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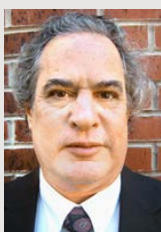
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A scarlet letter — your weakest moments can and will be used against you

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Part one of this article focused on the conclusive evidence of guilt that arises from an attorney's conviction, guilty plea, or plea of nolo to certain criminal offenses such as cheating or stealing from a client. In these cases, the attorney can expect to be summarily disbarred. Grand theft and forgery are prime

examples. However, the great majority of conviction referral cases arise from more mundane and all too common human foibles. Often the consequences of one's passions result in crimes, which may or may not involve moral turpitude, or other misconduct warranting discipline.

Typical offenses in this category include: driving while intoxicated, certain sex, drug and firearms offenses, and tax convictions. *In the Matter of Twitty* (Rev. Dept. 1994) 2 Cal St. Bar Ct. Rptr., 664. These types of offenses are normally referred to the Hearing Department of the State Bar Court for an evidentiary hearing. Either the crime itself or the facts and circumstances surrounding its commission can warrant a recommendation to the state Supreme Court of suspension or disbarment. *In the Matter of Miller* (Review Dept. 2008) 5 Cal. St. Bar Ct. Rptr., 110.

Be particularly aware of the phrase "other misconduct warranting discipline." This is another one of those terms of art around the State Bar. This can include uncharged misconduct and dismissed charges. It may also include reference to physical evidence, or statements made by the victim, law enforcement officers, investigators and percipient witness. Always remember that in criminal cases not otherwise eligible for summary disbarment, the State Bar is always looking for evidence of aggravating factors. Your weakest moments can and will be used against you.

Driving under the influence: While many would argue that drunken driving is a serious social problem, it may or may not be a proper subject for professional discipline. A conviction for driving under the influence is not professional misconduct on its face. *In the Matter of Carr* (Review Dept. 1991) 1 Cal St Bar Ct. Rptr., 756. For the most part, attorneys are treated no differently than ordinary citizens and sanctioned under the criminal law. The state Supreme Court has classified driving under the influence of alcohol as a crime which may or may not involve moral turpitude, and which may under certain circumstances result in discipline. *In the Matter of Respondent I* (Rev. Dept. 1993) 2 Cal St. Bar Ct. Rptr., 260. First offenses are automatically referred if they involve a felony and may be referred for an evidentiary hearing if aggravating circumstances are apparent from the record of conviction.

The general policy of the State Bar is not to refer a first offense misdemeanor drunken driving conviction to an evidentiary hearing. *In the Matter of Respondent M* (rev. Dept 1993) 2 Cal St. Bar Ct. Rptr. 465. Prior convictions for drunken driving do not establish moral turpitude per se, nor does the crime of gross vehicular manslaughter while intoxicated. Similarly, a violation of criminal probation or a high

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Government

Complex courts don't keep the fees they generate

While cash-strapped San Francisco County Superior Court's decision to close its complex litigation departments has surprised some, the fees they collect don't go straight to the court

Litigation

Jury hears allegations of corporate theft

Allies of bond wiz Jeffrey Gundlach staged an elaborate grab of client data from Trust Co. of the West, according to testimony during the first full week of trial in the high-stakes trade secrets dispute between the two.

Law Practice

Legal jobs jump in July

The month of July was generous to the legal sector, showing job growth that brought back more than the nearly 3,000 jobs lost in June.

On the Move

Hewlett-Packard Co. hired Drinker Biddle & Reath LLP partner Gregg R. Melinson to serve as vice president of global government affairs and deputy general counsel in Palo Alto, effective Sept. 19.

Government

Suit filed over green cards for foreign investors

The city of Victorville has made good on its threat to sue the federal government for shutting a jobs program aimed at stimulating employment in depressed areas by encouraging foreign investors.

U.S. Court of Appeals for the 9th Circuit Panel rules against airline

Dealing the second blow in a week against corporate arguments that federal statutes trump state laws, a 9th Circuit panel on Friday held that the Airline Deregulation Act does not foreclose state common law breach of contract claims.

Intellectual Property

Fish & Richardson booted from antitrust case

A San Francisco federal judge disqualified Fish & Richardson P.C. from representing plaintiffs in an antitrust lawsuit because the firm's Houston-based lead counsel previously represented one of the defendants in IP litigation.

blood alcohol level are insufficient to establish moral turpitude per se. *In the Matter of Anderson* (Rev. Dept. 1993) 2 Cal St. Bar Ct. Rprtr., 208. These aggravating factors may however constitute "other misconduct warranting suspension or disbarment."

The great majority of conviction referral cases arise from more mundane and all too common human foibles.

Sex offenses: As with driving under the influence, some may view sex offenses as morally reprehensible, yet consensual offenses normally do not merit professional discipline when not committed in the course of the practice of law. Note, Rule 3-210, Rules of Professional Conduct, generally prohibits sex with existing clients.

Misdemeanor sex offenses, which are not serious and are unrelated to the practice of law, have generally resulted in only private reprovals absent aggravating factors. Soliciting prostitution for instance is viewed as less serious than wilful failure to file a tax return or driving under the influence. *In the Matter of Buckley* (Review Dept. 1990) 1 Cal. St. Bar Ct. Rprtr. 201.

Case law indicates a wide range of available discipline for cases involving sexual conduct toward children depending on the circumstances. *In the Matter of Meza* (Review Dept. 1991) 1 Cal. St. Bar Ct. Rprtr. 608. Compare *In re Safran* (1976) 18 Cal. 3d 134 (indecent exposure; court imposed three years stayed suspension in lieu of 3 years probation) with *In re Duggan* (1976) 17 Cal. 3d 416 (contributing to the delinquency of a minor; disbarment ordered.) See also *In the Matter of X, An Attorney at Law* (1990) 120 N.L. 459, 461 (second degree sexual assault, attorney disbarred); *In re Yurman*, Supreme Ct. order filed March 29, 1979 (Bar Misc. 3750) excising the lust of a child under 14, two years suspension stayed in lieu of two years probation. Recently, sex offenses involving children are almost always resulting in disbarment.

Drugs: No Supreme Court decision has determined that a conviction for possession of marijuana for sale is one that inherently involves moral turpitude. *In the Matter of Deierling* (Review Dept. 1991) 1 Cal St. Bar Ct. Rprtr. 552. Even so, where the surrounding facts and circumstances showed that the attorney acted as a principal in a marijuana distribution scheme, for financial gain and with awareness of the illegality of his actions, these acts constituted acts of moral turpitude warranting discipline. Concealing ownership of property to prevent forfeiture by hiding drug profits for a client is an act of moral turpitude. *In the Matter of Rech*. (Review Dept. 1995) 3 Cal St. Bar Ct. Rprtr., 310.

With only one very serious case resulting in disbarment, marijuana distribution convictions have resulted in anywhere from no actual suspension to two years actual suspension. Simple possession has resulted in even less severe discipline. Again, it is the aggravating factors more often than the crime itself that can cause problems.

Firearms: Assault with a firearm (*In the Matter of Respondent O*, Rev. Dept. 1993, 2 Cal. St. Bar Ct. Rprtr., 581), or carrying a loaded firearm in a vehicle (*In the Matter of Rose*, Rev. Dept. 1994, 3 Cal. St. Br Ct. Rprtr.192), may appear to be against good public morals, but they are not crimes inherently involving moral turpitude. Any discipline flows from the facts and circumstances surrounding their use. Again, the aggravating factors constitute the "other misconduct" requisite for imposing discipline.

Tax offenses: The willful failure to file an income tax return, by itself, does not involve moral turpitude per se. *In the Matter of Frascinella* (Review Dept. 1991) 1 Cal. St. Bar Ct. Rprtr. 543. However, conspiring to impair the collection of federal income taxes (18 U.S.C. Section 371) epitomizes an offense, which may or may not constitute moral turpitude or other disciplinable misconduct. *In the Matter of Rech* (Review Dept. 1995) 3 Cal St. Bar Ct. Rprtr., 310.

There are many crimes that do not inherently involve moral turpitude but which may nevertheless result in an attorney's suspension or disbarment. More often it is the facts and circumstances surrounding the commission of the crime more than the crime itself that can cause problems. Always be aware that the State Bar will be looking at these attendant facts and circumstances no matter what miracle your excellent criminal defense attorney is able to obtain for you.

Government

Plan won't eliminate prison overcrowding
Gov. Jerry Brown's realignment proposal will go a long way to reducing the state's prison overcrowding problem but won't satisfy a U.S. Supreme Court ruling, the legislative analyst's office said Friday.

Discipline

Disciplinary Actions

Here are summaries of lawyer disciplinary actions taken recently by the state Supreme Court or the Bar Court, listing attorney by name, age, city of residence and date of the court's action.

Bankruptcy

Vallejo clears final hurdle

The city of Vallejo has cleared the final hurdle to emerging from bankruptcy.

Litigation

Jury awards \$46.5 million in Ponzi case

A Fresno County Superior Court jury returned a \$46.5 million verdict Friday against participants in a Ponzi scheme.

Verdict is not the end of Bratz fight

A federal judge last week awarded MGA Entertainment Inc. nearly \$310 million in damages and legal fees in its intellectual property war with Mattel Inc. over Bratz, but both companies continue to do battle on other fronts.

Corporate

Dealers asked to invest \$1 million in their dealerships, or face termination

Ford uses a questionable tactic to compete against the likes of BMW and Mercedes. By **Jonathan Michaels** of the Michaels Law Group

Discipline

A scarlet letter — your weakest moments can and will be used against you

Most attorney suspensions and disbarments result from all too common human foibles. By **Stephen J. Strauss** of Karpman & Associates

Litigation

Professional tools for litigators: results with diplomacy

How to respond when you feel that your trial judge is adversely affecting your ability to try your case effectively. By **James P. Gray**

Tax

Path cleared for class tax claims

The state Supreme Court makes it easier for taxpayers to challenge local tax impositions. By **Stanley S. Taylor** of Nossaman LLP

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Labor/Employment

Understanding the current wage-and-hour requirements

With the law governing meal and rest breaks up in the air, here are some steps employers can take to protect themselves. By **Imbar Sagi** of Kaufman Dolowich Voluck & Gonzo LLP

Corporate Counsel

David Sloan

Vice President, Legal Affairs at Sunstone Hotel Investors Inc.

Judicial Profile

Christine K. Moruza

Superior Court Judge, Alameda County (Pleasanton)

Environmental

Courts offer little clarity on CEQA cases

Local governments across California are looking at the climate change impacts on everything from housing developments to oil refinery expansions to county land use plans. But the question over how far to go remains up for debate.

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