IN THE MATTER OF

PAUL M. KAUFMAN

File No. 3-2113. Promulgated July 2, 1970

Securities Exchange Act of 1934—Rule 2(e), Rules of Practice

ATTORNEYS—PRACTICE AND PROCEDURE

Suspension and Denial of Privilege to Practice Before Commission

Conviction of Felony

Where attorney was convicted of felonies based on violations of antifraud provisions of Section 17(a) of Securities Act of 1933, *held*, convictions establish lack of requisite character or integrity to practice before Commission within meaning of Rule 2(e) of Commission's Rules of Practice, notwithstanding pendency of appeal, and attorney should be temporarily disqualified pending determination of appeal, and permanently disqualified should any of the convictions be affirmed and subject to no further review, or reinstated should convictions be reversed.

APPEARANCES:

Paul Gonson, for the Office of the General Counsel of the Commission.

Barry Ivan Slotnick, of Slotnick & Narral, and *Arnold E. Wallach*, for respondent.

FINDINGS AND OPINION OF THE COMMISSION

Following a private hearing in these proceedings pursuant to Rule 2(e) of our Rules of Practice, the hearing examiner filed an initial decision in which he concluded that Paul M. Kaufman, an attorney at law, should be permanently denied the privilege of appearing or practicing before this Commission.[1] We granted a petition for review filed by respondent, and briefs were filed by him and our Office of the General Counsel. Our findings are based upon an independent review of the record.

[1] Rule 2(e) of our Rules of Practice provides;

"The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (1) not to possesss the requisite qualifications to represent others, or (2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct."

Respondent is a member of the New York bar who has been practicing before this Commission for about 12 years and states that at present his entire practice consists of Commission matters. On June 19, 1969, he was found guilty after a trial by a jury in the United States District Court for the Southern District of New York of conspiracy to violate and of violations of Section 17(a) and 24 of the Securities Act of 1933 in the offer and sale of common stock of Donbar Development Corporation.[2] The pertinent counts of the indictment charged that between January and August 1963, pursuant to an arrangement with an officer of Donbar who owned and desired to sell a block of over 40,000 shares of Donbar stock, respondent and others offered and paid secret compensation to securities brokers and others to induce purchases of such stock, effected and induced purchases of Donbar stock through nominee accounts and otherwise for the purpose of manipulating the market price of the stock, and knowingly made and caused to be made representations to customers that were false and misleading in failing to disclose the payment of such compensation and the fact that the price of the stock was being manipulated.

Respondent was sentenced to imprisonment for nine months on the conspiracy count and on each of 11 substantive counts, such sentences to run concurrently, and execution of the prison sentence on the substantive counts was suspended and respondent was placed on probation for two years to commence upon the expiration of the prison sentence on the conspiracy count. In addition, respondent was fined a total of $24,000. On July 31, 1969, respondent filed a notice of appeal in the Court of Appeals for the Second Circuit, and execution of the sentence was stayed pending disposition of the appeal.

Respondent contends that his convictions cannot be considered evidence of lack of character or integrity within the meaning of Rule 2(e) because, pending disposition of his appeal, the convictions are not "final." We agree with the hearing examiner, however, that conviction of a felony, standing alone, establishes that respondent does not possess the requisite character or integrity to appear and practice before us, notwithstanding that it is the subject of a pending appeal.

[2] Section 17(a) of the Securities Act makes it unlawful for any person in the offer or sale of any securities by use of the mails or interstate facilities to employ a scheme to defraud, or to obtain money or property by means of a false or misleading statement of the material fact, or to engage in any transaction, practice or course of business which operates or would operate as a fraud upon the purchaser.

Section 24 of the Securities Act provides that any person who willfully violates any provision of the Act shall upon conviction be fined not more than $5,000 or imprisoned not more than five years or both.

Willful violations of the federal conspiracy statute and of Section 17 of the Securities Act are federal felonies,[3] and it is well established in the courts that conviction of a felony or other crime involving moral turpitude is ground for disbarment.[4] Such conviction bespeaks a serious breach of the obligation of an attorney to conduct himself in a proper manner and to abstain from acts bring discredit upon himself, the profession, and the forums before which he appears, whether such acts were performed in a professional capacity or otherwise.[5] If the public is to be protected and the public's confidence in the legal profession and in this Commission maintained, an attorney convicted of a serious crime such as securities fraud should not be permitted to hold himself out as entitled to represent others in securities matters before us merely because an appeal is pending.

Once the judgment of conviction was entered, respondent was no longer entitled to the presumption of innocence, and he stands convicted until such time as the conviction is reversed or set aside.[6] As stated by the Supreme Court in *Berman* v. *U.S.*, which involved an appeal from a sentence of imprisonment for using the mails to defraud and conspiracy:

> "Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. The record discloses that petitioner is a lawyer and by reason of his conviction his license was subject to revocation (and petitioner says that he has been disbarred) without inquiry into his guilt or innocence."[7]

Although, as stressed by respondent, the courts of California and Missouri have held that a felony conviction must no longer be subject to review to constitute evidence of an attorney's

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[3] 18 U.S.C. 1. We do not reach the question whether, as held by the examiner any of the respondent's violations are regarded as felonies under New York law and therefore a statutory ground in that State for an automatic disbarment which would remove respondent's qualification to represent others before us as provided in Rule 2(b) of our Rules of Practice). Respondent disputes that holding, and the Office of General Counsel states that while it would agree with the examiner's analysis, since there does not appear to be any precedent on the question it does not consider that the decision in this case should be based on such a holding.

[4] *Ex Parte Wall*, 107 U.S. 265, 273 (1882): "If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken." See also *In re Tinkoff*, 95 F.2d 651 (C.A. 7, 1938), *cert. denied* 304 U.S. 580, and 101 F.2d 341 (C.A. 7, 1939); *In re Pontarelli*, 66 N.E. 2d 83 (Ill. 1946); *State ex rel. Wright* v. *Sowards*, 278 N.W. 148 (Neb. 1938); *In re Gottesfeld*, 91 A.494 (Pa.1914).

[5] *State ex rel. Nebraska State Bar* v. *Fitzgerald*, 85 N.W. 2d 323, 324–25 (Neb. 1957); *In re Wilson*, 391 S.W. 2d 914, 918 (Mo. 1965); *In re Welansky*, 65 N.E. 2d 202, 204 (Mass. 1946); In re *Donaghy*, 83 N.E. 2d 560, 562 (Ill. 1948); *In re Goodrich*, 98 N.W. 2d 125, 128 (S.D. 1959).

[6] See, *e.g.*, *Curley* v. *U.S.*, 160 F.2d 229, 233 (C.A.D.C. 1947), *cert. denied* 311 U.S. 837; *Pannell* v. *U.S.*, 320 F.2d 698 (C.A.D.C. 1963); *State* v. *Lenske*, 407 P. 2d 250, 253 (Ore. 1965); *Quattrocchi* v. *Langlois*, 219 A.2d 570, 573 (R.I. 1966); *State* v. *Simpson*, 49 N.W. 2d 777, 789 (N.D. 1951); *State* v. *Levi*, 153 S.E. 587, 588–89 (W. Va. 1930); *Underhill's Criminal Evidence*, Vol. 1, Sec. 42 (5th Ed. 1956).

[7] 302 U.S. 211, 213 (1937).

unfitness, such holdings were based on the Courts' interpretation of statutes of those states providing for disbarment upon proof of a felony conviction.[8] The Supreme Court of South Dakota reached a different conclusion in interpreting a similar statute.[9] We also note that in one of the California cases cited by respondent, the majority opinion conceded that it would be advisable for the statute to be amended to provide for interim suspension pending the appeal and it was so amended subsequently.[10] And the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement has recently tentatively recommended a rule providing for suspension pending appeal from the conviction of a serious crime, with provision for immediate reinstatement should the conviction be reversed.[11]

We also find no merit in the further argument advanced by respondent that, under principles of *res judicata,* we are bound by the criminal court's stay of execution of the sentence, which it is argued indicated that the Court did not consider the public interest to be in jeopardy pending appellate review. The stay was required under the mandatory provisions of the Federal Rules of Criminal Procedure,[12] and therefore did not indicate any assessment by the Court of the particular situation presented.

We conclude that respondent should be temporarily denied the privilege of appearing or practicing before us pending final disposition of his appeal from the convictions. Should the conviction on any of the counts be affirmed and no longer subject to further review, we shall enter an order permanently disqualifying respondent. Should all the convictions be reversed or otherwise vacated or set aside, we shall, upon an appropriate application, immediately enter an order reinstating respondent's privilege to practice before us.

An appropriate order will issue.

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[8] See *In re Riccardi,* 189 P. 694 (Cal. 120); *State* v. *Sale,* 87 S.W. 967 (Mo. 1905).

[9] *In re Kirby,* 73 N.W. 92, 95 (S.D. 1897). Some state statutes specifically provide for disbarment upon conviction of a felony and for vacating the disbarment if the convictiion is reversed on appeal. See, e.g., N.Y. Judiciary Law, Sections 90.4 and 90.5.

[10] *In re Riccardi, supra,* at p. 696. See Annot. Cal. Codes, Sec. 6102 of Business and Professions Code (1939).

[11] *Problems and Recommendations in Disciplinary Enforcement,* pp. 154–66 (January 15, 1970). As stated in the special committee's preliminary draft report (p. 171): "The integrity of the profession simply cannot tolerate any proceeding that makes it possible for an attorney who stands convicted of a crime reflecting upon his fitness as an attorney to continue openly to engage in the practice of law without appropriate disciplinary action."

[12] Rule 38(a) (2) provides that a sentence of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. Rule 46(a) (2) provides that bail may be allowed pending appeal unless it appears that the appeal is frivolous or taken for delay.

By the Commission (chairman BUDGE and Commissioners OWENS, SMITH, NEEDHAM and HERLONG).