STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PHILLIP FRASCINELLA

A Member of the State Bar

[No. 88-C-14346]

Filed May 31, 1991

SUMMARY

Respondent was convicted of exhibiting a replica of a firearm in a threatening manner. He requested review of a hearing referee's decision concluding that the facts and circumstances of his conviction involved moral turpitude. (Anya Weisnewski, Hearing Referee.)

Respondent contended that the referee should have considered two declarations he submitted in mitigation; that improper evidence was admitted, and that his criminal conduct did not involve moral turpitude or other misconduct warranting discipline. Upon the review department's independent review of the record, it rejected respondent's evidentiary contentions; concurred with the hearing referee's determination that the matter involved moral turpitude, and remanded the matter to the hearing department for a hearing and decision recommending the appropriate discipline to be imposed.

COUNSEL FOR PARTIES

For Office of Trials: Mark A. Brooks, Sherry L. Pantages

For Respondent: Phillip Frascinella, in pro. per.

HEADNOTES

[1] **141 Evidence—Relevance**
740.59 Mitigation—Good Character—Declined to Find
1699 Conviction Cases—Miscellaneous Issues
In proceeding to determine whether criminal convictions involved moral turpitude, declarations submitted by respondent in which clients attested to respondent's character and legal abilities were properly disregarded as irrelevant, because neither declarant was present during the incident underlying the convictions nor did the declarations contain any information which could shed light on the incident.

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.

[2] **142 Evidence—Hearsay**
Witness's testimony as to witness's knowledge of respondent's conflicts with management of respondent's office building was not hearsay and was properly admitted.

[3] **142 Evidence—Hearsay**
1699 Conviction Cases—Miscellaneous Issues
In proceeding to determine whether criminal convictions involved moral turpitude, arresting officer's testimony regarding observations of witnesses at the scene was not hearsay and was properly admitted.

[4] **159 Evidence—Miscellaneous**
There is no rule that excludes the admission of proper evidence because the object to which testimony relates is not introduced into evidence. Evidence relating to replica gun was therefore admissible, even though gun was not offered into evidence.

[5] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous
166 Independent Review of Record
1699 Conviction Cases—Miscellaneous Issues
In proceeding to determine whether criminal convictions involved moral turpitude, the arresting officer's testimony describing a victim's retelling of the incident was hearsay, but was properly admitted because respondent waived hearsay objection by failing to appear at the hearing. The review department independently reviewed the hearsay evidence, found sufficient trustworthiness, and concluded it was properly relied on by the referee.

[6] **148 Evidence—Witnesses**
166 Independent Review of Record
The review department is obligated to afford great weight to the assessments of credibility made by the hearing referee, for the referee is in the best position to see witnesses and judge, by their demeanor and address, the truthfulness of each. Respondent's repeating his version of the events does not demonstrate that the referee's findings were unfounded.

[7 a, b] **191 Effect/Relationship of Other Proceedings**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1691 Conviction Cases—Record in Criminal Proceeding
Respondent's conviction for exhibiting a replica of a firearm in a threatening manner to cause reasonable fear or apprehension of harm conclusively established that respondent's acts were done in a threatening manner so as to cause a reasonable person apprehension or fear of bodily harm.

[8] **1516 Conviction Matters—Nature of Conviction—Tax Laws**
1527 Conviction Matters—Moral Turpitude—Not Found
The wilful failure to file income tax returns alone does not involve moral turpitude per se.

[9] **1523 Conviction Matters—Moral Turpitude—Facts and Circumstances**
Where facts showed respondent had sufficient time, however short, for respondent to plan criminal acts and to reflect upon them, review department concluded that respondent's criminal acts were premeditated.

[10] **1528 Conviction Matters—Moral Turpitude—Definition**

Moral turpitude determinations are a matter of law. Moral turpitude is not a concept that fits a precise definition. The definition most often recited by the Supreme Court is "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." The definition of moral turpitude is measured by the morals of the day, and may vary according to the community or the times. The moral turpitude prohibition is a flexible, "commonsense" standard, with its purpose not the punishment of attorneys but the protection of the public and the legal community against unsuitable practitioners. A holding that an attorney's act constitutes moral turpitude characterizes the attorney as unsuitable to practice law.

[11] **1528 Conviction Matters—Moral Turpitude—Definition**

Some offenses are crimes of moral turpitude on their face, including acts universally decried as morally reprehensible or necessary involving fraudulent or dishonest acts for personal gain. Other offenses do not in and of themselves constitute crimes of moral turpitude, such as voluntary manslaughter and simple assault. The commission of such lesser offenses by an attorney in the heat of anger or as result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to constitute moral turpitude.

[12 a-d] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances

Where, in brandishing replica firearm so as to cause reasonable fear of harm, respondent did not act out of uncontrollable anger or other disabling disorder; had the time and opportunity to ponder his acts beforehand; repeated his outrageous conduct after additional time for reconsideration; put innocent bystanders in fear for their safety and well-being; responded inappropriately to a dispute easily and routinely settled through normal legal processes; and did not act due to any abuse of alcohol, review department agreed with hearing referee's conclusion that the circumstances surrounding respondent's criminal offenses involved moral turpitude.

[13] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances

In determining whether respondent's criminal convictions for exhibiting a replica firearm in a threatening manner involved moral turpitude, it was of no consequence that no one was physically injured by respondent's acts. The acts were intended to be, and were, perceived to be life-threatening, and could have provoked heart attacks or an armed response, thus demonstrating a flagrant disregard toward human life.

[14] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
1528 Conviction Matters—Moral Turpitude—Definition

Any determination of moral turpitude in an offense not inherently involving moral turpitude is fact-sensitive. Serious assaultive conduct has sometimes been found not to involve moral turpitude.

ADDITIONAL ANALYSIS

Other

1545 Conviction Matters—Interim Suspension—Not Ordered

OPINION

NORIAN, J.:

Respondent, Phillip Frascinella, has requested review of a hearing referee's decision that the facts and circumstances of his conviction for violations of Penal Code section 417.2, subdivision (a), involved moral turpitude. After our independent review of the record, we concur with the hearing panel's determination that this matter involved moral turpitude. We return the matter to the hearing department of the State Bar Court, consistent with the Supreme Court's order dated December 20, 1989, for a hearing and decision recommending the appropriate discipline to be imposed.

PROCEDURAL HISTORY

Respondent was convicted on September 23, 1988, of two counts of exhibiting a replica of a firearm in a threatening manner to cause fear of bodily harm to another, in violation of Penal Code section 417.2, subdivision (a). By order dated November 23, 1988, the Supreme Court referred this conviction to the State Bar Court for a hearing, report and recommendation on the issue of whether the facts and circumstances surrounding the violations involved moral turpitude or other conduct warranting discipline. (Bus. & Prof. Code, §§ 6101-6102; Cal. Rules of Court, rule 951.) The Supreme Court did not place respondent on interim suspension.

The matter was heard by a hearing referee on July 10, 1989. Respondent did not appear but submitted declarations on his own behalf. The referee's decision was filed on October 31, 1989, finding that the circumstances surrounding respondent's conviction entailed "moral turpitude and misconduct warranting discipline." (Decision p. 5.) Respondent requested review on November 28, 1989. Upon finality of the criminal conviction, the Supreme Court issued an order dated December 20, 1989, augmenting its previous order and asking the State Bar, in the event that discipline is warranted, for a recommendation of the appropriate discipline to be imposed.

FACTS

This synopsis of the facts is drawn from the decision of the hearing referee as well as from the record of the hearing on July 10, 1989.

The conduct underlying the conviction occurred on September 2, 1988, in an office building in Los Angeles in which respondent was a tenant. Respondent had been involved in a number of disagreements with the property owner, had been given written warning to make timely rent payments and had been rude and abusive to employees of the building owner on a number of occasions. The receptionist for the building, Stephanie Hart (Hart), had been instructed to refuse to speak to respondent and to hang up when he was rude or abusive.

At approximately 11 a.m. on September 2, 1988, Hart had prepared and caused to be delivered to respondent at his third floor office a three-day notice to quit the premises. Ten minutes after service of the notice, respondent went to the reception area of the landlord's office on the first floor. Hart was not present at respondent's arrival but was informed by a handyman working in the reception area that someone was there to see her. As she entered the area, she saw respondent facing her approximately 10 to 15 feet away, feet spread apart, arms fully extended with both hands on what she thought was a gun. The gun was pointed at her. Respondent's manner toward her was threatening. She stood fixed for approximately five seconds, then turned her back on respondent and said, "That's not funny." (R.T. p. 26.) She heard a click and believed he had pulled the trigger. At that sound her heart stopped and she thought she would die. After a few seconds, she turned around and saw respondent had left. When she looked on her desk, she found the three-day notice she had previously given torespondent torn into little pieces and taped back together.

After respondent left the first floor reception area, he proceeded to the third floor to the reception area of an office near his office suite. Margo Payne (Payne), the receptionist in the third floor office,

testified that respondent walked into the back office area where she was working with two other employees. Payne testified that respondent announced, "'[e]verybody freeze'" (R.T. p. 18), held what appeared to be a gun with two hands and pointed it at her, and then, in a sweeping motion, fanned the room with the gun. She testified that she believed the gun to be real and was frightened. Payne testified that respondent started to laugh, said, "'[y]ou guys are no fun'" (R.T. p. 19), and walked out of the back office.

Another employee present in the back office with Payne was Jennifer Hale (Hale), an employee of a business with offices on the first floor. Hale observed respondent enter the area, say "'[f]reeze'" (R.T. p. 37), and pull out the gun and point it at the women sitting behind the reception desk. She believed the gun was real. She saw respondent point the gun at Payne and pull the trigger, the gun making a clicking sound. Hale said, "[t]hat's sick" (R.T. p. 37) to respondent and he responded by pointing the gun approximately six inches from her face. She said again, "[t]hat's sick" or "[t]hat's not funny." (R.T. p. 37.) His answer was "'[y]es, it is'" (R.T. p. 37), and he pulled the trigger. Testifying as to respondent's facial expression she said, "[t]hats' why it was so scary because it [his face] was not joking at all. It was just very blank. Very, very scary because it was just very calm, just 'freeze,' so not—[sic] it was just very serious." (R.T. p. 39.)

Hale proceeded to the elevators to return to her office on the first floor and while waiting for the elevator she said respondent "came out of there and he was holding the gun like a cowboy and just walked into his office." (R.T. p. 37.) She returned to her suite on the first floor. She said "I thought maybe I am overacting. I walked in and saw Stephanie [Hart] freaking out . . . ." "She was shaking and almost crying. I was shaking and she [Hart] told me what happened and I told her what happened . . . ." (R.T. pp. 37-38.) Their boss said to call the police and one of them did.

One of the officers who responded to the call was Officer Toisha Ellerson (officer). As part of her investigation, she secured the replica gun from its stand on respondent's desk. In her opinion, the gun looked real and operable, and only after a close examination could she and her partner discern that the barrel of the gun had been closed.

Respondent was arrested, charged with two counts of drawing or exhibiting a firearm in a threatening fashion to cause reasonable fear or apprehension of harm, contrary to Penal Code section 417.2, subdivision (a), and released on bail. Formal charges were filed by the City Attorney of Los Angeles on September 20, 1988.[1] On September 23, 1988, respondent pled no contest to two counts of violating Penal Code section 417.2, subdivision (a) and was sentenced to, among other things, two years probation, a $225 fine and forty hours of community service. Respondent paid his fine and completed his community service. No evidence was presented at the hearing that he had violated the terms of his criminal probation.

The hearing referee's decision found that respondent's conduct created genuine fear in those at whom he aimed the gun since each believed the gun to be real and that respondent intended to use it against them. The referee found that none of the victims knew the gun was a replica nor without careful examination would such information be reasonably apparent. The referee found that the facts and circumstances surrounding respondent's violation of Penal Code section 417.2, subdivision (a) involved an act of moral turpitude.

ISSUES ON REVIEW

Summary of Issues

Respondent challenges the hearing referee's decision in three basic areas: (1) mitigating factors in two declarations submitted by respondent were not

1. The City Attorney added a third count against respondent alleging a violation of section 55.09, subdivision (a) of the Los Angeles County Municipal Code, for a willful display of a replica firearm. This charge was dismissed by the municipal court judge.

considered in the finding of culpability; (2) improper evidence was admitted on which the referee relied for the findings of fact, which tainted the hearing and undermines the decision; and (3) disciplinary action is not required for respondent's criminal conduct in that it does not involve moral turpitude or otherwise warrant discipline.

The examiner for the Office of Trial Counsel contends that: the mitigating factors set forth in the declarations are not relevant to a determination of whether respondent's convictions involved moral turpitude or other misconduct warranting discipline; respondent's evidentiary concerns are without merit and were waived by his not appearing at trial; and the facts and circumstances surrounding respondent's convictions involve moral turpitude and warrant discipline.

1. Declarations

The declarations respondent submitted (exhs. B and C) are from two of his clients attesting to his character and legal abilities. The examiner objected to the declarations being admitted into evidence by the referee since they were hearsay and deprived the Office of Trial Counsel of the opportunity to cross-examine the declarant.

[1] Neither declarant was present during the incident underlying respondent's criminal conviction nor did their declarations contain any information which could shed light on the incident. Therefore, under our charge from the Supreme Court to determine whether the facts and circumstances of respondent's criminal conduct involve moral turpitude, the proffered client declarations are not relevant and the hearing referee was correct in not relying on them in his evaluation of the moral turpitude issue.

2. Evidence Admitted and Credibility Findings

Respondent asserts that inadmissible hearsay evidence was admitted at the hearing and the decision is tainted as a result. Two of the examples respondent cites are not hearsay. **[2]** Payne's testimony declares her knowledge of respondent's conflicts with the office building's management and is not hearsay. **[3]** Nor is the officer's testimony of her observations of witnesses at the scene. **[4]** Respondent also asserts that the replica gun was not offered into evidence and that necessitates excluding any evidence relating to it. There is no rule that excludes the admission of proper evidence because the object to which testimony relates is not introduced into evidence.

[5] The officer's testimony describing Hart's retelling of the incident was hearsay insofar as the truth of her statements is concerned, but respondent waived his hearsay objection when he failed to appear at the hearing. (*Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 109; *Morales* v. *State Bar* (1988) 44 Cal.3d 1037, 1044.) Under our independent review (rule 453, Trans. Rules Proc. of State Bar), we find sufficient trustworthiness as to the hearsay evidence and conclude it was properly relied on by the referee.

Respondent's attack on the testimony of the witnesses at the hearing is unavailing as well. What he characterizes as inconsistent statements by the witnesses are their observations of and reactions to respondent's conduct: the expression on respondent's face, their belief that the gun was real, the click of the hammer when the trigger was squeezed, and the fear generated by respondent's pointing of the weapon at them and his order to freeze. Respondent's reiterated contention that Hart, Payne and Hale falsely manufactured their fear in order to get respondent in trouble is contradicted by the credibility findings of the hearing referee and the criminal conviction itself. **[6]** We are obligated to afford great weight to the assessments of credibility made by the hearing referee, for he is in the best position to see the witnesses and judge, by their demeanor and address, the truthfulness of each. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 931.) By repeating his version of the events, respondent does not demonstrate the referee's findings were unfounded. (*Ibid.*) **[7a]** Moreover, the conviction conclusively established that respondent's acts were done in a threatening manner so as to cause a reasonable person apprehension or fear of bodily harm. (Bus. & Prof. Code, § 6101 (a); Pen. Code, § 417.2, subdivision (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097.) We therefore see no reason to alter the hearing referee's factual findings.

3. Moral Turpitude

Respondent contends that his acts do not rise to the level of moral turpitude. He argues that the primary purpose of lawyer discipline is the protection of the public, not the punishment of the attorney. In evaluating his own conduct, he asserts that no clients were involved, no person was harmed and no property was mishandled. He declares that the general public was adequately protected by the criminal justice system, which imposed a two-year probation term on respondent with conditions, including admonitions. Respondent notes examples of behavior in which moral turpitude was found, such as: writing bad checks with knowledge that there are insufficient funds in the bank account; serious offenses against minors; willful attempt to evade taxes;[2] **[8 - see fn. 2]** or a criminal conviction for possession of marijuana with intent to distribute. Respondent contends that the nature of his criminal conduct falls far short of the standards of moral infirmity represented by the moral turpitude instances he presents. He urges that the referee's finding of moral turpitude be reversed.

In response, the examiner contends what should have been a situation routinely heard and resolved by a legal process, the notice of an eviction, was turned by respondent's "outlandish and depraved tactics" (Examiner's Review Department Brief, p. 6) into a threatening episode. The examiner states that respondent's motive for brandishing the replica weapon was to gain some advantage over his landlord. The examiner also suggests that if respondent's reaction to pressure under the circumstances in this case resulted in criminal conduct which placed at least three people in fear of their lives, then the public needs protection in the future from any further reactions from respondent to pressure-filled legal disputes. The examiner argues that respondent's actions were premeditated and designed to induce fear and terror in those persons working for his landlord.

[7b] We affirm the finding of the referee below that respondent's acts caused reasonable fear and apprehension of harm, for those elements were established by respondent's criminal conviction. **[9]** The conclusion of premeditation is drawn from the amount of time respondent had after the delivery of the three-day notice to quit until completion of his criminal acts. Respondent went to the first floor reception area of the office of the building and asked for Hart, speaking to a handyman who was working there. Hart came out from the back and looked up to see respondent pointing the replica gun at her. After a few seconds she turned away and heard him pull the trigger. He left the area and went up to the third floor. At the third floor reception area he entered a back room, where he again with deliberation brandished the gun, pointed it at Payne and Hale and pulled the trigger. The time it took from receiving the notice until the first incident, as well as the break between traveling from the first floor back to the third floor area between incidents, was sufficient time, however short, for respondent to plan his acts and to reflect upon them.

[10] Moral turpitude determinations are a matter of law. (*In re Higbie* (1972) 6 Cal.3d 562, 569.) Moral turpitude is not a concept that fits a precise definition. (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110.) The definition most often recited by the Supreme Court is presented in *In re Craig* (1938) 12 Cal.2d 93, 97: "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." The Supreme Court has stated that the definition of moral turpitude is measured by the morals of the day (*In re Higbie, supra*, 6 Cal.3d at p. 572) and may vary according to the community or the times. (*In re Hatch* (1937) 10 Cal.2d 147, 151.) The Supreme Court has characterized the moral turpitude prohibition as a flexible, "commonsense" standard (*In re Mostman* (1989) 47 Cal.3d 725, 738) with its purpose not the punishment of attorneys but the protection of the public and the legal community against unsuitable practitioners. (*In re Scott* (1991) 52 Cal.3d 968, 978.) Consistent with that purpose, "holding that an attorney's act

2. **[8]** The willful failure to file income tax returns alone does not involve moral turpitude per se. (E.g., *In re Fahey* (1973) 8 Cal.3d 842, 850.)

constitutes moral turpitude characterizes the attorney as unsuitable to practice law." (*In re Strick* (1983) 34 Cal.3d 891, 902, citing *In re Higbie*, *supra*, 6 Cal.3d at p. 570.)

[11] Some offenses are crimes of moral turpitude on their face, including acts universally decried as morally reprehensible or necessarily involving fraudulent or dishonest acts for personal gain. (*In re Kirschke* (1976) 16 Cal.3d 902, 904 [first degree murder]; *In re Basinger* (1988) 45 Cal.3d 1348, 1358 [grand theft].) Other offenses do not in and of themselves constitute crimes of moral turpitude, such as voluntary manslaughter (*In re Strick* (1987) 43 Cal.3d 644, 653) and simple assault (*In re Rothrock* (1940) 16 Cal.2d 449, 459). "The commission of such lesser offenses [as simple assault] by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to constitute moral turpitude." (*In re Rothrock*, *supra*, 16 Cal.2d at p. 459.) In this case, the Supreme Court did not find moral turpitude to be imputed from the conviction itself and directed the State Bar Court to examine the facts behind the offense.

[12a] It is evident that respondent's actions were provoked in part by the three-day notice to vacate his office space. This event was, however, the culmination of a series of disagreements between respondent and his landlord. Their relationship had been acrimonious. We do not accept as an excuse, nor did the referee, respondent's claim that due to the strained relationship with his landlord, combined with very hot weather on the day in question, the service of the three-day notice to quit caused something inside respondent to snap. The testimony of the witnesses concerning his demeanor, particularly his cold, blank stare, and the professional manner in which he deployed the replica gun, provided a sufficient basis for the referee to conclude that respondent was not acting out of uncontrollable anger or other disabling disorder. He had the time and opportunity to ponder his acts prior to the initial confrontation on the first floor. Respondent had traveled from the third to the first floor, waited while the handyman working in the office reception area summoned Hart from a back office, then confronted her with the replica gun. Respondent had additional time for reconsideration between his criminal episodes on the first and third floors to consider his actions. However, he repeated his outrageous conduct, ordering innocent bystanders to freeze in the face of his apparent deadly weapon and putting all in fear for their safety and well-being.

[13] It is not of consequence that no one was physically injured by respondent's acts. (See *In re Mostman*, *supra*, 47 Cal.3d at p. 740, fn. 6.) Respondent's acts were intended by respondent to be perceived as, and were in fact perceived by his victims to be life-threatening. There was no reason for them to believe that the weapon was not real, that respondent was not prepared to fire it and that when he did pull the trigger, they would not be shot and killed. By his acts, respondent could have provoked heart attacks in the victims or armed response to the perceived threat, thus demonstrating a flagrant disregard toward human life. (Cf. *In re Alkow* (1966) 64 Cal.2d 838, 841.)

[12b] Respondent's inappropriate acts in answer to the three-day notice are unacceptable from anyone in society and particularly reprehensible from an attorney. As noted earlier, respondent's dispute with his landlord was one easily and routinely settled through normal legal processes. There was insufficient provocation to warrant an extraordinary, let alone extralegal, remedy. Rather than respecting and using legal methods to resolve his own conflict, respondent chose to threaten instead. Respondent's criminal conduct put members of the general public not involved in the underlying dispute in fear for their lives.

[14] Any determination of moral turpitude in an offense not inherently involving moral turpitude is fact-sensitive. We are aware that there have been recent prior cases in which serious assaultive conduct has not been found by the Supreme Court to involve moral turpitude. In *In re Larkin* (1989) 48 Cal.3d 236, Larkin contracted with a former client to have the client assault the boyfriend of Larkin's estranged wife, and threaten the boyfriend to leave town or face further injury. Larkin was originally charged with felony charges of assault and conspiracy.

Those counts were later reduced to misdemeanor charges and Larkin was convicted after a jury trial. The review department and hearing panel found Larkin's conviction for assault with a deadly weapon and conspiracy to commit that offense not to involve moral turpitude but found it to be other conduct warranting discipline. (*Id.* at p. 243.) The State Bar did not challenge the moral turpitude finding before the Supreme Court and the Supreme Court explicitly declined to consider the issue. (*Id.* at p. 244.) In *In re Otto* (1989) 48 Cal.3d 970, the Supreme Court affirmed the finding of the review department that Otto's conviction for assault by means to inflict great bodily injury (Pen. Code, § 245, subd. (a)) and infliction of corporal punishment on a cohabitant (Pen. Code, § 273.5), both misdemeanor charges, did not involve moral turpitude.

[12c] In *In re Larkin*, *supra*, 48 Cal.3d 236, the acts were by a surrogate, not by the attorney himself. The record in *In re Otto*, *supra*, 48 Cal.3d 970 indicates that the conduct stemmed in part from the attorney's abuse of alcohol, a circumstance which may influence a finding of moral turpitude. (*In re Rothrock*, *supra*, 16 Cal.2d 449, 459.) There are no such findings in this case.

CONCLUSION

[12d] Based on the foregoing, we agree with the hearing referee's assessment that the circumstances surrounding respondent's criminal offenses involve moral turpitude. Consistent with the Supreme Court's order of December 20, 1989, we remand the matter to the hearing department for a hearing and decision recommending the degree of discipline to be imposed.

We concur:

PEARLMAN, P.J.
STOVITZ, J.