

State Bar Court
Review Department

In the Matter of

**JAMES R. MILLER, A/K/A
JAMES MILLER, III**

A Member of the State Bar

No. 05-C-04139

Filed May 30, 2008

SUMMARY

Acting pursuant to authority delegated by the Supreme Court, the review department had referred a matter to the hearing department to determine whether respondent's criminal assault conviction involved moral turpitude or other misconduct warranting discipline, and, if so, to recommend a degree of discipline. The hearing department dismissed the conviction referral proceeding prior to consideration of evidence about the facts and circumstances of the conviction because the State Bar had failed to notify respondent, who defaulted, of factual and legal contentions about the evidence on which it would rely in this matter. (Hon. Richard A. Honn, Hearing Judge.)

The review department concluded that because of the nature of conviction referral proceedings, there is no requirement that the State Bar provide the attorney with written notice of all of the facts it considers germane to the matter before commencement of proceedings or entry of respondent's default. Instead, the State Bar's notice afforded ample due process protections where it alerted respondent that evidence could be introduced on the facts and circumstances surrounding his assault conviction. The review department therefore concluded the hearing judge erred in dismissing the referral, and remanded the matter to the hearing department for further consideration.

COUNSEL FOR PARTIES

For State Bar: Joseph R. Carlucci

For Respondent: No Appearance

HEADNOTES

- [1 a–d] 107 **Default/Relief from Default**
 191 **Effect of/Relationship to Other Proceedings**
 1511 **Driving Under the Influence**
 1513.10 **Homicide, Assault, Battery, and Related Crimes**
 1515 **Drug–Related Crimes**
 1516 **Violation of Tax Laws**
 1691 **Admissibility and/or Effect of Record in Criminal Proceeding**
 1699 **Other Miscellaneous Issues in Conviction Cases**

In contrast to original disciplinary proceedings, which emanate from complaints against lawyers or from State Bar investigations and require an accusatory pleading alleging with reasonable specificity the charges related to alleged violations of specific conduct rules or laws, conviction referral proceedings are intended to be more streamlined because they are initiated based solely on a member of the State Bar’s conviction, which is conclusive evidence of guilt of the crime. Convictions for offenses which may or may not involve moral turpitude or other misconduct warranting discipline should be referred for an evidentiary hearing to determine whether in the commission of the crime the convicted lawyer was guilty of misconduct warranting suspension or disbarment; typical offenses in this category include: assault and battery crimes, driving while intoxicated, certain tax convictions, and certain drug law convictions. Because it is appropriate to consider a wide ambit of facts and circumstances surrounding an attorney’s commission of a crime during an evidentiary hearing in a referral proceeding, the State Bar met historic notice requirements by alerting respondent that evidence could be introduced on the facts and circumstances surrounding his assault conviction. The review department held the State Bar was not further required to provide respondent written notice of all the facts it considered germane to the referral proceeding at the time it started or respondent’s default was entered for failure to reply to the notice of hearing.

- [2] 107 **Default/Relief from Default**
 192 **Constitutional Issues–Due Process/Procedural Rights**
 1699 **Other Miscellaneous Issues in Conviction Cases**

In conviction referral proceeding, ample due process protections were afforded to respondent where the State Bar served him via certified mail with a copy of the conviction referral order along with written notice that informed him of the specific conviction that was subject to the referral and of the specific issues to be decided at the hearing, warned him of the specific consequences of failure to timely reply, and directed him to attend the hearing to present evidence on his behalf and to examine and cross-examine witnesses. Further, the motion for entry of default, also served by certified mail, again warned respondent of the consequences of his failure to participate and notified him of the minimum level of discipline the State Bar would recommend if the hearing judge found culpability. /

- [3] 107 **Default/Relief from Default**
 191 **Effect of/Relationship to Other Proceedings**
 1699 **Other Miscellaneous Issues in Conviction Cases**

While allegations in an original proceeding are deemed admitted after a default is entered, in a conviction referral matter, even after a default, the State Bar must prove by clear and convincing evidence any facts or circumstances it maintains are relevant to the conviction. If respondent in conviction referral proceeding had replied instead of defaulting, he could have sought to discover the State Bar’s contentions of specific facts surrounding the conviction, and the court could have required the parties to exchange pretrial statements to identify factual contentions still in dispute before trial.

OPINION

STOVITZ, J.*

This review raises the question whether our court's Hearing Department erred in dismissing a referral we made to that department to determine, pursuant to authority delegated to us by the Supreme Court, whether the facts and circumstances surrounding the Ohio criminal assault conviction of respondent James R. Miller involved moral turpitude or other misconduct warranting discipline, and if so, for a recommendation as to the degree of discipline. Since the Hearing Department dismissed this proceeding prior to the consideration of evidence about the facts and circumstances of the conviction, and the dismissal was based solely on the failure of the State Bar to notify respondent (who had defaulted) of its factual and legal contentions about the evidence it would rely on, and since we hold that applicable law does not require such notice, we find that the hearing judge erred by dismissing our referral. We shall therefore remand this matter to the Hearing Department for further proceedings consistent with this opinion.

I. STATEMENT OF THE CASE

This proceeding was handled as a conviction referral proceeding by this court acting on delegated authority of the Supreme Court, which inherently controls such proceedings. (Bus. & Prof. Code, §§ 6101–6102;¹ Cal. Rules of Court, rule 9.10(a) (formerly rule 951(a)).² As we shall discuss in more detail *post*, and as the hearing judge acknowledged, this “conviction referral” proceeding, arising after a

California attorney is convicted of a criminal offense, is fundamentally different from “original disciplinary” proceedings.³

This conviction referral proceeding started in March 2006 when this court referred to the Hearing Department the question of whether respondent's conviction in the Court of Common Pleas of Ohio, Franklin County, on February 1, 2005, of one count of misdemeanor assault under Ohio Revised Code section 2903.13, involved moral turpitude or other misconduct warranting discipline.

Although the operative facts have not been found by our Hearing Department and we do not find them here, the Ohio state court transcript of proceedings of respondent's entry of his plea of guilty identified as a victim of respondent's criminal conduct a local police officer performing security duty on August 8, 2004, at the Port Columbus, Ohio, International Airport.⁴ The police officer was apparently summoned after respondent became verbally abusive to federal Transportation Security Administration employees who were screening respondent at the airport as a ticketed passenger. The facts surrounding the assault are in dispute as to the precise nature of respondent's physical conduct toward the police officer. What is not in dispute is respondent's admission to the Ohio court that he did commit an assault in violation of the Ohio misdemeanor offense underlying his conviction. The evidence proffered by the State Bar also includes a colloquy between respondent and the Ohio court as to the cause of respondent's conduct and the steps he has assertedly taken to resolve underlying problems.

* Honorable Ronald W. Stovitz, retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

1. Unless noted otherwise, all later statutory references are to the provisions of the Business and Professions Code.

2. As to conviction referral proceedings, generally, see, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 493-494; *In re Langford* (1966) 64 Cal.2d 489.

3. See sections 6075-6088. As to original disciplinary proceedings, generally, see, e.g., *Brotsky v. State Bar* (1962) 57 Cal.2d

287, 300-302; *Chronicle Publishing Co. v. Superior Ct.* (1960) 54 Cal.2d 548, 567; *In re Walker* (1948) 32 Cal.2d 488, 489-490.

4. In reciting these basic facts, we draw no conclusions concerning the admissibility of the evidence revealing these facts or as to whether or not respondent is culpable, pursuant to our referral of this conviction to the Hearing Department. (But see § 6102, subd. (g) [the record of proceedings in the convicting court, including a transcript of testimony in that court, may be received in evidence].)

On March 16, 2006, when we started this conviction referral proceeding, we filed an order referring this Ohio conviction to the Hearing Department for a hearing and decision recommending the degree of discipline in the event that the Hearing Department found that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline. The referral order was served on respondent at his official State Bar Membership Records address, which he is required to maintain pursuant to section 6002.1.

On March 27, 2006, the clerk of the Hearing Department served on the parties a notice of hearing on the conviction referral. That notice opened with a bold-faced, underlined heading: "**NOTICE TO RESPONDENT RE: DEFAULT AND INACTIVE ENROLLMENT.**" In following paragraphs, this notice warned respondent of the consequences of default, should he not file an answer or appear at the State Bar Court hearing, including the consequences of inactive enrollment: that he would lose the opportunity to participate further in the proceedings, that evidence "that would otherwise be inadmissible may be used against" him, and that he would lose the opportunity to present evidence in mitigation or to counter the State Bar's evidence in aggravation. This notice was served by certified mail on respondent at his official Membership Records address and attached our order of referral filed March 16, 2006.

Respondent failed to timely reply to this notice of hearing and the State Bar moved for entry of his default. As required by the Rules of Procedure of the State Bar, the motion gave notice to respondent that if he failed to file an answer within ten days of service of the motion for entry of default, among other consequences, "EVIDENCE THAT WOULD OTHERWISE BE INADMISSIBLE MAY BE USED AGAINST YOU IN THIS PROCEEDING." (See

Rules Proc. of State Bar, rule 202(a) [at default hearings, the State Bar is "entitled to introduce any evidence on which responsible persons are accustomed to rely in the conduct of serious affairs"].)⁵

Respondent failed to reply to the motion for entry of default or to file an answer, and on May 17, 2006, the court granted the motion and entered his default.⁶ The order was served on respondent.

After the State Bar filed a closing brief as to culpability and discipline, which included the evidence it offered to prove the facts and circumstances surrounding the conviction,⁷ the matter was submitted.

After vacating the submission and issuing an order to the State Bar to show cause why this proceeding should not be dismissed in the interests of justice or for want of due process, the hearing judge dismissed the conviction referral proceeding without prejudice for failure of the State Bar to show that it had notified respondent, prior to the entry of default, of the State Bar's factual and legal contentions about evidence of respondent's conviction that it had submitted to the Hearing Department with its closing brief. While acknowledging the substantial differences between conviction referral proceedings and original proceedings, the hearing judge nevertheless determined that the State Bar breached principles of due process by failing in a conviction proceeding to give notice to respondent, prior to the entry of default, of the legal and factual contentions on which the State Bar relied. Accordingly, the hearing judge concluded that the State Bar could not sustain its burden of presenting clear and convincing evidence that the facts surrounding respondent's conviction involved moral turpitude or misconduct warranting discipline in light of the State Bar's failure to have submitted the evidence it would rely on to respondent prior to entry

5. The motion also set forth the minimum discipline the State Bar intended to recommend if culpability was found. (Rules Proc. of State Bar, rule 200(a)(3).)

6. Respondent also failed to answer the charges of two original disciplinary proceedings that were consolidated with this conviction referral proceeding. His default was entered in the original proceedings as well.

7. This evidence consisted of a declaration from the police officer assaulted by respondent, certified copies of two reporter's transcripts of hearings in respondent's criminal proceeding in the Court of Common Pleas, Franklin County, Ohio, and a declaration from a State Bar supervising attorney overseeing the monitoring of pending criminal charges against California attorneys.

of default. The hearing judge also concluded that the fundamental fairness requirements of notice of alleged offenses in an original proceeding extended to require a similar notice in conviction proceedings that depend on a referral to the Hearing Department to assess the surrounding facts and circumstances. The State Bar seeks review, urging that the procedures followed in conviction referral proceedings are fair to the respondent and that the hearing judge's dismissal order was unwarranted.

II. DISCUSSION

[1a] As we noted *ante*, this conviction referral proceeding is fundamentally different in structure and governing procedures from the more common original disciplinary proceedings. Original disciplinary proceedings, which emanate either from complaints against lawyers or from State Bar investigations without a complaint, ultimately require an accusatory pleading ("Notice of Disciplinary Charges"), alleging the charges, with reasonable specificity, as related to the specific conduct rules or laws alleged to have been violated by the accused attorney. (See, e.g., § 6085; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168.)

In contrast, it is solely the event of a misdemeanor or felony conviction of a member of the State Bar of a criminal offense that is the initiating basis of a conviction referral proceeding under sections 6101 and 6102, and implementing rule 9.10(a) of our Supreme Court. (*In the Matter of Curtis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 601, 606.)

Conviction proceedings have been a feature of California's attorney disciplinary framework for at least eight decades and are intended to be more streamlined than original proceedings, "recognizing that they rest on proceedings in the criminal courts in which the burden of proof is beyond a reasonable doubt." (*Ibid.*) For that reason, California law has long recognized that an attorney's conviction of a crime or even the entry of a plea of *nolo contendere* or guilty to criminal charges is "conclusive evidence of guilt" of the crime. (§ 6101, subs. (a), (e).) Moreover, convictions of crimes inherently involving moral turpitude, including, *inter alia*, forgery, perjury, bribery, extortion and murder, necessarily establish

an attorney's culpability by the very fact of the conviction and do not require any evidentiary hearing or showing beyond the certified evidence of the conviction itself. (§ 6101(a); e.g., *In re Hallinan* (1954) 43 Cal.2d 243, 247–248; *In re Rothrock* (1940) 16 Cal.2d 449, 454.) Indeed, between 1872 and 1955, an attorney's final conviction of a crime involving moral turpitude was a basis for *automatic* disbarment – obviating any evidentiary hearing. (*In re Paguirigan* (2001) 25 Cal.4th 1, 5, 8.) Commencing in 1986, summary disbarment was enacted for certain felonies. (*Id.* at p. 8.)

[1b] No later than 1954, the Supreme Court recognized that not all crimes committed by California attorneys inherently involved moral turpitude, and certain convictions should be referred to the State Bar to determine whether "in the commission of the crime the convicted lawyer was guilty of misconduct" warranting suspension or disbarment. (*In re Hallinan, supra*, 43 Cal.2d at pp. 253–254.) As a result, many of the conviction proceedings started against attorneys in California, including the one before us, arise from convictions which *may or may not* involve moral turpitude or misconduct warranting discipline. Typical offenses in this category include convictions involving: assault and battery crimes (e.g., *In re Otto* (1989) 48 Cal.3d 970; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52); trespassing (e.g., *In re Hurwitz* (1976) 17 Cal.3d 562); driving while intoxicated (e.g., *In re Kelley, supra*, 52 Cal.3d 487); certain tax convictions (e.g., *In re Grimes* (1990) 51 Cal.3d 199; *In re Rohan* (1978) 21 Cal.3d 195); and certain drug law convictions (e.g., *In re Cohen* (1974) 11 Cal.3d 416). Prior to 1991, the Supreme Court itself referred these convictions to the State Bar for a hearing and report as to whether moral turpitude or misconduct warranting discipline were involved; and if so found, for a recommendation of the degree of discipline. (See, e.g., *In re Hallinan, supra*, 43 Cal.2d at p. 253; § 6102, subd. (f) (as amended in 1955).) In 1991, the Supreme Court delegated its referral powers to this court, which continued the practice of evidentiary referral to the hearing department of those crimes which did not involve moral turpitude *per se*.

[1c] In a referral for an evidentiary hearing of those criminal convictions which "may or may not"

involve moral turpitude or misconduct for an attorney, it is clear that “all facts and circumstances surrounding the commission of a crime by an attorney” may properly be considered. (*In re Arnoff* (1978) 22 Cal.3d 740, 745; see also *In re Higbie* (1972) 6 Cal.3d 562, 572; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 740–747.) Thus, the Supreme Court has rejected claims by attorneys that it was improper to consider facts about the use of fraudulent medical reports in a conviction for capping (*In re Arnoff, supra*, 22 Cal.3d at p. 745), and about an attorney’s involvement in a gold importation transaction in a conviction for selling securities in a crib–playpen venture without a permit (*In re Langford, supra*, 64 Cal.2d at p. 496).

[1d] Since a wide ambit of facts surrounding the commission of a crime is appropriate to consider in a conviction referral proceeding, and since the basis of such a State Bar Court referral proceeding is the conviction itself, there has never been a requirement that, at the time the proceeding is started or at the time that the member’s default is entered for failure to reply to the notice of hearing, the member receive written notice of all the facts that the State Bar considers germane to the referral.⁸ The notice that was provided literally alerted respondent that evidence could be introduced on the facts and circumstances surrounding his Ohio assault conviction.⁹ This is all that has historically been required.

[2] Contrary to the conclusion drawn by the hearing judge, we hold that the procedures surrounding this conviction referral proceeding afforded respondent ample due process protections. First, respondent was served with written notice of the specific issues to be decided at a hearing that he was

directed to attend in order to present evidence on his behalf and to examine and cross–examine witnesses, and the notice cited the specific criminal conviction which was the subject of the referral. Second, the notice at the outset warned respondent of the specific consequences for failure to reply timely. This notice was served upon respondent by certified mail at the address he was required to maintain on the State Bar’s official records, and it was accompanied by a copy of our referral order. Finally, in the motion for entry of default, respondent was again warned of the consequences of his failure to participate, and was notified of the minimum level of discipline the State Bar recommended if culpability was found. This motion also was served upon respondent by certified mail.

[3] The well–established conviction referral proceedings provide even more defense opportunities for attorneys who participate in the proceedings. Thus, had respondent replied instead of defaulting, he could have sought to discover the State Bar’s contentions of specific facts surrounding the conviction and the court could have required pretrial statements to be exchanged between the parties to identify factual contentions still in dispute before trial. (Rules Proc. of State Bar, rules 180 et seq., 211 and 608.) In all conviction referral cases, including defaults, the State Bar is required to present by clear and convincing evidence any facts it maintains are relevant to the conviction. (See *In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 763–764 [paucity of record presented by State Bar did not permit conclusion that facts and circumstances surrounding the attorney’s conviction was a basis for discipline].) Thus, while allegations in an original proceeding are deemed admitted after a default is

8. We have only found one case in which we discussed a notice issue in a conviction referral proceeding. In *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 269, the attorney, who was convicted in another state of driving under the influence of alcohol, argued that due process would be violated because he was provided no advance notice of the grounds on which discipline would be imposed. We did not resolve this issue as we decided the case on other grounds, but we noted authorities which rejected or cast serious doubt on the vitality of such a challenge. (*Id.* at p. 270.)

9. To require that the State Bar provide notice, at the outset of a conviction proceeding, as to the facts it relies on to establish moral turpitude or other misconduct warranting discipline, may well be unduly burdensome in light of the case law cited *ante* that all facts and circumstances surrounding the conviction are appropriately considered. Unlike an original proceeding, which is more within the control of the State Bar as to timing of initiation, a conviction referral proceeding is intended to be streamlined and the State Bar is under a statutory duty to transmit the record of conviction to the State Bar Court within five days of its receipt. (See § 6101, subd. (c); Cal. Rules of Ct., rule 9.10(a).)

entered, in a conviction referral matter, there is an additional built-in prophylactic measure that, even after a default, any fact or circumstance relied on must still be proven.

III. DISPOSITION

The hearing judge erred by dismissing this referral proceeding without legal justification. We therefore remand the proceeding to the Hearing Department with directions to vacate the order of dismissal and to take further proceedings consistent with this opinion.

We concur:

REMKE, P. J.

WATAI, J.