Challenges in Discipline Proceedings: Parallel Criminal or Civil and Regulatory Proceedings

Timing is Everything; Or is it?

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2014 CLEAR Conference: Challenges in Discipline Proceedings

Ready, Set, Go!

- Authority Set by Federal and State Statutes, Regulations and Case Law
- Relationships with Other Departments, Agencies and Attorneys
- Origin of Complaint
Good Faith But No Evidence

- Evidentiary Standard
- Co-operation and Compliance Issues
- Subject Matter and Legal Restrictions

Strategies

- The 5th!
- Perception Issues: Taking one for the team or Tainting Public Perception?
- Better Late than Never - Or Not

The Domino Effect

- Forum Shopping and Verdicts
- Good cop / Bad cop
- Evidentiary Rules
- Res Judicata
- Collateral Estoppel / Issue Preclusion
- SOL or Time Bars

Questions?

Evidence Considerations
ALJ Steve Adler
Transcripts

- Same or similar subject matter/charges?
- Opportunity to cross-examine?
- If both factors present, transcripts generally may be used

Criminal Investigation Evidence in Admin Case

- Very tricky area!
- Criminal defenses/objections MAY apply
- Generally they do not, but make no assumptions!
- Check law in your jurisdiction
- CAUTION: privacy considerations/HIPAA exceptions

Evidence from Criminal Case

- Admitted in evidence at trial: Court permission to copy/use/view
- Not admitted; obtained by search warrant
  - Under control of court issuing warrant
  - Need to request issuing court to permit use in admin case
Not admitted (cont.)

- Federal Court permission required; obtained by motion

During investigation

- CAUTION: compare privacy protections during criminal and administrative investigations
- Administrative access to privacy-protected records: would a search warrant be needed in the criminal investigation?

Potential Lawsuit Scenario

- Administrative investigator obtains privacy-protected information as part of a proper investigation and hands it over to a police officer conducting a criminal investigation based on verbal request
- Consequences: suppression in criminal case and possible lawsuit against administrative investigator
Use of Criminal Case Findings

- Conviction conclusively proves every element of the conviction offense
- Do your criminal juries/judges make findings beyond the guilty/not guilty judgment?
- If so, those factual findings might be used to prove elements of administrative case

Generally, in California and in federal court, no factual findings are made in passing judgment on criminal case
- Comments/statements by criminal judge in sentencing or other hearings?
- No legal weight in administrative proceeding, but will an administrative tribunal consider them anyway?

Sealed Proceedings

- In U.S. generally, only juvenile court and mental health proceedings might be sealed or confidential
- Application must be made to Court issuing sealing/confidentiality order
- Do not assume you will obtain access to such proceedings absent a strong showing of need
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Timing Considerations

ALJ Steve Adler

CONVICTION

Conviction conclusively proves each element of the offense(s) in the guilty plea or verdict.
Each element is proved beyond a reasonable doubt

Standard of proof in administrative cases is lower: preponderance of the evidence or clear and convincing evidence

Consequently, any attempt to re-litigate any fact so established is improper

CAUTION: the conviction only proves administrative case to the extent that elements are identical

For example, a conviction of sexual battery does not necessarily prove the administrative violation of improper sexual contact with a patient; the elements of each offense must be compared

EXAMPLE from California Penal and Business and Professions Codes

Sexual battery, a felony/misdemeanor:

Touching the intimate part of another person for purposes of sexual gratification, arousal, or abuse.
Sexual misconduct (administrative violation):

The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person ....

Substantial Relationship Test

Generally, to use a criminal conviction as a basis for discipline, the crime must be substantially related to the qualifications, ability or duties of the licensee as to the business, profession or trade in question.

Acquittal

Acquittal is a judgment of “not guilty” rather than “innocent.” As is the case with conviction, that finding applies only to elements of the crimes as to which the finding is made.
However, the standard of proof differs in criminal cases and administrative proceedings: administrative proceedings have a lower standard.

In addition, the judgment means only that there was no proof beyond a reasonable doubt as to one or more of the elements of the crimes charged in the criminal case. Not "innocence"

DISCUSSION

ADMINISTRATIVE PROSECUTION AND FINDINGS OF VIOLATION NOT BARRED

Because the acquittal means only that there was no proof beyond a reasonable doubt as to one or more of the elements of the crime charged, there is no bar to administrative prosecution and discipline based on the same facts.

ADMINISTRATIVE PROSECUTION AND FINDINGS OF VIOLATION MAY BE BARRED

People v. Sims (1982) 32 Cal.3d 468, affirmed a trial court’s dismissal of a criminal complaint filed against a welfare recipient for fraudulently obtaining welfare payments from the Department of Social Services (DSS) because the County, in an earlier administrative hearing before a hearing officer, had failed to meet its burden of proving that she (Sims) had fraudulently obtained welfare benefits.
The County had adopted the fair hearing result as found by the hearing officer and did not request a rehearing nor did it seek judicial review.

Is Sims the law in your jurisdiction? If it is, should the criminal case go first?

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Timing - Who Goes First

Investigations

Provisions for sharing with "law enforcement"
Statutory Requirements
Sometimes only if asked
Can a regulator share its information with the police?
Can the police share its information with the regulator?

Evidence of child pornography in Crown Brief
Police wouldn’t hand it over to CPSO
College of Physicians and Surgeons of Ontario v. Peel Regional Police, 2009 Divisional Court
AG will weigh competing interests

Prosecutions

Pros When the Regulator Goes First?

- Public confidence
- Avoids criminal trial delay concerns
- Fresh memories
- Avoids impact of criminal acquittal
**Cons When the Regulator Goes First?**

- Have to prove the case as opposed to tendering criminal finding
- Expensive
- If member is acquitted, court could make findings of credibility that would impact regulator’s case

**Re-Litigate Findings**

Can a member reargue a finding made at a criminal proceedings?

A: Yes  
B: No

**Convictions? No.**

*Toronto (City) v. Canadian Union of Public Employees, Local 79 (2003 SCC)*

*But there are exceptions!*
Effect of Criminal Acquittal on Discipline Prosecution

- Acquittal in a criminal case establishes legal, not factual innocence
- Acquittal does not establish that the events did not occur - only decides whether Crown has proved beyond a reasonable doubt that accused committed the criminal offence

Acquittal Inadmissible to Prove Innocence

Criminal acquittal is not admissible in a subsequent civil trial/discrimination proceeding as proof of the accused person’s factual innocence (i.e. as proof that the alleged conduct did not occur)

- *R. v. Mahalingan*, 2008 SCC 63 at para. 136 (S.C.C.);
Admissibility of Criminal Convictions

- Ontario *Evidence Act*, s. 22.1
- Proof of conviction or discharge of a crime is proof, absent evidence to the contrary (and where the time for appeal has expired/ appeal unsuccessful), that the crime was committed by the person
- Certificate of conviction/discharge is sufficient proof

Use of Criminal Proceeding Transcripts

- Criminal transcript may be admissible in discretion of tribunal. Must consider:
  - seriousness of the allegations
  - nature of evidence to be tendered
  - reason for tendering the transcript rather than calling “live” witnesses
  - hardship to the witnesses if required to testify in person/ prejudice to the Member

Use of Reasons/ Factual Findings from Criminal Proceedings

- Reasons and findings may be admissible, if findings were essential to decision in criminal case and not *obiter*
- Consider rules of tribunal and circumstances of case (as with use of criminal transcripts)
Use of Evidence Excluded in Criminal Proceeding

- s. 24(2) Charter analysis (exclusion of unlawfully obtained evidence where admission would bring administration of justice into disrepute) is different in civil/administrative vs. criminal context
- Evidence unlawfully obtained in a criminal proceeding may (sometimes) be used and admitted in a civil proceeding

Use of Excluded Evidence: Discipline Committee Decides

- Discipline Committee, not court, determines admissibility - plays “primary role in determining Charter issues falling within their specialized jurisdiction”
- “Context is everything” - criminal vs. civil/regulatory context is “entirely different”
- Scope of investigation/admissibility of resulting evidence in discipline proceeding is strongly influenced by public protection mandate

Use of Criminal Crown Brief

- D.P. v. Wagg principles (but not specific process of a Wagg motion) apply to College summons (by investigator, with powers under PIA) for production of the Crown brief
- College should ensure that the Attorney General is given notice and has an opportunity to raise the public interest concerns. Lack of notice would constitute a lawful excuse for refusal to comply with the summons.
Types of Publication Bans

- **Criminal Code** legislates situations under which the public may be excluded from a criminal proceeding and to what extent
- Judge may close courtroom for all or part of proceeding if such an order is “in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security” (s. 486.4(1))
  - Very high threshold. Cannot access court documents if public is excluded.

• More common is to restrict “publication, broadcast or other transmission” of any information which tends to identify complainant or witness (s. 486.4(1))
  - Mandatory where requested by complainant re: certain offences
• In Canada, publication bans are most often found in respect of cases involving vulnerable individuals, including victims of sexual crimes and minors. Goal of publication ban is to encourage reporting and protect victims and collaterals by limiting information that is released
• s. 539 provides for publication ban re: evidence at preliminary inquiry which continues until accused is discharged/trial is completed
  - Designed to protect fair trial interest

Effect of Publication Bans on Use of Criminal Transcript

• s. 539 preliminary inquiry publication ban ceases to apply upon accused’s discharge/completion of trial (which may include stay of charges), but may still need to redact names of witnesses/complainant from evidence/transcript in question
• Ongoing s. 486.4 publication ban may be lifted on consent of complainant/witness at whose request it was made, or complied with by redacting names and identifying information (re: witnesses/complainant)
  • B.C. College of Teachers v. B.C.(A-G) [2010]
    B.C.J. No. 1152

• Access may also be restricted in discipline hearing by:
  - Excluding public from some/all of the hearing
    • (s.9 of SPPA; s. 45(2) of RHPA, Procedural Code);
  - Banning publication where exclusionary order could be made
    • (s. 45(3) of RHPA, Procedural Code);
  - Prohibiting publication of name/identifying information re: sexual misconduct witness
    • (s. 47 of RHPA, Procedural Code)

• Release of Materials from Discipline Proceedings for Use in Criminal Proceedings

• Typical confidentiality provisions in regulator’s enabling statutes (eg: s. 36, RHPA) may prohibit disclosure of documents/interviews obtained in regulatory investigations to the police in a criminal (law enforcement) proceeding except pursuant to a warrant
Use of Testimony from Discipline Proceeding in Criminal Proceeding

- Member’s compelled testimony in a professional regulatory proceeding may be admissible in subsequent a criminal proceeding against the member in certain limited circumstances
- Charter s. 13 (protection against use of prior incriminating testimony to incriminate witness in subsequent criminal proceeding) may not apply to prior testimony that does not qualify as “incriminating” (eg: testimony used to impeach witness’ credibility)

Parallel Criminal and Regulatory Proceedings

Jonathan Bracken

Jefferson Ltd v Bhetcha [1979] 1 WLR 898

- a civil action may proceed even if it leads to the defendant disclosing his or her defence in concurrent criminal proceedings.
- proceedings may be stayed, but a case must be judged on its own facts.
- the defendant has the burden of establishing a real danger of injustice in the criminal case, such as:
  - publicity reaching and influencing potential jurors;
  - the criminal proceedings taking place imminently;
  - disclosure enabling the fabrication of evidence or interference with witnesses.
"a real discretion": Mote v Secretary of State for Work and Pensions [2007] EWCA Civ 1324

Mote is jailed for benefit fraud
An MEP for South east England has been jailed for six months, after claiming benefits of more than £200,000.

Real danger of injustice
- self incrimination
- double jeopardy
- adverse publicity
- rehearsal of evidence
- burden of conducting parallel proceedings

Self incrimination
V v C [2001] EWCA Civ 1509
Summary judgment against Defendant who declined to make a statement:
- no right to silence in the context of civil proceedings;
- early disclosure of positive defence now expected in criminal case;
- legitimate starting point is a defence will exculpate not incriminate.

C PLC v P and Attorney General (intervening) [2007] EWCA Civ 493
incriminating material found under civil search order not privileged if it exists independently of compulsory questioning

Double jeopardy
R v L [2006] EWCA Crim 1902
A decision in civil (care) proceedings was not, and could not be, a final determination of related criminal proceedings.
Adverse publicity

A largely theoretical challenge, which will rarely succeed:

- Juries can and do follow judicial directions and disregard what they may have seen or heard outside court.
- A significant level of prejudicial pre-trial coverage has to be tolerated.
- Only exceptional adverse publicity during a trial is likely to trigger a stay.

*R v Abu Hamza* [2006] EWCA Crim 2918

Rehearsal of Evidence

"... the fact that the prosecution has had a previous opportunity to rehearse its case cannot be said to give rise to substantial prejudice to the defendant in a subsequent criminal trial. If it were otherwise, it would provide a ground of objection to a retrial in criminal proceedings where the jury have been unable to agree in the first trial or where a conviction in the first trial has been quashed on appeal."

*Mote v Secretary of State for Work and Pensions*

Burden of conducting parallel litigation

*R v Institute of Actuaries ex p Ranson* [2004] EWHC 3087: stay also granted based on sheer scale (Equitable Life).
*Financial Services Authority v Anderson* [2010] EWHC 599 (Ch): stay refused for unauthorised trading proceedings under FSMA with parallel criminal proceedings, even though the FSA was the complainant.
Staying concurrent proceedings

- the court must exercise its original jurisdiction and not merely conduct a Wednesbury review;
- the power to stay must be exercised sparingly and with great care;
- unless the applicant shows that there is a real risk of serious prejudice which may lead to injustice, a stay must be refused;
- such a risk must be balanced against other considerations, such as the public interest in the disciplinary process not being impeded;
- in a balancing exercise, the court is the final arbiter of what is fair;
- as each case turns on its own facts, only limited assistance can be derived from comparing the facts with those of other cases.

R (Land) v Executive Counsel of the Joint Disciplinary Scheme [2002] EWHC 2086 (Admin)

Concurrent or consecutive?

- police powers are wider
- scope and depth of investigation
- defence evidence known
- conviction can be relied upon
- acquittal may still leave a ‘residual’ case for the regulator
- limited influence over investigation
- defence gets a ‘test run’
- delay and its impact on witnesses

A settled legal principle

“Regulatory investigations and disciplinary proceedings perform important functions in our society. Furthermore, the days have gone when the High Court could fairly regard the proceedings of disciplinary tribunals as necessarily providing second class justice”.

R (Land) v Executive Counsel of the Joint Disciplinary Scheme
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