ORAL ARGUMENT – 01/17/01
99-0976
IN RE LOCK

PURDUE: The question before the court is whether a conviction with deferred adjudication and no adjudication of guilt of the possession of cocaine standing alone with nothing more is it a crime of moral turpitude subjecting attorney license in this state to the ultimate sanction available to the State Bar of Texas, which is disbarment or suspension.

In August of 1998, Paula Lock accepted deferred adjudication for the crime of possession of cocaine in the amount between 1.4oz grams, which is a third degree felony. As part of her plea arrangement she received 6 years of community supervision in a deferred adjudication arrangement. Upon the successful completion of which she will not be convicted of the offense.

Ms. Lock is a Texas attorney licensed in 1985. As a result of the criminal action in April 1999, the chief disciplinary counsel filed a petition for compulsory discipline under Part 8 of the Texas Rules of Disciplinary Procedure. And in Sept. 1999 after hearing the Board of Disciplinary Appeals, the appellee in this matter entered a judgment of suspension concurrent with the probation or community supervision term.

ENOCH: I'm presuming that a felony involving moral turpitude means something. And although there may be those who disagree it seems to me just a conviction for a felony obviously doesn't get you there. So you have to decide what's the moral turpitude here. What does that mean if anything. In your work have you been able to glean from the cases either of this state or other states how they make a differentiation between a felony and a felony involving mortal turpitude that's meaningful, that means something?

PURDUE: That's meaningful is the operative term. Probably the most reasoned decision _____ would be that of the Oregon SC both in the majority opinion and the dissent. The other decisions just seem to reach a conclusion frankly. This court has articulated a definition of moral turpitude in the Duncan and Humphreys earlier cases. That definition says those crimes involving dishonesty, fraud, deceit, misrepresentation, or deliberate violence, or that reflect adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

HANKINSON: What Humphreys and Duncan tell us is that for compulsory discipline, we're not even looking at whether or not the felony involves a crime of moral turpitude. We're to determine if it's moral turpitude per se. Which means we really just look at the record of the conviction basically and are unable to look at the circumstances surrounding the crime and unable to deal with any aspect that would weigh whether this particular conduct in this instance involves a crime of moral turpitude. Are the other jurisdictions - you mentioned the Oregon SC - and then you said the other jurisdictions are summary conclusions that if they do determine that felony drug possessions is a crime of moral turpitude they are summary dispositions. How many of those

jurisdictions have made that determination using a procedure similar to the Texas Compulsory Discipline Procedure as opposed to a procedure that allowed the court to look at all of the circumstances surrounding the commission of the crime in order to then conclude it was crime of moral turpitude?

PURDUE: It appears without representing that I am an authority on the Texas disciplinary rules, much less those of other states, but it appears that the majority of jurisdictions cited take into account factors of aggravation, mitigation. They are not engaging the per se analysis that our set of rules Part 8 of the Compulsory Discipline seem to require.

HANKINSON: Are you aware of any other jurisdictions that have cases similar to Humphreys and Duncan interpreting compulsory rules where the determination of the per se violation is made based on the elements of the offense as listed in the penal code?

PURDUE: The Oregon SC case does go through an analysis and states that it is bound to make the determination based on the elements of the crime and not the facts underlying the crime.

HANKINSON: You're not aware of any decision that has that kind of discussion?

PURDUE: Other than that they seem to take into account factors of aggravation, mitigation that depend on underlying facts or facts that's extraneous to the criminal.

OWEN: I thought in some states there was automatic suspension if you are convicted of possession of cocaine.

PURDUE: That very well may be true.

OWEN: Including Florida and South Carolina. Gibson, for example, a South Carolina case and some of the Florida decisions, those opinions seem to reflect that at the outset there was automatic suspension of the license and these proceedings were just to determine how much longer there should be suspension.

PURDUE: And issues such as whether the reinstatement is automatic after the suspension. To that extent, I might suggest that the language of those cases - there is not an exposition of their scheme.

OWEN: Do you know how many states have automatic suspensions so that they don't take into account those specifics - if you are convicted that's it?

PURDUE: I do not.

O'NEILL: But if there is automatic suspension during the process, in this court there is

review of the underlying circumstances, is that correct?

PURDUE: It's not abundantly clear. In the cases that I believe she is referring to, the only issue of appeal is the term of the suspension or whether the attorney will be reinstated automatically after the suspension concludes, and things of that nature.

O'NEILL: And what factors are examined to make that determination?

PURDUE: Generally, the procedural rules. For instance, I believe it's the Florida cases say if an attorney is suspended for less than 90 days his/her restatement is automatic. If it's longer than 90 days...

O'NEILL: But how do you determine whether it's going to be less than or longer than?

PURDUE: Well they don't really get into that. In those cases that is not the issue before the court there. It don't seem to be affirming or even investigating the underlying findings. And they are investigating the term of suspension itself.

OWEN: Have you looked at the history of the whole issue about moral turpitude and how it affects lawyers? Didn't it start out with the legislature?

PURDUE: I'm afraid that's a question I can't answer.

OWEN: So you haven't looked at any of the history of what the bar was doing and whether it was based on the then existing statute, and what the intent of the bar was when they adopted this rule, or what the outstanding law was at that time?

PURDUE: I will suggest this, that the cases seem to refer often to common law principles, to the American Bar Ass'n model rules and disciplinary rules as they've been enacted over time. None of those sources would seem to be legislative in origin.

OWEN: You're not familiar with 1969 legislation that involved suspension of attorneys for crimes involving moral turpitude in subsequent provisions in the State Bar Act?

PURDUE: That's a very good point. Legislation I was thinking in terms of acts of the Texas legislature. I believe that the bar rules are adopted by this court.

OWEN: I'm talking about an act of the Texas legislature in 1969.

PURDUE: I was unfamiliar with that portion of the history.

ENOCH: Whether it's legislative or not, if a felony involving moral turpitude means

something, it seems to me that then moral turpitude means something. The implication it would seem to me is there is a distinction between felonies based on some felonies aren't crimes involving moral turpitude and some felonies are. Have you been able to catalog the types of cases courts have found to be felonies involving moral turpitude and ones not involving moral turpitude - I guess keeping in mind the per se aspect of not considering the circumstances but simply considering the conviction and the elements of the crime?

PURDUE: I have not cataloged. The State of Texas courts, this court and some others, the CCA have found that driving while intoxicated, possession of alcohol during prohibition when it was _____ constitutionally by federal law and by state law illegal to possess alcohol in the State of Texas, that was not a crime of moral turpitude.

ENOCH: That was or was not?

PURDUE: Was not. Crimes that are of moral turpitude in Texas recently include baby selling, arranging financially motivated adoptions, most recently conspiring to defraud the federal government, specifically the IRS, and drug crimes of possession with the intent to distribute have all been held to be crimes of moral turpitude.

PHILLIPS: Will you go through again with what has been held not to be moral turpitude but is still a felony?

PURDUE: I don't believe there is any bright line that one can discern in the cases in this state and elsewhere between felonies and misdemeanors.

HANKINSON: Did you say that driving while intoxicated and possession of alcohol during prohibition when it violated federal law were not considered crimes of moral turpitude?

PURDUE: That's correct.

HANKINSON: Regardless of whether they were felonies or misdemeanors, they were not crimes of moral turpitude?

PURDUE: That's correct.

ABBOTT: Is someone who is arrested for stealing a pack of bubble gum would commit a crime of moral turpitude?

PURDUE: Apparently so. It being a theft/crime that would implicate fraud.

ABBOTT: So for the person who steals a pack of bubble gum can have their license taken away, but a person who possesses cocaine cannot?

PURDUE: Under per se analysis, under the position that we take assuming the theft of bubble gum implicates dishonesty, fraud, deceit and misrepresentation.

ABBOTT: Theft falls within that category does it not?

PURDUE: I believe it does.

ABBOTT: So what you're saying then is a person who steals a package of bubble gum should have their license yanked, but a person who possesses a whole bunch of cocaine should not?

PURDUE: Well a whole bunch may very well invoke the intent to distribute, which would take it out of the category of simple possession.

ENOCH: The statute covers theft specifically whether it's a misdemeanor or a felony or whether it involves crimes of moral turpitude or not, the statute has already made a distinction?

PURDUE: That is correct.

OWEN: Have you found any case in any jurisdiction in the US where a court has said felony possession of cocaine does not involve moral turpitude?

PURDUE: I believe the Oregon and the California cases...

OWEN: I thought Oregon was a misdemeanor possession?

PURDUE: I believe that they are misdemeanors.

ABBOTT: So you have no case showing that felony possession of cocaine does not involve moral turpitude?

PURDUE: That is correct.

OWEN: And we have at least five jurisdictions that have gone the other way, that have said felony possession or sometimes even misdemeanor possession was a crime involving moral turpitude.

PURDUE: I'm not sure I would say has gone the other way. For one thing it's not a per se analysis there...

OWEN: But they were automatic suspensions in most of those cases.

PURDUE: I'm not sure that I would agree with the characterization as automatic. There

were suspensions and punishments. Curiously, generally very much shorter than that involved this case.

OWEN: But there was suspension, and the only issue was how much longer or do they get reinstated?

PURDUE: That's correct.

HANKINSON: But they involved looking at the underlying circumstances of the crime to make that determination. Even though the suspension was automatic, in order to get to the point of automatic suspension, it wasn't a matter of looking at the elements of the offense in the statute, it was the matter of looking at the underlying circumstances of the crime the individual had committed?

PURDUE: Correct.

OWEN: I think you may be wrong about that. Can you tell me where the cases were where they were not automatically suspended? I thought certainly in Florida and in some of these jurisdictions they have been automatically suspended and then the only issue on appeal was how much longer their suspension would last or when they could be reinstated so that the suspension was automatic under their disciplinary rules.

PURDUE: I cannot rapidly answer. I agree that the issue before the Florida SC in the Florida cases was a procedural one with regard to the suspension. What happened in the lower tribunal was it automatic. I think we may be choking on the definition of automatic.

OWEN: They have been suspended without any consideration of the elements or the particular facts of that case.

PURDUE: I'm not sure that that's correct. I can't quote from the cases before me, but I believe that there were findings again of factors of aggravation and mitigation in those cases.

O'NEILL: My understanding is is you're agreeing that this offense will be subject to the normal grievance procedure?

PURDUE: Absolutely.

O'NEILL: It's not the cause of the discipline.

PURDUE: Absolutely.

O'NEILL: If we were to agree with that position what happens to the case procedurally?

PURDUE: I believe at any time that the district grievance committee may take action. It's not dependent on remand this decision.

O'NEILL: There would be no reason to remand since this is a possible discipline case correct?

PURDUE: I believe that's correct.

O'NEILL: Could the grievance committee initiate a grievance process or _____ to do that?

PURDUE: I believe that the limitations period for a grievance action is 4 years from the time the bar becomes aware of the actions, so that the limitations period then notwithstanding the tolling by this appeal would run until 2003. I'm not sure that there is anything by virtue of this appeal under rule 8.01 that would prevent the grievance committee from taking action.

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RESPONDENT

LAWYER: The court has visited this issue before. In 1993, the court affirmed BODA's very first decision that a conviction for possession of cocaine is an intentional crime.

HANKINSON: We did that before the Duncan and Humphrey's decisions were issued in which we specified that compulsory discipline procedures require us to look only at the elements of the events and we're dealing with the per se offenses.

LAWYER: That's correct. But even at that time that's the position that we took and BODA as well.

HANKINSON: I understand, but it does predate that. And there is no opinion issued. There's just a summary order saying that the decision was affirmed.

LAWYER: That is correct.

HANKINSON: So as far as the public is concerned there would be no basis for the public to be able to use that as precedent. Is that right?

LAWYER: I would agree that is probably not as easy to find out about those decisions, but it's not like it's a secret. BODA publishes the abstracts of their opinions in the bar journal. You can readily call up both our office and their office.

ENOCH: Let's assume that's correct, that some reaffirmance of BODA in 1993

established that mere possession of a drug is a felony and a crime of moral turpitude. Describe for me a felony that would not be a crime of moral turpitude?

LAWYER: I will have to tell you that we've not come up with felonies that don't involve moral turpitude in the cases that we have brought to BODA. The only one that I can give to you is Duncan, because that's a decision that this court made in the _____ felony case.

HANKINSON: Why don't we just say all felony crimes in rule? Moral turpitude must have some meaning. And similarly in the definition that this court has given moral turpitude where we talk about the rendering the person unfit to practice law all of that must have some meaning. Or, is it meaningless and we're really dealing with just the fact that what we mean here is all felonies?

LAWYER: I think in some sense we are dealing with the fact that it means all felonies. I think when you look at moral turpitude and how it's been interpreted and this court has obviously has done a good job in trying to get its arms around sort of the vague nebulas concepts that are out there and has brought it in a little bit to try to structure it a little bit more, and in this inquiry what the court has said is that you look at the nature of the offense as it applies to a lawyer's moral fitness to practice law, and that it does include crimes which reflect adversely on a lawyer's honesty, trustworthiness or fitness to practice law.

The inquiry I think with respect to this offense is twofold. One is whether or not it involves intent or knowledge as an element. And of course, the big question, the moral turpitude question. I don't think there is any debate that the offense does require intent or knowledge, and I emphasize that only because in the criminal law when it comes to knowledge or intent, that means that you had a conscious objective or desire to engage in the conduct. So by pleading guilty the lawyer admits to all of the elements of the crime.

HANKINSON: If we were to agree with you like in this instance, the possession of 1 gram of cocaine justifies suspending the lawyer's license and that it is a crime of moral turpitude, how do we justify that interpretation first of all in light of the fact that there is a definition of moral turpitude it's not just all felonies? The Texas Lawyer's Assistance program in which in fact impaired lawyers, those with drug and alcohol problems, are entitled to confidentiality and receive assistance and are allowed to continue to practice while they are participating in the program - don't we have an inconsistency there? If it really renders someone unfit that you possessed 1 gram of cocaine, then how can we justify allowing impaired lawyers to continue to practice and to protect their confidentiality while they are participating in the program?

LAWYER: It seems like on the surface that there is some inconsistency there, but I think that we're actually quite consistent on our approach. First of all, the TLAP(?) program is not a diversionary program. They are not a bypass procedure. They act as nothing more than a resource center and are neutral when it comes to this.

The Board of Law Examiners, I think, is another example that's used. Well they don't give licenses to individuals who have been convicted of any felonies. Their rules specifically say that a felony conviction conclusively establishes that you don't have the moral character and fitness to practice law.

HANKINSON: But we're responsible for that rule just like this rule and they are read differently. So shouldn't they be interpreted to mean different things?

LAWYER: I don't think so. I think in the context in what you're looking at that the way the moral turpitude analysis has to go is that the first issue is that you have to recognize the serious nature of this particular narcotic. This court doesn't have to decide how bad of a drug this is because the legislature has already done that. It has classified cocaine among the most serious and dangerous of the illegal narcotics. First of all, it is classified as a narcotic. Second, it's put in the first penalty group along with heroine, which means that any amount, any possession offense that you have is going to be a felony and it's going to be punishable for up to 20 years in prison. And I think it's that recognition...

HANKINSON: I don't think that any of us - I mean obviously none of us disagree with that. And I don't think that your opponent or anyone disagrees with the fact that discipline is not appropriate. I think the question has to do with the nature of the compulsory discipline procedure in Texas and the interpretation of that procedure under Humphreys and Duncan. Which means we have to look at the elements of the offense and are unable to look at the underlying circumstances of the offense. And would you agree that even in terms of drug offenses or alcohol offenses or what may be involved with that, that underlying circumstances may be an appropriate factor to determine whether or not a suspension - what type of discipline is appropriate?

LAWYER: And I think that it is in terms of that BODA does have the ability to take into consideration for that inquiry as far as whether they are going to suspend a lawyer or disbar the lawyer...

HANKINSON: No, they don't have any choice under compulsory discipline.

LAWYER: Well they do in the context. They didn't disbar Ms. Lock. They could have done that had they wanted to even though she received probation. And I think you can take into consideration, and they do take into consideration, the facts and circumstances surrounding the offense. And in this particular instance, they chose to suspend Ms. Lock as opposed...

HANKINSON: I thought it was mandatory that they suspend rather than disbar if in fact you've got a deferred adjudication _____.

LAWYER: No, if you look at the first part of the rule 8.05. It says, when a lawyer has been convicted of an intentional crime or has received...

HANKINSON: It shall be disbarred unless BODA...

LAWYER: Shall be disbarred. So they have the ability to do that as well.

HANKINSON: Unless BODA under §8.06 suspends his or her license to practice law.

LAWYER: That's correct. So they have the ability to do one or the other.

HANKINSON: But 8.06 is mandatory. So it says that if it's deferred adjudication, the attorney's license to practice shall be suspended during the term of probation.

LAWYER: But in 8.05 it says, if the lawyer receives deferred adjudication or adjudication without appeal they shall be disbarred. It does use the word shall as well. And so how that has played out with BODA is that they take that to mean they have the discretion depending on the facts and circumstances surrounding the offense which do become relevant in terms of that it's like theft. If you stole the money to buy a Mazarriti or you stole the money to feed your family, they may take that into consideration in terms of mitigating circumstances.

ENOCH: But you don't get to either of those options until it's determined that this conviction was involving crime involving moral turpitude?

LAWYER: That's right. It has to have intent or knowledge as an element of the offense.

ENOCH: Going back to the beginning. Is the decision in 1993 - if that's relied on for precedent at all, and as I understand, you are weary but you think if that was right on precedent at all, that virtually made all felony crimes involving moral turpitude?

LAWYER: As far as that...

ENOCH: You can't think of a felony that's not moral turpitude?

LAWYER: And maybe that's because of where I'm presenting our case from.

ENOCH: Assume with me that if that were the case, all felonies are crimes involving moral turpitude. It seems to me we can't reach that conclusion because we have to assume that if they intended for felonies to be subject to mandatory discipline, that's what they would have said. But using moral turpitude, it means that it's not all felonies. It's only some felonies and we have to decide what the distinction is.

LAWYER: And I think that plays out by the cases as they come before us as you take them individually and look at the offense.

ENOCH: Looking at this case - possession of a controlled substance. It seems to me your argument is that while that demonstrates the lawyer's inability to perform their service, that fits your notion of moral turpitude because it's not deception, it's not theft, it's apparently incompetence to perform a service is what you are saying?

LAWYER: That' part of it. But what it really is is that because if you're looking at the nature of this particular narcotic that we've decided as a society has reaped all sorts of havoc on our society, and the fact that you have a lawyer and you have to - we are officers of the court and I think our conduct has to be viewed in that light. We are held to a higher standard and should be held to a higher standard. And when you have a lawyer who willingly participates in the unlawful possession of cocaine and its use, I think necessarily that demonstrates a disregard for what we as a society - our societal judgment as to what relating to the possession of illegal narcotics...

ENOCH: How about an illegal gun?

LAWYER: Possibly so. I don't know enough about the offense to know how it's been categorized by the legislature. But I think it necessarily makes you a willing participant and a contributor to the drug culture. And I think that that conduct in and of itself is what makes it moral turpitude. Because it's the nature of the narcotic coupled with the lawyer's willingness to be a participant and a contributor to the impact that cocaine has had on our society that renders it a conviction involving moral turpitude. It erodes the public confidence that the public needs to have in lawyers. I think it brings disrespect to the system. I think it demeans the integrity of the profession. And that's how you get there for this particular analysis.

ENOCH: So we would overrule that case during prohibition on alcohol that said it was not moral turpitude?

LAWYER: I think that there is a recognition at the end of the day that what reflects on a lawyer's moral fitness to practice is always going to be measured by whatever the prevailing sentiments are of our time. That that might change over time I think is understood and is accepted. And so I think today for today we view cocaine as being such a dangerous and serious drug that it's been classified as it has by the legislature.

HANKINSON: The definition of moral turpitude that you're hanging your hat on is the unfit to practice law piece?

LAWYER: That and the fact that you're looking at the nature of the offense.

HANKINSON: But we look at the nature of the offense in light of the definition of moral turpitude is. And the part that fits for this offense is the unfit to practice law. And I guess the difficulty I'm having as I understand and I agree with you the legislature's position about this being serious and society's view of it being serious, but it seems to me we've got an inconsistency here that

we say that lawyers who have a cocaine problem may continue to practice law, that they in fact are fit to practice law in Texas, and that the lawyer's assistance program becomes aware of them. They are not allowed to turn them in for disciplinary means. So if we try to fit under the unfit to practice law piece, how can we on the one hand say as long as you don't get caught you are fit to practice law. On the other hand if you get caught you are unfit.

LAWYER: I understand and maybe you know at its very bottom there is perhaps some inconsistency, but I think that the point that I was trying to make is that the whole reason why you have the program is because the problem of lawyers doing that rendered them unfit.

HANKINSON: But we let them continue to practice. And in fact, we protect them from discipline during that practice.

LAWYER: No, we do not protect them from discipline. I think that's a misconception.

HANKINSON: I mean to the extent that the program is not allowed to turn them in to the bar.

LAWYER: And again, that's a misconception. The TLAP program does not run its own monitoring program. The state bar does not have, they're not monitoring lawyers as they go along. They act as a resource center.

HANKINSON: But they are made aware of, and the identity of lawyers is known to them - lawyers who have drug problems.

LAWYER: My understanding is that they remain neutral. That they simply send them out to resources. I don't know if they actually know who they are. But I would suspect in some cases they do.

HANKINSON: But they are required to protect the confidentiality as they make the referrals for resource purposes. Which means that along the way the determination has been made that we're not going to decide as soon as we find out that a lawyer has used drugs, that that renders them automatically unfit to practice law. Otherwise, we would be doing something else at that point.

LAWYER: We might be doing something else at that point. But I think also the monitoring program probably also involves that when the lawyer is being monitored that there is some - I think that they send them off to the peer review or peer assistance or whatever.

ABBOTT: Would you respond to the procedural question about what happens to this case in the event that things don't go your way?

LAWYER: I can respond in two aspects. The first is I think that there is a statute of

limitations problem because the misconduct occurred in looking at the indictment in April 1996, and there is a 4 year statute of limitations. It's a 4 year statute of limitations of when the misconduct occurred to when it has to be brought to the attention of ...

ABBOTT: Is that tolled by this particular procedure?

LAWYER: There is nothing in the rules that tolls the procedure. But I think the other issue is that the only rule that it would fit under that I can see in looking in the rules is the rule that says a lawyer shall not commit a serious or any other criminal act that adversely reflects on the lawyer's honesty, trustworthiness or fitness to practice law. Which is this court's definition of moral turpitude. So if it's not going to be, then I don't think that you would be able to get at it from that aspect either from the disciplinary rules.

OWEN: So you're saying if moral turpitude doesn't apply, there is no other disciplinary rule?

LAWYER: I think that that rule was probably enacted in part to cover misdemeanor offenses that might involve moral turpitude - the same kinds of things that say it wasn't a felony conviction. That was taken care of by compulsory discipline, but you did have a rule there that you could take it through the grievance process.

ENOCH: Not necessarily so. Because under compulsory discipline you take it from the elements of the crime as opposed to what is proven. It could be that we say the elements of this crime doesn't satisfy the moral turpitude but the circumstances of the crime, which is it - a number of the cases that we read seem to indicate that mere possession - well really what's going on here, there was enough here to be distributed or there is enough here maybe to be sold again, and so it's not that the elements which may not have met moral turpitude, but it was the circumstances of the crime that seemed to influence the courts. Now wouldn't that be a difference?

LAWYER: Except that the comments to that rule basically say that they are to attract the same kinds of things that are being considered in compulsory discipline cases. I've looked at that because I was sure that it would be asked when I came, and wanted to make sure that I had...

HANKINSON: So is it your view then that Humphreys and Duncan were wrongfully decided that, in fact, that we boxed ourselves in by looking at only the elements of the offense, that in fact we should be able to look at the circumstances?

LAWYER: Not necessarily. I think that if you look at the jurisdictions that there are jurisdictions that look at the elements of the offense. There are jurisdictions that look at the circumstances...

HANKINSON: Which jurisdiction in terms of - I mean the opinions that you see in the other

jurisdictions are very perfunctory in most instances. They don't say very much at all and you have to really long and hard at them to see what's going on. And if you look at in most circumstances it seems that the determination of whether something is a crime of moral turpitude is not a per se determination in most jurisdictions. In fact is a question of looking at the underlying circumstances. It seems to be the usual way that this is reviewed.

LAWYER: I tried to pick the cases that I thought didn't go in to the facts and circumstances except for maybe the California case. And I think the case from Missouri, the Shunk(?) case is probably a good example that looked like they just looked at the elements of the offense.

HANKINSON: But nobody has a Humphreys and Duncan on the books?

LAWYER: No. And no other jurisdiction also relies on what the sentencing is as the basis for the suspension or the disbarment. Because that was the other thing. The first thing that we looked for was something that would be similar in that context.

OWEN: But are there jurisdictions where you're automatically suspended for felony possession of cocaine without any inquiry at all, and then there may be a later determination of how long that suspension will last or whether you get reinstated?

LAWYER: Like I said, most of the cases that I cited I tried to pick those where they were either felony offenses and it looked as if it was automatic from the procedure. I tried to stay away from the cases where it was clear that they had looked into the circumstances to make the determination.

OWEN: But in your view there are some automatic suspensions?

LAWYER: Yes, I think that out of Florida and South Carolina and maybe the Missouri case. Now they do make _____ with the circumstances to see how much of a suspension they might get.

OWEN: Can you shed any light on the legislative history of all of this, and do you know what the bar might have been thinking when they enacted this rule in terms of cocaine possession and moral turpitude?

LAWYER: I can tell you that the phrase moral turpitude has been in this court's rules since the inception of the bar act in 1940. That if you looked there has always been provision for compulsory discipline. It initially said moral turpitude of the level of a felony or something to that extent. And that has been carried forward since the court started issuing rules which govern the state bar.

HANKINSON: Do you agree with - there's some testimony in the record and also a discussion in Ms. Lock's brief - that in fact moral turpitude language was included so that intoxication offenses would not be subject to compulsory discipline?

LAWYER: I think that that's a misstatement. I think that what Mr. Zunker was actually testifying about is that intoxication offenses like DWI have never been included because there is no mens rea, there is no mental culpable state that's required for that type of conviction when there were felony convictions now for DWI. I think that what he was talking about was the part of the compulsory discipline statute that now added that intent or knowledge had to be an element of the offense, that that was added to keep out the DWI cases.

HANKINSON: But you do agree that the intent was to keep out intoxication offenses?

LAWYER: Not the moral turpitude.

HANKINSON: I understand, but that the rule is drafted so that intoxication offenses are not covered by compulsory...

LAWYER: Because of the lack of mens rea.

HANKINSON: But they are not covered by compulsory _____?

LAWYER: That's correct.

ABBOTT: For us to rule in your favor do we need to overrule Humphreys and Duncan?

LAWYER: I don't think so, because I don't think there are any circumstances in which it is okay for a lawyer to have been convicted of possession of cocaine. I don't think there are any extenuating circumstances. I think that was one of the issues in Duncan.

ABBOTT: So how would you distinguish this case from Humphreys and Duncan?

LAWYER: I'm not sure I - I don't think that they need to be distinguished necessarily. I think that the finding would simply be that it is per se an offense involving moral turpitude. If you want to continue with the per se analysis.

ABBOTT: And if we don't go per se, then do you lose?

LAWYER: I suppose if you can come up with some circumstance or fact situation in which it conceivably would not involve moral turpitude.

ENOCH: I think it is your answer really in the Lock case for there to be compulsory

discipline the court has to determine that drug use is per se a crime involving moral turpitude?

LAWYER: Of cocaine yes. I think that's the issue that's actually before the court.

ENOCH: And it's because it is a - the legislature determined that it's illegal...

LAWYER: It's the nature of the drug itself and the fact that you have a lawyer who is a willing participant in that conduct.

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REBUTTAL

PURDUE: I believe Justice Enoch asked if there were any felonies that are not crimes of moral turpitude under this court's analysis. And in the Duncan case, the _____ of a felony that the attorney had been convicted of is a federal felony. So the answer is yes, there is a felony under Texas jurisprudence specifically under this statute that it is not a felony involving moral turpitude.

HANKINSON: Is this offense one of the crimes that the legislature a couple of sessions ago moved down the - what did they call them felony jails?

PURDUE: The state jail.

HANKINSON: Is this a state jail offense where the legislature in fact took a whole category of drug offenses and slid them down the punishment scale?

PURDUE: I can tell you this, the statute does make possession of under a gram a state jail felony. So I think the answer is yes.

HANKINSON: So in fact, the legislature has - because they did some big shift in the drug laws a couple of sessions ago.

ABBOTT: What was the amount of possession here?

PURDUE: Just slightly over 1 gram - 1/40th of an ounce. And Justice Abbott had posed the question seemingly ridiculous that someone may be convicted of stealing bubble gum and disbarred, and if this court rules that possession of cocaine is not a per se moral turpitude offense, then they would not be disbarred. However, I think the distinction therein lies from the theft of even bubble gum one can reasonably infer that that attorney may commit acts of death or dishonesty, and that consistent with the jurisprudence of this and other courts is intolerable.

OWEN: How many people of Texas do you think want their lawyer who is

representing them to have been convicted of felony conviction of possession of cocaine?

PURDUE: Probably none.

OWEN: But isn't the result of your position that a lawyer can have a felony conviction of cocaine, have a suspended sentence, continue to practice law and not have to disclose to anyone those facts?

PURDUE: I believe that even if the court holds that possession of cocaine is a per se moral turpitude offense, that at the conclusion of Ms. Lock's termination she very well may be reinstated to the practice of law, and will be an attorney practicing with a conviction of possession of cocaine.

OWEN: But it's publically available that it's not a private reprimand or some other privately done discipline so that the public never knows?

PURDUE: That' true.

OWEN: This will be very public.

PURDUE: And I assume that indictments for possession of cocaine do not result in convictions or deferred adjudication similarly are public records, and grievances arising out of chemical dependency or disciplinary actions...

ABBOTT: Is it correct to say that the petitioner if she were just now for the first time applying to become a lawyer because of this conviction she would not be allowed to be a member of the bar?

PURDUE: I believe the rule is that one must complete the term of probation and deferred adjudication before making application.

ABBOTT: So mere conviction of a felony will not prohibit somebody from becoming a member of the bar?

PURDUE: The rule I believe is quoted in the brief.