in light of *In re Alkow* (1966) 64 Cal.2d 838; and, in so doing, to permit the parties to adduce any additional evidence bearing on the question and on the issue of discipline, as the hearing judge deems appropriate.

We also direct that this matter be set before Judge Jennifer Gee, the same hearing judge before whom is pending on referral by the Supreme Court, respondent's 1989 driving under the influence conviction (State Bar Court No. 88-C-14545) evidence of which respondent introduced in this proceeding we now review. We further direct that Judge Gee consolidate this matter, 88-C-14303, with 88-C-14545 for the purpose of a single set of findings and conclusions on the issues referred by the Supreme Court and a single recommendation with respect to discipline unless she determines that consolidation of the two convictions would result in prejudice to substantial rights of either party,[4] a situation we do not find from the record before us. The introduction of such record in the new trial may obviate most of the task of the parties and trial judge in reconsidering the facts and circumstances of this matter.

PROCEDURAL HISTORY

In referring this matter, 88-C-14303, to the State Bar, the Supreme Court requested that a hearing be held and a report and recommendation made on whether or not the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline and, if so, the appropriate degree of discipline to recommend.[5]

The State Bar Court Hearing Department held the requested hearing in this matter on July 18, 1989.[6] About four weeks earlier, on June 21, 1989, the Supreme Court had referred to the State Bar another conviction of respondent on May 19, 1989, for driving under the influence arising out of his arrest in 1988.[7] (State Bar Court No. 88-C-14545.) For reasons not evident from the State Bar Court's records in 88-C-14545, but apparently relating to the transition in the State Bar Court from setting matters for hearing before volunteer referees or retired judges to

1. See Transitional Rules of Procedure of the State Bar, rule 450(a). In seeking our review, the examiner urges that the discipline recommended is inadequate.

2. Business and Professions Code sections 6101-6102; California Rules of Court, rule 951.

3. Respondent's 1984 conviction also found him guilty of Vehicle Code section 12500, subdivision (a) (driving while unlicensed).

4. See Transitional Rules of Procedure of the State Bar, rule 262.

5. See minute orders of the Supreme Court filed December 1, 1988 and January 5, 1989 in Bar Misc. No. 5960.

6. Since the hearing was set to occur before September 1, 1989, it was set before a referee (here a retired judge) sitting under the provisions of Business and Professions Code section 6079 as that section read prior to July 1, 1989.

7. See minute order of the Supreme Court filed June 21, 1989 in S010596.

setting matters for hearing before full-time judges appointed by our Supreme Court, the notice of hearing in that more recent matter was not issued until November 17, 1989, after the Supreme Court had augmented its earlier order to include the issue of discipline.[8] State Bar Court records show that respondent's recent conviction in 88-C-14545 was assigned to and is pending before hearing judge Jennifer Gee. Trial before her is set for April 20, 1990.

At the trial hearing in the case we review, respondent's counsel acknowledged his client's third conviction (88-C-14545) and requested it be included in the scope of this proceeding. (R.T. pp. 6-7.) As respondent's counsel stated: "[Respondent's third conviction] is certainly not a matter that is positive toward my client, but rather another matter that is negative toward him. But we feel that it makes more sense to deal with all of the problems at one given time, rather than doing it in two stages. And I would think that the Supreme Court, faced with the same problem, would agree with our analysis, that it ought to be handled all at once." (R.T. p. 8.) The examiner opposed consolidating 88-C-14545 with this matter for two reasons: first, respondent's more recent conviction was not the subject of a Supreme Court referral order,[9] thus the hearing referee had no jurisdiction to make it the subject of hearing, and second, 88-C-14545 had come to the State Bar too recently to allow for discovery to be conducted. (R.T. p. 7-8.) The referee sustained the examiner's objection, on the ground that it appeared that he had no jurisdiction to extend the hearing to cover 88-C-14545. Nevertheless, the referee did deem relevant to the facts and circumstances in this matter, some evidence concerning respondent's 1988 arrest which led to his 1989 conviction. (R.T. p. 58.) Moreover, respondent's counsel continued to proceed in this matter as if respondent's third conviction were an admitted fact. (E.g., R.T. p. 162.)

Regarding the issue of moral turpitude in the matter under review, 88-C-14303, after the examiner presented his opening statement and respondent's counsel included in his reply a statement that no moral turpitude was involved in respondent's acts, the examiner stated: "The State Bar is *not* seeking to establish moral turpitude. It's a *borderline case*, but we are primarily looking at other conduct warranting discipline. And also my comments during opening statement were strictly directed to be that." (R.T. p. 14, emphasis added.) Prior to the presentation by respondent of character evidence, the examiner asked for a finding that respondent engaged in misconduct warranting discipline. (R.T. p. 75.) The referee granted the examiner's motion. Although on review the examiner sought a substantial increase in the referee's disciplinary recommendation, and asserted that respondent's conduct "was outrageous!" (Review Department Brief of Examiner, p. 8), he has always maintained that the facts and circumstances surrounding respondent's convictions did not involve moral turpitude, but only other misconduct warranting discipline.

At oral argument, respondent's counsel argued that in view of the examiner's consistently stated position that moral turpitude was not at issue it would be prejudicial to respondent for the review department to reassess the issue of moral turpitude on the present record. He requested that the matter be

---

8. Pursuant to Business and Professions Code section 6079.1(f), effective July 1, 1989, the Board of Governors fixed September 1, 1989, as the date after which all formal regulatory matters in the State Bar Court Hearing Department could be tried only by a judge appointed by the Supreme Court or a judge pro tempore. This change had a major effect on all case assignments and case calendaring. Cases had to be calendared several months before the trial date to allow for pre-hearing and discovery procedures. Since the enabling legislation was not effective until July 1, 1989, terms of new State Bar Court judges and the newly constituted State Bar Court Executive Committee could not start before July 1, 1989 (Bus. & Prof. Code, § 6079.1) thus delaying formulation of transitional rules of practice. Finally, to support the full-time judges, a branch court clerk's office was opened in San Francisco in September of 1989 requiring hiring and training of new employees.

9. The examiner was apparently unaware that, as noted *ante*, footnote 7, the Supreme Court had earlier referred 88-C-14545 to the State Bar. As also noted *ante*, no notice of hearing was issued by the State Bar Court clerk's office in that matter until November 1989. Had counsel and the referee been aware of that action at the time of the trial in this matter, it would have eliminated the very real jurisdictional concern posed by the examiner and held by the referee.

remanded to provide respondent with an opportunity to introduce additional evidence on such issue.

DISCUSSION

1. Moral Turpitude.

We deal first with the issue of moral turpitude referred by the Supreme Court to the State Bar in this matter for a hearing, report and recommendation to the Supreme Court.

[1a] Although our review was invoked by the examiner on the issue of degree of discipline, once we have jurisdiction over a proceeding, all issues are subject to our *independent* review. (Trans. Rules Proc. of State Bar, rule 453(a).) Moreover, since this matter arose from a decision of a hearing referee under former Business and Professions Code section 6079, we would have been required to undertake an independent review of the record even in the absence of a request for review. (Trans. Rules Proc. of State Bar, rule 452(a).) **[2a]** Further, it is settled that the question of moral turpitude is one of law ultimately for the Supreme Court to decide. (E.g., *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 109-110; *In re Mostman* (1989) 47 Cal.3d 725, 736.) However, such determination must be made based on all of the facts and circumstances surrounding the conviction. (*In re Carr* (1988) 46 Cal.3d 1089, 1091.)

In *In re Carr*, the petitioner had pled no contest in 1983 and 1984 to two separate counts of driving under the influence of alcohol. The two convictions were separately referred by the Supreme Court to the State Bar Court for a hearing, report and recommendation. The two matters were consolidated by the State Bar Court and reviewed as a single proceeding before the Supreme Court. The Supreme Court held, after reviewing the entire record and considering all the facts and circumstances, that "Carr's conduct did not involve moral turpitude, but did involve other misconduct warranting discipline." (*Id.* at p. 1091.) It ordered Carr suspended from practice for six months.

The Supreme Court subsequently issued its referral in this matter to have a similar determination made after hearing as to whether under all the facts and circumstances respondent Anderson's conduct constituted moral turpitude or other misconduct warranting discipline. **[2b]** It seems clear that the Supreme Court did not intend its decision in *In re Carr*, *supra*, to be dispositive of the issue of moral turpitude in all driving under the influence cases. Given possible aggravating factors indicated by the record in this case[10] the examiner's concession of the issue at an early point in the proceedings below is troublesome.[11] **[3 - see fn. 11]**

It also appears that neither the parties nor the hearing referee expressly considered the Supreme Court's decision *In re Alkow* (1966) 64 Cal.2d 838. Prior to oral argument we invited counsel at argument to address the effect of that decision on the question of moral turpitude in this matter. In *Alkow*, the Court ordered six months suspension of the attorney holding that the facts and circumstances surrounding the vehicular manslaughter conviction of that attorney involved moral turpitude. In reaching that conclusion, the court emphasized Alkow's

---

10. For example, respondent's own testimony in this record established that he was well aware of the dangers of driving under the influence, for he started his legal career as a deputy district attorney. As such, he prosecuted between 30 and 40 driving under the influence cases to jury trial. (R.T. pp. 54-55, 62-63.) His testimony also showed that he drove while intoxicated more times than the three in which he was arrested and this conduct spanned a five year period. (R.T. pp. 49-50, 58-61, 66-68.) When arrested, respondent's blood alcohol level was well in excess of legal standards (exhibit 1) and the circumstances of his arrests appear to have been aggravated in other respects, including his lack of a currently valid driver's license on at least one occasion. (R.T. pp. 18-24, 38-45.) As to the extreme risk posed to public safety by driving under the influence, see, e.g., *Burg* v. *Municipal Court* (1983) 35 Cal.3d 257, 262.

11. We do not wish to be overly critical of the examiner in this case for exercising his judgment to concede an issue which he apparently did not feel could be won. We assume he relied on his interpretation of the facts in light of *In re Carr*, *supra*. **[3]** Stipulations by both parties in the interests of justice on a wide variety of issues, including the entire proposed disposition of disciplinary matters, are encouraged and the procedural rules explicitly provide for such stipulations. (Trans. Rules Proc. of State Bar, rules 401, 405-408.)

disregard of the law, the terms of his probation and the public safety. (*Id.* at p. 841.)

There are several similarities between the facts of this case and *Alkow*.[12] Although there may be differences as well which would support the hearing referee's conclusion of no moral turpitude, we believe that the issue of moral turpitude is a far closer question than viewed by the examiner and one which we would have expected to have been focused on by both sides at the hearing below in accordance with the Supreme Court's referral order. The examiner having conceded the fundamental issue of moral turpitude early in the hearing below, respondent's counsel argued to us that he relied on that concession and chose not to present certain evidence as a result. As discussed above, he urged remand if we were considering reaching a different conclusion on moral turpitude than reached by the referee below.

Respondent's reliance on the examiner's position is not in and of itself a persuasive reason for remanding the case. **[4a]** It is the duty of any accused member of the bar to present at the evidentiary hearing, all evidence favorable to him or her. (See, e.g., *Warner* v. *State Bar* (1983) 34 Cal.3d 36, 42.) **[1b]** Respondent was placed on notice from the outset pursuant to rule 453(a) and the case law that our review of the record is an independent one, not limited by the examiner's position. (Cf. *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) **[4b]** The Supreme Court is in turn not limited by our recommendation or that of the hearing referee in assessing the record. (*In re Young* (1989) 49 Cal.3d 257, 264.) **[5]** If a related proceeding were not currently pending in the hearing department, the argument in favor of remand would carry much less weight. However, the pendency of such proceeding creates an opportunity for a fuller record to be prepared in this case without undue delay. **[6a]** As discussed *post*, remand also would permit consolidation which appears desirable because the record before us includes some evidence regarding respondent's subsequent conviction and his alleged abstention from alcohol thereafter through the date of oral argument. We are in effect being asked to consider part, but not all, of the same circumstances which are currently at issue before Judge Gee.

Under all the circumstances, we deem it appropriate to remand this matter to Judge Gee of the Hearing Department of the State Bar Court to consider further the issue of moral turpitude, relieving the examiner of his prior concession of that issue. Our remand will give both parties the chance to present any additional evidence deemed appropriate by the hearing judge. **[6b]** The remand will also permit an improved record on the issue of the extent to which respondent complied with the conditions of his probation imposed in his 1984 and 1985 convictions, an important issue when analyzing *Alkow* but about which this record is unclear. (See R.T. pp. 160-161.) In addition, since respondent has urged in rehabilitation his recent total abstention from alcohol, the hearing judge on remand will be in a better position than we are to assess respondent's evidence.

2. Consolidation.

[6c] Respondent's 1984, 1985 and 1989 convictions are interconnected in their surrounding facts and circumstances. In the present matter, the hearing referee properly ruled that some of the facts surrounding respondent's 1988 arrest, which led to his 1989 conviction, are relevant. Since conviction matters referred by the Supreme Court are not limited to the facts underlying the *immediate* conviction (*In re Arnoff* (1978) 22 Cal.3d 740, 745-746; *In re Langford* (1966) 64 Cal.2d 489, 496-497), we can anticipate that the circumstances surrounding respondent's 1984 and 1985 convictions will be inquired into in the hearing yet to occur on his 1989 conviction. If kept separate, each of the referrals will contain pieces of the other; and neither will constitute a single whole. Because of the particular timing of these referrals and our decision to remand this matter on the issue of moral turpitude, we have an opportunity, as did the State Bar Court *In re Carr*, *supra*, 46 Cal.3d 1089, to give the Supreme Court a single record analyzing all facts and circumstances surrounding both referred convictions with a single set of findings and conclusions and, if moral turpitude or other misconduct

12. See footnote 10, *ante*.

warranting discipline is found, a single recommendation of discipline.

[7a] Consolidation may be ordered by the Presiding Judge of the State Bar Court on her own motion, if no substantial rights will be prejudiced. (Trans. Rules Proc. of State Bar, rules 2.22, 2.25, 262.) Here, the respondent urged below that the matters be consolidated. The examiner's objection was founded on his mistaken belief that the Supreme Court had not yet referred the 1989 conviction and on a lack of time for discovery which could have been remedied by a continuance.

[7b] Consolidation is encouraged at the hearing department level where feasible to avoid substantial duplicate effort expended by counsel and the hearing department to create trial records. We recognize that that is not always possible. Indeed, as the State Bar disciplinary system continues to work to reduce delay in pendency of matters, it is inevitable that different matters of a similar nature concerning the same attorney may pend concurrently at different levels of the State Bar Court. To avoid undue delay, those matters may often need to be judged as they each independently become at issue. However, in this instance in which Judge Gee has yet to act in the proceeding before her, if any delay is occasioned by consolidation, it would at most, be brief; and it would appear that most of the facts and circumstances of this matter, 88-C-14303, can be established simply by introduction into evidence in 88-C-14545 of the record from the prior hearing. It would also appear that a substantial savings of time of this review department and the Supreme Court will result from a single proceeding on review as occurred in *In re Carr*, *supra*, 46 Cal.3d 1089.

DISPOSITION

For the reasons stated, we remand the above matter, 88-C-14303, to the Hearing Department of the State Bar Court with directions to the hearing judge to consider whether the facts and circumstances surrounding respondent's 1985 conviction (including his 1984 prior conviction) involved moral turpitude, particularly in light of *In re Alkow*, *supra*, 64 Cal.2d 838, and, in so doing, to permit the parties to adduce any additional evidence bearing on the question of moral turpitude and on the question of appropriate discipline, as the hearing judge deems appropriate.

We further direct that this matter be set before Judge Jennifer Gee, the same hearing judge before whom is pending 88-C-14545, and we also direct that this matter, 88-C-14303, be consolidated with 88-C-14545 for the purpose of a single set of findings and conclusions on the issues referred by the Supreme Court and a single recommendation with respect to discipline unless Judge Gee determines that consolidation of the two convictions would result in prejudice to substantial rights of either party.

We concur:

NORIAN, J.
STOVITZ, J.