

PUBLIC MATTER -- DESIGNATED FOR PUBLICATION

Filed September 17, 2003

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	No. 02-C-15210
)	
ALAN WESLEY CURTIS,)	OPINION AND ORDER OF
)	REFERRAL
A Member of the State Bar.)	
_____)	

In this first impression case, we must decide whether a disciplinary proceeding initiated after an attorney’s conviction of a crime may proceed, although it rests on the same essential underlying facts as an original disciplinary proceeding tried earlier in our court against the same California attorney.

Respondent, Alan W. Curtis, has a pending disciplinary proceeding against him arising out of his federal court conviction in 2002 of conspiracy to violate federal law prohibiting structuring financial transactions in order to evade currency reporting requirements. (18 U.S.C. § 371; 31 U.S.C. § 5324(a)(3).) Respondent moved to dismiss this proceeding on the grounds of res judicata, collateral estoppel, and/or due process because the same facts were tried against him in a previous original disciplinary proceeding in this Court in 1997 (Case No. 95-O-18504).¹ The State Bar’s

¹For convenience, the present proceeding, arising under Business and Professions Code sections 6101-6102 and rule 951(a), California Rules of Court, will be referred to as the “conviction proceeding.” The 1997 original proceeding, arising under section 6075 et. seq. of the Business and Professions Code, will be referred to as the “1997 proceeding.”

Office of Chief Trial Counsel (State Bar) contends that respondent has offered no good reason to dismiss this conviction proceeding.

Because of the issues in this first impression case, we invited briefs from the parties and heard oral argument on the motion. We shall conclude that the conviction referral proceeding may continue. However, as we discuss below, should the hearing judge find a basis to recommend discipline, the judge should consider the factors we set forth, *post*.

I. STATEMENT OF THE CASE.

We set forth the factual background of the two State Bar Court proceedings at issue.

A. The 1997 Proceeding.

As pertinent here, the 1997 proceeding charged respondent with acts of moral turpitude, dishonesty or corruption in wilful violation of Business and Professions Code section 6106² and with violating federal law in wilful violation of section 6068, subdivision (a). The State Bar alleged that in 1994, respondent's client, Mark Bailey, and a corporate party, agreed with a development company to form a venture to acquire the master lease to property in Southern California. In June 1994, the development company, Bailey and respondent agreed that respondent hold \$310,000 of Bailey's funds in trust for the benefit of Bailey and the development company to purchase the master lease. Less than two weeks later, respondent opened a trust bank account but never deposited more than \$100,000 in the account. The State Bar also charged that when respondent received \$310,000 from Bailey, respondent failed to file with the Internal Revenue Service a required cash transaction receipt report under title 26 United States Code section 6050I.

²Unless noted otherwise, all references to sections are to the Business and Professions Code.

The State Bar further charged respondent with misrepresenting, including to a bankruptcy judge, that he held \$310,000 in trust when he did not, and with placing the \$310,000 in a safe deposit box which did not meet the requirements of rule 4-100(A), Rules of Professional Conduct.³

During the State Bar Court trial in the 1997 proceeding, the State Bar devoted two pages in its trial brief to the federal currency reporting requirements the State Bar claimed that respondent breached. The State Bar contended that not only did respondent fail to report the \$310,000 from Bailey, but that “respondent and Bailey illegally structured the purchase transaction to avoid the bank’s reporting requirement [for cash transactions in excess of \$10,000].” Footnote six of the State Bar’s brief pointed out that although respondent was not charged with acting with Bailey to illegally structure the funds transactions, “it can be considered in aggravation.”

The hearing judge made detailed findings of fact in the Bailey matter. As pertinent to this case, she found that in June 1994, Bailey gave respondent \$310,000 in cash which respondent placed in a safety deposit box, not labeled with trust or escrow status. Although respondent opened a trust account for the Bailey property transaction, he did not place any of the cash from Bailey therein. Respondent did not report receipt of the cash to the Internal Revenue Service. Respondent contended that, as an escrow holder, he was exempt from filing such a report and that the State Bar did not show clearly that the tax law applied to respondent. The hearing judge concluded that the State Bar did not prove by clear and convincing evidence that respondent violated the Internal Revenue Code provision requiring a cash receipt report. She also found, however, respondent culpable of violating the trust account provision of the Rules of Professional Conduct in the Bailey

³The 1997 proceeding also charged other misconduct as to another client matter. As that matter is not alleged to be involved in the conviction proceeding, we do not discuss it.

matter and other misconduct in another charged matter. She did not make any findings in aggravation regarding respondent's charged conduct with Bailey in structuring the cash transactions. The hearing judge recommended 60 days' actual suspension as part of a stayed suspension. This decision was not appealed to us, and, effective July 22, 1999, the Supreme Court imposed the recommended discipline.

B. Conviction proceeding.

In late 1997, prior to the State Bar Court trial in the 1997 proceeding, the State Bar reported respondent's conduct in the Bailey matter to the Internal Revenue Service's Criminal Investigation Division.

In January 2002, federal criminal charges were filed⁴ against respondent and Bailey. Respondent was accused of conspiring with Bailey and others to structure currency transactions to evade federal currency reporting requirements. (18 U.S.C. § 371 (conspiracy to violate 31 U.S.C. § 5324(a)(3)).) Charged as the sole object of the conspiracy, was the same \$310,000 transaction between respondent and Bailey as was the subject of part of the 1997 proceeding. In particular, the United States charged that of the \$310,000 respondent received from Bailey, respondent knowingly structured \$34,000 in currency to evade reporting requirements by having that money deposited in a bank in increments of less than \$10,000.

In February 2002 respondent pled guilty to the charge and he was sentenced on September 30, 2002.

⁴The record of conviction shows that criminal proceedings on this and other charges commenced against respondent and Bailey as early as 1998.

The conviction proceeding was initiated in our Court in February 2003 when the State Bar filed the record of respondent's criminal conviction. The State Bar asserted that it was a crime involving moral turpitude and that it would seek respondent's summary disbarment when the conviction became final. (§ 6102, subd.(c).)

We disagreed with the State Bar's claim that respondent was convicted of a crime of moral turpitude; and, following precedent for similar currency reporting offenses, but unaware of the factual similarity with the 1997 proceeding, we classified it as a crime which may or may not involve moral turpitude or misconduct warranting discipline. Since respondent was convicted of a felony, however, we ordered his interim suspension. (§ 6102, subd. (a); Cal. Rules of Court, rule 951(a).)

In February 2003, respondent filed the current motion to dismiss the conviction proceeding and to stay the interim suspension. We stayed the interim suspension and, as noted, invited briefs from both parties on the issues raised by the motion to dismiss.

Respondent urges that the conviction proceeding is barred by the final decision of the hearing judge in the 1997 proceeding because the respondent's failure to file cash transaction reports and the manner in which he handled Bailey's \$310,000 was fully litigated in the 1997 proceeding. He also urges that the initiation of these conviction referral proceedings was an act of vindictive prosecution by the State Bar and that this deprived respondent of due process.

The State Bar contends that neither the doctrine of res judicata nor collateral estoppel applies to bar the conviction proceeding, that the issue of summary disbarment is not yet ripe for decision, that respondent's claim that the conviction was the result of vindictive prosecution is frivolous and that respondent has not established any due process violation.

II. DISCUSSION.

A. Respondent's contention of prosecutorial misconduct.

At the outset, we dispose of respondent's contention that the conviction proceeding is the product of vindictive prosecution tactics of the State Bar. The State Bar is required by statute to disclose to criminal investigatory agencies the type of information it disclosed here as a result of an investigation or formal proceeding. (§ 6044.5.) The State Bar also is obligated by statute to refer all convictions to this court. (§6101, subd. (c).) There is no evidence that the State Bar acted inappropriately and it appears that the State Bar notified federal authorities, well before the start of trial in the 1997 proceeding, of information in fulfillment of its statutory duty. Respondent's claim is without merit.

B. The unique nature of attorney disciplinary proceedings.

Neither party has cited and we are unaware of any California attorney disciplinary opinion which squarely addresses the ability to prosecute a later disciplinary proceeding involving the same facts as an earlier one. The closest expression we can find is a very brief reference in *Urbano v. State Bar* (1977) 19 Cal.3d 16, 20, a case which is dissimilar to this one. Urbano had been suspended in 1975. In its 1977 opinion, the Supreme Court noted Urbano's claim that it was a due process violation to prosecute him a second time for the single course of conduct which was involved both in the 1975 matter and in the later proceeding then before the Supreme Court. The Supreme Court rejected Urbano's argument noting that the two proceedings "involve different acts of misconduct, different clients and different dates. Nothing in the record shows that bringing the instant proceeding violated due process." (*Ibid.*)

There are several principles pertinent to this motion. The first is that attorney disciplinary proceedings are unique. They are neither purely civil, criminal or even administrative in nature. (E.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302.) The reason for the uniqueness of these proceedings is that they are conducted within the inherent authority of the Supreme Court to regulate the legal profession. (*In re Paguirigan* (2001) 25 Cal.4th 1, 7, and cases there cited.) Accordingly, many rules invoked in criminal proceedings are generally inapplicable in State Bar proceedings, such as the constitutional prohibition against multiple prosecutions in criminal cases (*Urbano v State Bar, supra*, 19 Cal.3d at p. 20), or the exclusionary rules (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 226-229).⁵ Moreover, whether civil, criminal or unique rules apply, State Bar Court proceedings must afford the accused adequate administrative due process. (*Emslie v. State Bar, supra*, 11 Cal.3d at pp. 226, 229, citing *In re Ruffalo* (1968) 390 U.S. 544, 550-551; see also *Urbano v. State Bar, supra*, 9 Cal.3d at p. 20.) As our Supreme Court observed in *Emslie*, “[t]he Rules of Procedure enacted by the State Bar provide a wide array of procedural safeguards in addition to those otherwise provided by statute or the courts.” (*Emslie v. State Bar, supra*, 11 Cal.3d at p. 226.)

The Supreme Court has also long recognized that acquittal or dismissal of criminal charges does not bar institution of a later disciplinary proceeding on the same acts charged in the criminal action. (*Wong v. State Bar* (1975) 15 Cal.3d 528, 531-532; *Emslie v. State Bar, supra*, 11 Cal.3d at p. 224.)

⁵However, the Supreme Court has applied the doctrine of entrapment to medical disciplinary proceedings. (*Patty v. Board of Medical Examiners* (1973) 9 Cal.3d 356.)

C. Disciplinary proceedings arising after conviction of crime contrasted with original disciplinary proceedings.

In our view, and what most influences our decision of this motion, is that disciplinary proceedings arising from conviction of a crime (§§ 6101-6102) are fundamentally different from original proceedings brought under section 6075 et seq.

1. Original proceedings.

Respondent's 1997 proceeding was an original disciplinary proceeding authorized by article 5 of the State Bar Act (§ 6075 et seq.). As section 6075 declares, it is a complete alternative to conviction referral proceedings under article 6 of the State Bar Act (§ 6100 et seq.) (hereafter article 6), discussed, *post*. Together with implementing procedural rules adopted by the Board of Governors of the State Bar pursuant to section 6086, original proceedings require an investigation by the State Bar's Office of Chief Trial Counsel, the filing in this Court of a Notice of Disciplinary Charges, or a stipulated disposition in lieu of those charges, and a formal evidentiary hearing or stipulated disposition. (§§ 6085, 6085.5; Rules Proc. of State Bar, rules 101, 134-135.) If the matter proceeds by way of trial, the respondent is afforded the right to introduce evidence in defense of the charges, to examine and cross-examine witnesses, to issue subpoenas, to be represented by counsel, to receive exculpatory evidence possessed by the State Bar, to exercise constitutional rights and to engage in specified discovery. (§ 6085; e.g., Rules Proc. of State Bar, rules 150-189, 214, 219; *Brotsky v. State Bar*, *supra*, 57 Cal.2d at pp. 300-302.) Charges in original proceedings must be proven by clear and convincing evidence. (Rules Proc. of State Bar, rule 213; e.g., *Himmel v. State Bar* (1971) 4 Cal.3d 786, 794.)

2. Conviction proceedings.

Conviction proceedings, such as respondent's present proceeding, are authorized by article 6 (§§ 6101-6102). They are considerably streamlined over original proceedings, recognizing that they rest on proceedings in the criminal courts in which the burden is proof beyond a reasonable doubt.

In a seminal 1970 report which studied lawyer disciplinary systems nationwide, the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, chaired by retired United States Supreme Court Justice Tom C. Clark, concluded that "no single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline." (ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (June 1970) Problem 22, p.124.) Thus, in California streamlined conviction referral proceedings aid the maintenance of public confidence in the legal profession. (*In re Lesansky* (2001) 25 Cal.4th 11, 17.)

The procedures following an attorney's conviction of a crime recognize that the basis for attorney discipline is not the provable violation of a rule of professional conduct but the mere existence of a certified copy of a record of conviction of an attorney of a crime involving moral turpitude. (§ 6101 subd. (a); Cal. Rules of Court, rule 951(a).) The record of conviction of the crime is conclusive evidence of guilt of the crime (§ 6101, subd. (a)), and such evidence of guilt may not be the subject of a collateral attack. (*In re Prantil* (1989) 48 Cal.3d 227, 231-32.) Upon a conviction of a moral turpitude crime or upon any felony conviction, an attorney is subject to prompt interim suspension. (§ 6102 subd. (a).) When an attorney's conviction of a crime, which

inherently involves moral turpitude, becomes final, the attorney is subject to summary disbarment without any hearing to decide whether lesser discipline should be imposed. (§ 6102, subd. (c); *In re Paguirigan*, *supra*, 25 Cal.4th at pp 7, 9.)

Only convictions which do not inherently involve moral turpitude are referred for an evidentiary hearing to determine whether there is a legal basis for imposing discipline under article 6. (E.g., *In re Strick* (1983) 34 Cal.3d 891, 897.) Even under those convictions that “may-or-may-not” involve moral turpitude or other misconduct warranting discipline, the attorney’s guilt of the convicted crime is conclusively established and the attorney is subject to interim suspension if the conviction was a felony. (§§ 6101, subd. (a); 6102, subd. (a).)

D. Discussion of appropriate principles.

California has no express authority directing the effect of an earlier original proceeding on a later conviction proceeding resting on the same facts.⁶ Since *res judicata* is designed to prevent relitigation of the same cause of action in a later suit between the same parties and collateral estoppel exists to prevent relitigation of the same issues when decided in prior actions (e.g., *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896), neither doctrine applies to this case. This is so because neither the issues nor “causes of action” are the same when the conviction

⁶We believe that the question would be easier if the facts were different and if both the 1997 and present proceedings were original proceedings based on the same facts and ethical rule allegations. In that case, if the earlier proceeding had been dismissed with prejudice, it would have been a bar to commencing a “new proceeding based on the same transaction or occurrence.” (Rules Proc. of State Bar, rule 261(b).) Moreover, principles of *res judicata* could be invoked to effect such a bar to commencing a new original proceeding, if the 1997 proceeding were a final determination on the merits. (Cf. *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 447-448.)

proceeding is based on the mere existence of a criminal conviction, rather than a corpus of proven facts as in the original proceeding.

We are guided by two decisions of supreme courts of other states which involve situations similar to the case before us. (*Florida Bar v. Hochman* (Fla. 2002) 815 So.2d 624 and *Matter of Chastain* (2000) 340 S.C. 356 [532 S.E.2d 264].)

In *Florida Bar v. Hochman, supra*, the attorney was earlier found culpable of ethical misconduct in an original proceeding arising from an agreed disposition. He admitted in that proceeding that he had misappropriated client trust funds resulting from addiction to drugs. The Florida Supreme Court suspended Hochman for three years. (*Florida Bar v. Hochman* (Fla. 1998) 717 So.2d 539.) In 1999, Hochman pled no contest to felony grand theft charges based on the same facts underlying his earlier misappropriation; and, in 2000, the Florida Bar requested the state Supreme Court to suspend Hochman for three years on account of his criminal conviction. Hochman sought review by the Florida court on various grounds including that the earlier discipline was a bar to the second suspension since he was being disciplined twice for the same misconduct.

After reviewing a referee's report, which rejected Hochman's claims, the Florida Supreme Court concluded that a three year suspension reverting back to the date of his earlier suspension, was warranted as the discipline in the conviction case. (*Florida Bar v. Hochman, supra*, 815 So.2d at p. 626.) The Florida court did not expressly discuss Hochman's claims below that the discipline in the first proceeding barred the conduct of the second one, but, by imposing discipline for the second proceeding, inferentially rejected that claim and adopted the position of the Florida Bar that the issue in Hochman's second disciplinary proceeding was not the underlying misconduct but the

felony judgment. (*Id.* at pp. 625-627.) However, in imposing the suspension in the conviction proceeding that was coextensive with his earlier suspension, the Florida court noted “that both suspensions were ultimately based on the same underlying misconduct.” (*Id.* at p. 626.) Finally, the court pointed out that Hochman’s offenses of misappropriation of trust funds and felonies “typically resulted in disbarment.” (*Id.* at p. 627.) The court stated that it would have imposed more severe discipline in both proceedings had Hochman not taken responsibility promptly for his acts and “doggedly pursued meaningful rehabilitation.” (*Ibid.*)

Matter of Chastain, supra, presented a similar situation: an original proceeding which resulted in Chastain’s two-year suspension for misconduct in six client matters, followed by a conviction proceeding arising from some of the same facts as in the original proceeding. Chastain’s misconduct in the original proceeding was found to have involved neglect of client matters, failure to refund unused attorney fees and failure to reply to inquiries during the attorney discipline investigation. (*Matter of Chastain* (1994) 316 S.C. 438 [450 S.E.2d 578].)

In 1995, one year after Chastain was disciplined in the original proceeding, he was convicted of one count of breach of trust with fraudulent intent for failing to return the unearned fee to one of the clients involved in the original proceeding. In 1998, formal proceedings were brought against Chastain based on his conviction. Chastain objected on double jeopardy grounds as he was already disciplined for the underlying misconduct in 1994. The state’s Commission on Lawyer Discipline concluded that Chastain’s conviction was an independent ground for discipline but recommended that no added discipline be imposed in view of the 1994 discipline. The South Carolina court held that Chastain’s claim of a double jeopardy bar was without merit. (*Matter of Chastain, supra*, 532 S.E.2d at pp. 268-269.)

In its analysis, the South Carolina court reviewed the scope of the double jeopardy clause, concluding that its application is limited to criminal proceedings. (*Matter of Chastain, supra*, 532 S.E.2d at p. 266.) It then reviewed the different labels applied to attorney disciplinary proceedings by different states, noting that they are either classed as civil in nature; or quasi criminal; or, as classified in California and other states, as unique, sui generis or special. (*Id.* at pp. 267-268.) Since the court concluded that disciplinary proceedings are not criminal in nature and do not have punishment as a purpose, it concluded that the double jeopardy provision did not bar imposing added discipline. Finally, the court stated that Chastain’s “criminal conviction which followed a disciplinary proceeding in which he was sanctioned, provides a separate basis for an additional sanction. [Citations.]” (*Id.* at p. 269.)

Turning to the appropriate degree of discipline, the court determined that added discipline was not required in every case and the court stated it would review each case before deciding whether to impose an added sanction. It also identified seven relevant factors in assisting it to decide whether it would impose added discipline.⁷ In this case, the Court concluded that imposing an added sanction would be unnecessary. (*Matter of Chastain, supra*, 532 S.E.2d at p. 269.)

We are persuaded to follow the analysis in *Chastain* and the result in *Hochman* that the bringing of a conviction proceeding is not barred because it arose from underlying facts which

⁷In substance, the seven factors set forth in *Chastain* are: whether an added sanction was needed to (1) protect the public or (2) protect the integrity of the legal system or the administration of justice; (3) whether the conviction proceeding yielded information not considered during the previous proceeding; (4) whether the attorney was unable to practice due to criminal sanctions such as incarceration; (5) whether the disciplinary or criminal processes had been manipulated to harass the lawyer; (6) whether an added sanction would be unfair to the lawyer; and (7) any other factor deemed relevant. (*Matter of Chastain, supra*, 532 S.E.2d at p. 269.)

were the subject of an earlier original proceeding. We stress that the situation before us is extremely rare. Indeed we believe it is the only such proceeding to arise in the nearly 75-year history of State Bar proceedings.⁸ Nevertheless, for those expectedly rare cases that may arise, we believe that our conclusion provides the correct result under California law. Moreover, it recognizes that underlying issues in criminal referral cases differ from the issues in original disciplinary proceedings. In addition, recognizing that a later conviction proceeding is not barred because of the pursuit of an earlier original proceeding allows the statutory standard for summary disbarment to be recommended to the Supreme Court in eligible cases. (See *In re Paguirigan*, *supra*, 25 Cal.4th at p. 9.) Finally, our conclusion recognizes and reinforces the goals of attorney discipline – protection of the public, the courts and the integrity of the legal profession – which are strong public policy considerations in this state. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309.)

However, we share the concerns found in *Chastain*; and, at least implicitly, in *Hochman*, that, except for proceedings eligible for summary disbarment, the degree of discipline to be imposed in the later conviction proceeding should take into consideration any discipline imposed in the earlier original proceeding. This also comports with the earlier-cited requirements of due process in these proceedings.

⁸But compare with *Shafer v. State Bar* (1932) 215 Cal.706 in which a suspension recommendation was made in an original proceeding after the attorney was convicted of a felony for failing to account for trust funds involved in the original proceeding, but before the conviction became final. The court chose to impose the suspension recommended in the original proceeding. At the time, had Shafer's conviction become final, he would have been automatically disbarred. (See *In re Paguirigan*, *supra*, 25 Cal.4th at p.5.)

For the purpose of assessing the appropriate discipline in the conviction proceeding, and to ensure fundamental fairness, we adopt the following factors: (1) whether discipline in the conviction proceeding is needed to protect the public or the courts or to maintain the integrity of the administration of justice; (2) the extent to which the hearing judge or the parties in the original proceeding addressed the underlying facts supporting the criminal conviction which forms the basis for the subsequent conviction proceeding; (3) whether the criminal conviction yielded any relevant information that was not considered by the hearing judge in the original proceeding; (4) whether the discipline imposed in the conviction proceeding would unfairly duplicate any discipline actually imposed in the original proceeding, or would otherwise be unfair to the respondent; and, (5) the extent to which the public policy sought to be protected in the original proceeding relates to the public policy sought to be protected in the criminal conviction which forms the basis for the conviction proceeding.

Since this conviction is now final, we shall refer it to the hearing judge as set forth below. If the judge so assigned finds a basis for imposition of discipline, we direct that the assigned judge consider the operation of the five factors set forth *ante* in determining the appropriate degree of discipline.

III. CONCLUSION AND ORDERS.

For the foregoing reasons, we conclude that this conviction proceeding, 02-C-15210, may proceed. As respondent's conviction is now final, this proceeding is referred to the Hearing Department under the authority of subdivision (a) of rule 951, California Rules of Court, for a hearing and decision recommending the discipline to be imposed in the event that the Hearing Department finds that the facts and circumstances surrounding the violation of title 18 United

States Code section 371, of which respondent was convicted, involved moral turpitude or other misconduct warranting discipline. Should the hearing judge find a basis for recommending discipline, the judge shall consider the five factors we set forth *ante* before making a discipline recommendation.

STOVITZ, P. J.

We concur:

EPSTEIN, J.
HONN, J.*

* (Judge of the Hearing Department, sitting by designation under rule 305(e), Rules of Procedure of the State Bar.)

Case No. 02-C-15210

In the Matter of Alan Wesley Curtis

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