

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LAWRENCE BUCKLEY

A Member of the State Bar

[No. 88-C-12896]

Filed October 11, 1990

SUMMARY

Respondent, who had two prior impositions of discipline, was convicted on a plea of nolo contendere of violating Penal Code section 647, subdivision (a), a misdemeanor which was found not to have involved moral turpitude. The former, volunteer review department had found misconduct warranting discipline, reversed the hearing referee's recommended dismissal, and remanded for further hearing. On remand, the hearing referee had adopted the examiner's recommendation of a one-year stayed suspension, no actual suspension, one year of probation with standard conditions, and passage of the Professional Responsibility Examination ("PRE"). (Jay C. Miller, Hearing Referee.)

Respondent requested review, contending that the recommended discipline was excessive. The review department agreed, and recommended that respondent be publicly reprovved, conditioned upon passage of the PRE. Misdemeanor sex offenses which are not serious and are unrelated to the practice of law generally result in private reprovval absent aggravating circumstances. Respondent's prior private reprovvals for dissimilar conduct were held to warrant a public reprovval, and another aggravating factor warranted requiring respondent to pass the PRE, but suspension was held inappropriate even if stayed in its entirety.

COUNSEL FOR PARTIES

For Office of Trials: Carol A. Zettas

For Respondent: Byron K. McMillan, G. David Haigh

HEADNOTES

[1 a-c] 806.52 Standards—Disbarment After Two Priors

1091 Substantive Issues re Discipline—Proportionality

1092 Substantive Issues re Discipline—Excessiveness

1514.30 Conviction Matters—Nature of Conviction—Sex Offenses

Misdemeanor convictions of sex offenses which are not serious and are unrelated to the practice of law have generally resulted in only private reprovval absent aggravating factors. Where

respondent was convicted of such a misdemeanor, disbarment would have been manifestly disproportionate to his cumulative misconduct, notwithstanding his record of two prior private reprovls. Respondent's misconduct was less serious than wilful failure to file tax returns or driving under the influence, and did not warrant the same degree of discipline.

- [2] **159 Evidence—Miscellaneous**
 162.90 Quantum of Proof—Miscellaneous
 1691 Conviction Cases—Record in Criminal Proceeding
In a conviction matter, the respondent's criminal conviction by itself constitutes conclusive proof that the respondent committed all acts necessary to constitute the offense charged.
- [3] **745.10 Mitigation—Remorse/Restitution—Found**
Where restitution to client was made after disciplinary hearing despite respondent's bankruptcy, this fulfilled a rehabilitative purpose which was appropriate to consider in disciplinary proceedings.
- [4] **801.30 Standards—Effect as Guidelines**
 1551 Conviction Matters—Standards—Scope
Assessment of the appropriate degree of discipline starts with the Standards for Attorney Sanctions for Professional Misconduct, and in a criminal conviction matter, specifically with part C of those standards.
- [5] **513.20 Aggravation—Prior Record—Found but Discounted**
 805.10 Standards—Effect of Prior Discipline
 903.10 Standards—Miscellaneous Violations—Reproval
 1514.30 Conviction Matters—Nature of Conviction—Sex Offenses
 1554.10 Conviction Matters—Standards—No Moral Turpitude
Where respondent was convicted of misdemeanor sex offense not involving moral turpitude and not related to practice of law, respondent's record of two prior private reprovls made it appropriate to impose public reproval rather than private reproval that would otherwise have been warranted, but due to lack of common thread among matters and their collective lack of severity, it would have been manifestly unjust to recommend suspension.
- [6] **173 Discipline—Ethics Exam/Ethics School**
 541 Aggravation—Bad Faith, Dishonesty—Found
 1554.10 Conviction Matters—Standards—No Moral Turpitude
Where respondent in criminal conviction matter had initially misrepresented his occupation in the course of his arrest, it was appropriate to impose requirement to take and pass professional responsibility examination as condition of public reproval.
- [7] **173 Discipline—Ethics Exam/Ethics School**
 251.10 Rule 1-110 [former 9-101]
When a requirement to take and pass the professional responsibility examination is attached as a condition to a reproval, wilful failure to comply may be cause for a separate disciplinary proceeding.

ADDITIONAL ANALYSIS

Standards

802.30 Purposes of Sanctions

Discipline

1641 Public Reprimand—With Conditions

Probation Conditions

1024 Ethics Exam/School

Other

1527 Conviction Matters—Moral Turpitude—Not Found

OPINION

PEARLMAN, P.J.:

Respondent was admitted to practice in 1966. In 1987 he was convicted on a plea of nolo contendere of violating Penal Code section 647, subdivision (a), a misdemeanor. The Supreme Court conviction referral order directed the State Bar Court to conduct a hearing as to whether respondent's conviction involved moral turpitude or other misconduct warranting discipline, and if so, a recommendation as to discipline. The referee originally recommended dismissal based on a finding that the conduct did not involve moral turpitude. The former review department, while finding that the conviction did not involve moral turpitude, did find other misconduct warranting discipline and reversed and remanded for further hearing. On remand, the referee adopted the examiner's recommendation of one year suspension stayed, no actual suspension, one year probation with standard conditions and passage of the Professional Responsibility Examination ("PREX").

Respondent requested review contending that the discipline was excessive. He argues that his conduct warrants only a public reproof and passage of the PREX. We agree. [1a] Misdemeanor convictions of sex offenses which are not serious and are unrelated to the practice of law have generally resulted in only private reproof absent additional factors in aggravation.¹ Upon review of the record before us we have determined that respondent's prior unrelated private reprovals and the circumstances of the conviction warrant a public rather than private reproof, with the condition of passage of the PREX, but do not justify a suspension, even if stayed in its entirety.

DISCUSSION

The findings of the former review department are not disputed by either party and we adopt them as

established by clear and convincing evidence in the record. [2] Respondent's criminal conviction by itself constitutes conclusive proof that he committed all acts necessary to constitute the offense charged. (*In re Higbie* (1972) 6 Cal.3d 562, 570; see also Bus. & Prof. Code § 6101 (a); *In re Prantil* (1989) 48 Cal.3d 227, 231-233.) It is therefore established that respondent solicited a lewd act in a public place. In addition, the review department found in aggravation that he was not carrying his driver's license although he had been driving when arrested; he was initially uncooperative with the arresting officer; and most significantly, he initially lied about his occupation when he was booked.

Respondent also had a prior private reproof in 1976 for a single abandonment of a case, coupled with failure to return unearned fees of \$300. Respondent was found to be candid and cooperative in that proceeding. The failure to repay was due to financial inability. [3] Restitution to the client was made after the disciplinary hearing despite the fact that respondent was in bankruptcy. He thus fulfilled a rehabilitative purpose which the Supreme Court has recognized as appropriate to consider in disciplinary proceedings despite discharge in bankruptcy. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1093; compare *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1074 [applicant's failure to repay isolated discharged debt unrelated to practice of law held insufficient basis for denial of admission to practice].)

In 1980, respondent was again privately reproofed for a matter in which he had been held in contempt of court. Respondent had been substituted out as counsel for a criminal client with the client's consent but without filing a formal notice of substitution with the court. The judge at the sentencing hearing at which new counsel for the client appeared held a separate hearing at which he cited respondent for contempt for failure to appear at the morning sentencing hearing since he was still counsel of record for the defendant. The State Bar hearing panel

1. For example, the May 1990 issue of *California Lawyer* anonymously summarized three matters in which private reprovals had resulted from convictions for various misdemeanor sex crimes. (*State Bar Discipline* (May 1990) 10

Cal.Law. vol. 5, pp. 75, 80.) Specifically, the convictions involved in those matters were for: soliciting an act of prostitution; disturbing the peace (after agreeing to an act of prostitution), and soliciting and engaging in a lewd act in public.

found that the respondent did not conduct himself with proper decorum for a public courtroom in the contempt hearing, but also found that his inappropriate conduct may have been provoked by the judge.

In the present matter, respondent testified in mitigation that he is employed at the Public Defender's Office representing indigents in major felony cases, that his crime occurred long after working hours and had nothing to do with his law practice and that the two priors occurred many years ago and were of decreasing degrees of seriousness.

[4] In assessing the appropriate degree of discipline to recommend we start with the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V), and specifically with the Standards Pertaining to Sanctions For Professional Misconduct Following Conviction of the Member of a Crime. (*Id.*, part C.) Standard 3.4 provides that final conviction of a crime not involving moral turpitude (but involving other misconduct warranting discipline) "shall result in a sanction as prescribed under Part B of these standards appropriate to the nature and extent of the misconduct found to have been committed by the member." Standard 2.10, in part B, provides that for violation of any unspecified provision of the Business and Professions Code or the Rules of Professional Conduct the discipline which shall result is "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." The primary purposes of imposing discipline, as set forth in standard 1.3, are "protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys[;] . . . preservation of public confidence in the legal profession [and] [r]ehabilitation of a member" Also relevant is standard 1.7(a) which provides that the effect of one prior imposition of discipline is that "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the

prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust."²

[1b - see fn. 2]

[1c] To support the asserted reasonableness of the discipline recommended by the examiner and adopted by the referee in this case, the examiner cites cases involving other crimes (which, as here, did not involve moral turpitude) in which the Supreme Court imposed actual suspensions of two to six months. These cases, however, involved much more serious offenses than the crime involved here. (*In re Rohan* (1978) 21 Cal.3d 195, 200 [wilful failure to file income tax returns]; *In re Carr* (1988) 46 Cal.3d 1089, 1090 [driving under the influence].) As pointed out in Justice Tobriner's concurring opinion in *Rohan*, there is a nexus between an attorney's wilful failure to file tax returns and the attorney's fitness to practice, because the recordkeeping and timely action required to prepare a tax return are closely related to the skills involved in practicing law and handling client funds. (*In re Rohan, supra*, 21 Cal.3d at p. 206 (conc. opn. of Tobriner, J.)) Obviously, the criminal conduct involved in *Carr* poses a serious risk of injury and death which is not involved in the type of conduct committed by respondent in this case.

[5] We conclude, in accordance with standard 1.7(a), that greater discipline than the private reproval that would otherwise be warranted is appropriate in light of respondent's priors, but that the lack of a common thread in this and the prior matters coupled with their collective lack of severity would make it manifestly unjust under the circumstances to recommend suspension based thereon. (See *Arm v. State Bar, supra*, 50 Cal.3d at pp. 778-790.) We therefore recommend that respondent be publicly reproved.

[6] Because of respondent's initial misrepresentation of his occupation in the course of his arrest, however, we deem it appropriate to recommend

2. [1b] Standard 1.7(b) provides that presumptively when there are two priors "the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate." The examiner, to her credit, conceded that standard 1.7(b) should not be applied by

the referee in the circumstances of this case. We agree with her position. (See *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-780.) Disbarment in this matter would be manifestly disproportionate to respondent's cumulative misconduct.

attaching to the reproof the condition that he take and pass the PREX within one year of the effective date of the Supreme Court's order of final discipline. (See Cal. Rules of Court, rule 956; see also *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) [7] Pursuant to rule 956, respondent is advised that the wilful failure to comply with the PREX requirement, if ordered by the Supreme Court, may be cause for a separate disciplinary proceeding under rule 1-110 of the Rules of Professional Conduct.

We concur:

NORIAN, J.
STOVITZ, J.