STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Petition for Resignation Pursuant to An Order of Disbarment of Kenneth A. Flaska, P 28605,

Case No. 14-100-MZ

Decided: December 5, 2014

Appearances:

Kenneth M. Mogill, for the Petitioner.
Cynthia C. Bullington, for the Grievance Administrator.

BOARD OPINION

This matter was commenced by the filing of a "Petition to Allow Respondent's Resignation Pursuant to Order of Disbarment." According to the petition, Kenneth Flaska was licensed to practice law in 1978; he resigned his membership in the State Bar of Michigan effective July 3, 2013; and, on or about April 23, 2014, Mr. Flaska entered a plea of guilty in federal court to:

> felony embezzlement and money-laundering charges for having embezzled over 2.7 million dollars from his law firm and his clients over a nine-year period. On September 3, 2014, Petitioner was sentenced to sixty-four (64) months imprisonment and ordered to pay restitution in the amount of $2,756,786.63.

The petition in this matter was filed by Mr. Flaska and recites that he "understands his rights to a hearing in the event that a disciplinary proceeding based on his judgment of conviction were filed against him by the Attorney Grievance Commission." The petition also recites that Mr. Flaska is aware of the burden and standard of proof in a reinstatement proceeding following disbarment and concludes with a request that the Board enter an order disbarring him from the practice of law in Michigan pursuant to MCR 9.115(M).

MCR 9.115(M) provides in its entirety:

> **Resignation by Respondent; Admission of Charges.**
> An attorney's resignation may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of disbarment.

Recently, the Board has had cause to examine the meaning, effect, and application of this rule. For example, in order to process the instant filing certain questions must be answered. Is this matter to be assigned to a hearing panel? If so, what procedures should the panel follow? What prerequisites must be fulfilled prior to the entry of an order allowing resignation and imposing disbarment?

It appears that, since 1992, this rule has been employed in various ways. In 1992 and 1993, hearings were held and findings of misconduct were made before the respondent tendered a resignation and the panel entered an order of disbarment. See *Grievance Administrator v Wilfred C. Rice*, 92-89-GA (HP 12/29/92) (following the filing of a formal complaint, hearing and report on misconduct, the parties stipulated to resignation/disbarment), *Grievance Administrator v Michael J. Blake*, 92-210-GA (HP 6/25/93) (formal complaint alleging criminal conduct, hearings and reports on misconduct and discipline, respondent absented himself from proceedings but wrote to panel that he wished to resign), and *Grievance Administrator v Russell G. Slade*, 91-249-JC (HP 5/3/93) (judgment of conviction filed, hearing held, respondent announced his resignation, indicating he understood revocation would follow, and walked out of the hearing).

For the next 12 years, it appears that this rule was not utilized.

In 2005, a matter in which a formal complaint was filed was resolved by the filing of a stipulation for consent discipline pursuant to MCR 9.115(F)(5) containing respondent's plea of no contest to the allegations of the formal complaint which also contained a paragraph referring to respondent's desire to resign pursuant to MCR 9.115(M) and an order of revocation pursuant to that rule was entered. *Grievance Administrator v James Noecker*, 04-106-GA (HP 8/19/05).

In 2007, a member of the bar filed a petition with the Board reciting that he had requests for investigation pending and seeking permission to resign and consenting to revocation of his license. No admissions as to misconduct were made. The Administrator filed a response indicating that he had no objection to the entry of an order of revocation. *In Re Richard McQuillan*, 07-MZ-94 (6/12/07). Thereafter, disbarment under this rule was imposed by a panel or the Board, upon a

petition by an attorney or a joint petition by the Administrator and the attorney, several more times. Of the 19 orders of disbarment entered pursuant to MCR 9.115(M) since 1992, a formal complaint or judgment of conviction was filed in 13 of those cases (and 12 were entered by a hearing panel, while seven were entered by the Board).

To answer the questions set forth above, we must examine the text of the rule and of subchapter 9.100 in addition to our past practices.

One notable feature of MCR 9.115(M) is that it seeks to meld two distinctly different ways to terminate bar membership: resignation and disbarment. Resignation requires one who wishes to be a lawyer again to seek (re)admission through the process set forth in the Rules Concerning the State Bar and the Rules for the Board of Law Examiners.[1] Disbarment leads to a different path for one interested in practicing again, i.e., reinstatement by a hearing panel pursuant to the procedures of MCR 9.124 and the standards of MCR 9.123(B).

Although MCR 9.115(M) attempts to blend resignation and disbarment, it is clear that the former may only take place "pursuant to" an order imposing the latter. Thus, the disciplinary sanction of disbarment is essential to the operation of this rule, however it is to be read and employed.

Prior to the most recent amendment of MCR 9.115(M), in 1987, the rule read as follows:

> **Resignation by Respondent; Admission of Charges.** An attorney's request that his or her name be stricken from the official register of attorneys may not be accepted while a request for investigation of his or her misconduct or a complaint against him or her is pending, unless the attorney admits the misconduct in writing or by default. The attorney's request entitles the hearing panel to find that the misconduct charge is true and to enter an order revoking his or her license.

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[1] RCSB 15 sets forth the admissions process, including the process for character and fitness certification. RCSB 3(E) states, in part, that: An active or inactive member who is not subject to pending disciplinary action in this state or any other jurisdiction may resign from membership by notifying the secretary of the State Bar in writing .... To be readmitted as a member of the State Bar, a person who has voluntarily resigned and who is not otherwise eligible for admission without examination under Rule 5 of the Rules for the Board of Law Examiners must reapply for admission, satisfy the Board of Law Examiners that the person possesses the requisite character and fitness to practice law, obtain a passing score on the Michigan Bar Examination, and pay applicable fees and dues. Resignation does not deprive the Attorney Grievance Commission or the Attorney Discipline Board of jurisdiction over the resignee with respect to misconduct that occurred before the effective date of resignation.

Thus, MCR 9.115(M), prior to its amendment in 1987, was consistent with rules in other jurisdictions in that a "resignation" with disciplinary charges pending could not be done without an admission of some misconduct. The commentary to Rule 21 of the ABA Model Rules for Lawyer Disciplinary Enforcement explains the purpose of such a requirement:

> The respondent should be required to admit the charges before discipline is stipulated, so that evidence of guilt will be available if the respondent later claims that he or she was not, in fact, guilty. Petitions for reinstatement are often filed years after discipline has been imposed, and if there is no admission it may be difficult for the agency to establish the misconduct because relevant evidence and witnesses may no longer be available.
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> Discipline by consent which results in the lawyer withdrawing from the practice of law should be recorded and treated as disbarment, not as resignation.

The comment to the 1987 amendments to MCR 9.115(M) states that the rule was amended to "eliminate past uncertainty regarding the effect of a resignation while charges were still pending."[2] However, even under the previous version, an attorney would not be allowed to simply resign membership in the bar to avoid discipline; an order of disbarment, based on admissions of misconduct, would be necessary for a "resignation" to be accepted. The pre-1987 version of MCR 9.115(M) had been in existence under the General Court Rules (which preceded the Michigan Court Rules of 1985) and had always performed the important (and perhaps primary) function of preventing resignation to escape discipline. However, not until the Rules Concerning the State Bar of Michigan were amended on July 22, 2003, was there a State Bar rule expressly providing that a member of the State Bar of Michigan could resign. The rule also states: "Resignation does not deprive the Attorney Grievance Commission or the Attorney Discipline Board of jurisdiction over the resignee with respect to the misconduct that occurred before the effective date of the resignation." RCSB 3(E). Thus, it appears that MCR 9.115(M) has been eclipsed by RCSB 3(E) in one important aspect: even without the former, the latter will prevent a respondent from avoiding discipline by resigning.

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[2] This comment does not explain the reason for removing the language requiring the resigning attorney to "[admit] the misconduct in writing or by default" so that the panel would be "entitle[d] . . . to find that the misconduct charge is true and to enter an order revoking [the attorney's] license."

MCR 9.115(M) had previously required the resigning attorney to "[admit] the misconduct in writing or by default" thereby "entitl[ing] the hearing panel to find that the misconduct charge is true and to enter an order revoking his or her license." The current rule, providing only that resignation must occur "pursuant to" an order of disbarment, no longer provides a basis for a panel finding within that rule – notwithstanding the catchline's reference to "Admission of Charges." It is not clear from the comments and history of the rule revisions whether the 1987 deletion of language requiring a basis for a panel finding was inadvertent, which we do not presume, or whether the language was deemed nonessential in light of the existence of other rules providing procedures for obtaining an order of disbarment.

MCR 9.102(A) provides: "Subchapter 9.100 is to be liberally construed for the protection of the public, the courts, and the legal profession." This general guidance offers some assistance here, and militates in favor of a construction requiring an order of disbarment to be obtained through one of the procedures set forth in subchapter 9.100 which require findings or admissions of misconduct. This would be crucial in applying MCR 9.123(B) upon an attempt at reinstatement by an attorney committing misconduct serious enough to warrant disbarment.[3] However, it is the plain text of subchapter 9.100 that gives the clearest direction in this instance.

Nothing in MCR 9.115(M) creates an independent means or mechanism to effectuate the entry of an order of disbarment. Instead, the rule merely says that: "An attorney's resignation may not be accepted while a request for investigation or formal complaint is pending except *pursuant to* an order of disbarment" (emphasis added). According to Black's Law Dictionary (7th ed), p 1250, "pursuant to" means, primarily and most pertinent to this discussion, "in compliance with," "in accordance with," or "under." Thus, while the rule requires an order of disbarment as a prerequisite to allowing the act of resignation, it does not provide a separate procedure for obtaining a disbarment. With but one exception, an order of discipline must be the product of a proceeding conducted, at least initially, before a panel.[4]

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[3] See also, *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW2d 369 (1997) (explaining that "attorney misconduct cases are fact-sensitive inquiries that turn on the unique circumstances of each case" and the importance of careful inquiry and of making a record of misconduct in the event of further acts of misconduct in the future).

[4] See MCR 9.120(C)(6) (reciprocal discipline may be imposed by the Board where the parties do not object within 21 days of service of the order from the original jurisdiction).

A "disciplinary proceeding" is a proceeding commenced under subchapter 9.100 of the Michigan Court Rules seeking the imposition of discipline for misconduct. MCR 9.101(16). "Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel." MCR 9.115(B). To initiate a proceeding under MCR 9.115, "The administrator shall prepare the complaint." *Id.* A proceeding is commenced under MCR 9.120 when the Administrator files a certified copy of a criminal conviction or a certified copy of an order of discipline or disability inactive status entered in another jurisdiction. MCR 9.120(B) and (C).

Thus, in order to obtain an order of disbarment, a disciplinary proceeding must be commenced by the Administrator. And, it is axiomatic, as well as provided in subchapter 9.100, that an order of discipline must be predicated upon facts establishing misconduct, which may be admitted (MCR 9.115(F)(5)), found after a hearing (MCR 9.115(J)), or established conclusively by certain certified documents (MCR 9.120(B)(2) and (3); MCR 9.120(C)(1) and (2)).

For all of the foregoing reasons, we conclude that MCR 9.115(M) does not create an independent mechanism for the entry of an order of disbarment. Accordingly, we shall enter an order denying the petition without prejudice to the commencement of a discipline proceeding in accordance with MCR 9.115 or MCR 9.120.

Board members James M. Cameron, Jr., Lawrence G. Campbell, Dulce M. Fuller, Rosalind E. Griffin, M.D., Sylvia P. Whitmer, Ph.D., Michael Murray, James A. Fink, and John W. Inhulsen concur in this decision.

Board member Louann Van Der Wiele was recused.