In the Matter of the Reinstatement Petition
of Evan H. Callanan, Jr.

92-324-RP

Decided: March 8, 1996

BOARD OPINION

This reinstatement matter is before us on remand from the Supreme Court for reconsideration in light of In Re Petition for Reinstatement of McWhorter, 449 Mich 130; 534 NW2d 480 (1995). After careful reconsideration of our September 29, 1994 opinion and order affirming the hearing panel's order of reinstatement in light of McWhorter, we conclude that McWhorter does not require that we change our decision. Accordingly, we again affirm the hearing panel's order of reinstatement.

Callanan was convicted on September 1, 1983, and his license to practice law was revoked effective that date.[1] He first petitioned for reinstatement on August 21, 1990, when MCR 9.123(B)(2) required (as it does today) a disbarred attorney to demonstrate that "5 years have elapsed since revocation of the license." He was released from parole on November 30, 1990. A hearing panel ordered him reinstated to the practice of law, and this Board affirmed. On August 7, 1992, the Supreme Court reversed this Board's order affirming Callanan's reinstatement, ordering that he not be reinstated at that time because his misconduct was substantial and his fitness[2] could not then be determined due to the little time he had spent outside federal supervision. 440 Mich 1207; 487 NW2d 750 (1992). Reconsideration was denied on November 24, 1992. 440 Mich 1209.

On December 11, 1992, Callanan again petitioned for

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[1] The procedural history of this case, prior to remand, is detailed in our September 1994 opinion.

[2] See MCR 9.123(B)(6) & (7).

reinstatement in accordance with the then applicable rules.[3] A new hearing panel held hearings in May and June of 1993, and ordered Callanan reinstated in an order dated October 7, 1993. The order of reinstatement was effective November 16, 1993, and Callanan has been practicing law since then.

The Grievance Administrator appealed to this Board, which affirmed the panel in a September 29, 1994 opinion. The Grievance Administrator then sought leave to appeal to the Supreme Court, and, on November 7, 1995, in lieu of granting leave, the Court remanded this matter to the Board for reconsideration in light of McWhorter. We ordered additional briefing, and we have considered the arguments raised in the briefs as well as potentially dispositive questions raised by our own reading of the McWhorter opinions.

I

The Grievance Administrator argues that Callanan should be prohibited from applying from reinstatement for another five years. The Grievance Administrator reasons that Callanan's "premature" petitions have extended the period during which he was under scrutiny of one form or another:

> The fact that a premature petition for reinstatement, and the resulting special scrutiny of the disciplinary system, must extend the period during which a disbarred attorney is prohibited from seeking reinstatement is implicitly recognized in McWhorter. In imposing the five year period following release from federal parole, the court stated at 449 Mich 142,
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> > We are persuaded that this addresses the problem identified by one commentator: ["]The disbarred

[3]MCR 9.123(D)(3)'s 180-day waiting period for a new petition after denial of reinstatement did not come into effect until March 1, 1994. Callanan's second petition would not have been premature under this rule even if it had existed: the hearing panel order of reinstatement was entered May 8, 1991, and thereafter reversed; he did not file a second petition until December 11, 1992.

> > attorney may file another petition at a later date. In light of this, it would be helpful if the rules provided a minimum spacing between subsequent petitions to prevent a lawyer whose petition is denied from immediately filing another petition.["]
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> Such language demonstrates the court's disapproval of the filing of a new petition for reinstatement directly on the heels of the denial of a prior petition, and supports the argument that a petitioner must spend sufficient time outside the scrutiny of disciplinary authorities before requesting reinstatement. Respondent should not now be permitted to file a new reinstatement petition simply because the five year period following termination of parole has recently expired. The critical issue is whether sufficient time outside any special scrutiny <u>or</u> supervision has expired to enable a fair evaluation of rehabilitation, not simply whether five years have passed since the end of parole. [Grievance Administrator's supplemental brief following remand, pp 13-14.]

We reject this interpretation of the <u>McWhorter</u> decision for several reasons.

A

First, this was not the holding of the Court. The lead opinion does indeed make reference to scrutiny by disciplinary agencies, but it clearly does not embrace the consequences urged by the Administrator. McWhorter was allowed to petition for reinstatement on or after "June 28, 1997, five years from the date of his release from federal parole," 449 Mich at 143, even though he had been under the scrutiny of the disciplinary agencies and the Court while his matter made its way to, and through, the Court.

Furthermore, it is not apparent that a majority (or any) of the Justices agree that the "scrutiny" undertaken during an unsucessful attempt at reinstatement should result in an extended waiting period for a subsequent petition. The lead opinion, signed by two Justices, obtains concurrence from Justices Riley and Boyle who "join [only] in the ruling of the lead opinion imposing a five-

year waiting period following a period of parole supervision." 449 Mich at 144. Justice Weaver concurs in the result while taking issue with the reasoning behind the scrutiny argument. Justice Cavanagh does not specifically address the lead opinion's statements in this regard. And, as noted, even the lead opinion does not tack on an additional period for scrutiny during the reinstatement process.

B

Callanan's filing of the instant petition soon after the Court denied reconsideration of its 1992 order denying him reinstatement was permitted by the rules. See n 3 supra. Moreover, the rules may have encouraged his efforts. One of the reinstatement criteria that has remained constant during these proceedings is the requirement that the petitioner demonstrate that "he or she desires in good faith to be restored to the privilege of practicing law in Michigan." MCR 9.123(B)(1). A petitioner could reasonably conclude that one way to show this is by promptness and persistence. It would be manifestly unfair to penalize Callanan for diligently seeking reinstatement when he could in no way have foreseen that his attempts would in hindsight be characterized as "premature." Nothing prior to the dicta in the McWhorter lead opinion would give petitioner or anyone else the slightest hint that the pendency of a petition for reinstatement might arguably serve to lengthen the five year waiting period in MCR 9.123(B)(2) and (D)(2).

C

Apart from the foregoing considerations, we are not persuaded that it would be appropriate to adopt a hard and fast rule whereby the waiting period prior to a disbarred attorney's ability to petition for reinstatement is automatically extended by the duration of an unsuccessful reinstatement proceeding or series of proceedings.

The "scrutiny" of the Attorney Grievance Commission, the Board, and the Court is not truly comparable to supervision by parole authorities. Parole supervision comes to an end. While the proposed "no-credit-for-scrutinized-conduct" rule sounds like it

has a fixed point (five more years in this case), in fact it extends infinitely into the future. As Justice Weaver pointed out, "the petitioner will remain under our scrutiny and therefore will probably attempt to conform his conduct to our standards until he reaches his goal of readmittance." McWhorter, 449 Mich 144 (Concurring opinion of Justice Weaver).

Also, the concept of scrutiny (as opposed to parole supervision) has too many analogies and too much room for expansion. The Administrator argues that: "Rehabilitation is demonstrated by a review of what a person has done when left on his or her own, not what he or she has done while being watched." Administrator's brief, supra, p 12. We question whether a person will very often truly be "left on his or her own." MCR 9.123(B)(6) requires that the hearing panel, this Board, and the Court reach a conclusion as to whether the petitioner has "a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards." But, we will probably never know whether a lawyer's continued good conduct is the result of his inherent goodness or the belief that his conduct might be scrutinized by others who could subject him to sanctions including ostracism, professional discipline, incarceration, or worse.

The Administrator's argument not only stretches McWhorter beyond its literal and logical confines, but it also conflicts with other Supreme Court decisions. Supervision by parole authorities may impede a hearing panel's ability to judge whether a petitioner for reinstatement has complied with MCR 9.123(B)(6) & (7).[4] And,

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[4] Other jurisdictions have addressed this issue. See, e.g., Texas Rule of Disciplinary Procedure 11.01 (no person disbarred by reason of conviction [or diversion] for certain crimes "is eligible to apply for reinstatement until five years following the date of completion of sentence, including any period of probation and/or parole"). See also, State Bar Rules, Title 2, Subtitle G, App, art 10, § 28, Tex Gov't Code Ann (Vernon 1988), repealed effective May 1, 1992, which provided in pertinent part:

> (A) Eligibility and Venue. A disbarred attorney may, at any time after the expiration of five (5) years from the date of final

just as some individuals might be able to reform and prove such rehabilitation prior to the expiration of five years after revocation, others may be able to do so before five years following the end of parole, while still others may not be able to demonstrate their fitness even after the passage of longer periods. Despite these variances, several policy reasons may dictate the adoption of "an arbitrary waiting period,"[5] applicable to all disbarred attorneys who have served criminal sentences, instead of the individualized inquiry that is traditional in disciplinary matters. But our Supreme Court has not hastily created such uniform periods.

It may be tempting to devise additional uniform rules to assist in the difficult process of judging whether a person will abide by rules of professional conduct, is trustworthy, and can safely be recommended to the public. MCR 9.123(B)(6) & (7). However, for the foregoing reasons, a strict "no-credit-for-scrutinized-conduct" rule does not justify departure from "the established rule that each attorney misconduct case is to be considered on its own facts." Grievance Administrator v August, 438 Mich 296, 309; 475 NW2d 256 (1991).

II

Having determined that an order precluding Callanan from petitioning for reinstatement for another five years is inappropriate, we must now consider whether the McWhorter opinions compel us to modify our September 29, 1994 opinion affirming the

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> judgment of disbarment . . . , apply . . . for reinstatement. Provided, however, that when the attorney has been disbarred . . . based upon conviction of a criminal offense, such person may not make application for reinstatement until five (5) years from the date of completion of sentence.

[5] McWhorter, 449 Mich at 144 (concurring opinion of Justice Weaver).

panel's order of reinstatement because Callanan's petition was filed prior to five years from the end of his parole.

In McWhorter various Justices endorsed a five year waiting period from the end of McWhorter's parole. The lead opinion states in part:

> [W]e hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole.
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> We borrow this time span from MCR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities and the contemplation of petition for reinstatement to fully evaluate his fitness to practice law.
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> We therefore would reject petitioner's application for reinstatement and would hold that he may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole. [449 Mich at 142-143.]

If the decision is read to establish a rule of general applicability, it would be that no disbarred attorney may petition for reinstatement sooner than five years after the end of any supervision by parole officers. This modification of the waiting period in MCR 9.123(B)(2) and (D)(2) would be the only change in the reinstatement requirements effected by McWhorter.

It is undisputed that the five year period has expired in this matter. Callanan was released from parole on November 30, 1990, over five years ago. He has been reinstated and practicing law since November 16, 1993. In McWhorter, the petitioner had been released from parole for only three years at the time of the Court's decision.

Two panels have previously concluded that Callanan had established his fitness under MCR 9.123(B)(6) & (7). Although the

the record at the most recent hearing was closed approximately 31 months after the end of Callanan's parole (instead of 48 or more months thereafter), the panel had had the benefit of the Court's order reversing the first order of reinstatement for the reason that Callanan had not spent enough time outside the supervision of federal authorities. Were we to reverse the hearing panel's order, Callanan would be entitled to immediately file another petition for reinstatement. The only issue not previously considered by a panel would be whether the five year waiting period announced in McWhorter has elapsed.[6] Since it is undisputed that this is the case, we see no need to expend additional adjudicative resources by requiring petitioner to refile his petition, or by remanding to a panel for consideration in light of McWhorter.

We also note that Callanan has been practicing law since November 16, 1993, and the Grievance Administrator has not sought remand to supplement the record with any evidence of misconduct or other improprieties by Callanan since the last panel hearing.

We have reconsidered this matter in light of McWhorter and we do not find that a different disposition is required by that decision. Accordingly, we again affirm the panel's order of reinstatement.

Board Members George E. Bushnell, Jr., C. Beth Dun Combe, Barbara B. Gattorn, and Michael R. Kramer concur.

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[6] This situation may be contrasted with one which arose in the first reinstatement proceedings instituted by Callanan. When the Supreme Court issued Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991), while the panel's order was on review by this Board, we remanded for a supplemental report by the panel in light of that decision. In August the Court explained that the inquiry under MCR 9.123(B)(7) as to whether a disbarred attorney "can safely be recommended to the public . . ." involves the discretionary determination whether, in light of the nature of the misconduct giving rise to revocation, sufficient time has passed since revocation to ameliorate the taint on the legal profession and enable the Court to confidently affix its stamp of approval upon the petitioner. In McWhorter, the only new development is the five year waiting period. The standards for reinstatement were not otherwise changed or clarified.

Elaine Fieldman (concurring).

I dissented from the Board's order affirming reinstatement because I believed that under Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991), the Supreme Court would have denied reinstatement. I have not changed that opinion. However, we have been ordered to reconsider this matter in light of In Re Petition for Reinstatement of McWhorter, 449 Mich 130 (1995). As to that question, I agree with the majority that McWhorter does not require a reversal of the Board's opinion of September 29, 1994. In addition to the reasons set forth in the majority opinion, I note that when the Supreme Court reversed this matter on August 7, 1992, it did not state that Callanan was subject to a minimum time requirement outside the supervision of parole authorities.

Miles A. Hurwitz, Chairperson (dissenting).

Four (4) members of this Board voted to reinstate Evan H. Callanan, Jr. on September 24, 1994. Three (3) members of the Board, including the undersigned, dissented and indicated that Callanan should not practice law in this state. Petitioner Callanan had been reinstated effective November 16, 1993, based upon a hearing panel order. No stay of that order had been requested and reinstatement had not been thwarted by the Board of Law Examiners.

This matter is again before the Board for reconsideration in light of In Re Petition for Reinstatement of Robert McWhorter, 449 Mich 130 (1995). Both McWhorter and Callanan committed crimes which led to their convictions and imprisonment, followed by parole. Disbarment and revocation of their licenses to practice law resulted.

In McWhorter, 449 Mich at 143, the Supreme Court held,

> We conclude that petitioner has not spent sufficient time away from the authority of parole officers to demonstrate by clear and convincing evidence that he may be safely recommended to the public, the courts, and the legal profession as a person fit to be consulted by others or to represent them and act in matters of trust and confidence. MCR

> 9.123(B)(7). Nor has sufficient time passed in order that he may demonstrate a proper understanding of and attitude [toward the standards that are] imposed on members of the bar pursuant to MCR 9.123(B)(6). We therefore would reject petitioner's application for reinstatement and would hold that he may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole.

Callanan's parole ended November 30, 1990. Callanan was not eligible to request reinstatement until November 30, 1995, or more than three years after he filed the petition for reinstatement in this case.

On August 7, 1992, the Supreme Court ruled that Callanan had not spent sufficient time outside the supervision of federal authorities to give a hearing panel or this board an adequate basis for evaluating his fitness and rehabilitation. The Court referred to the seriousness of Callanan's criminal offenses. Matter of Reinstatement of Evan H. Callanan, Jr, 440 Mich 1207 (1992).

As the Court's amendment to MCR 9.123, effective September 15, 1994, makes clear, the nature of the misconduct should be taken into account in determining whether Callanan "can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court . . ." MCR 9.123(B)(7). See also Grievance Administrator v August, 438 Mich 296, 306, 310 (1991).

The misconduct for which Callanan suffered disbarment is set forth, in part, in the Sixth Circuit's reported decision on direct appeal by various defendants:

> In June 1981 the government informant Judeh was actually charged by the state of Michigan with criminal sexual conduct in the third degree. . . . Qaoud [a codefendant, and the alleged bagman for Judge Callanan] told Judeh that it would cost $3,000 to $5,000 to fix the sexual conduct charge. Qaoud explained that the judge would either promptly dismiss the charge for lack of probable cause or bind it over for another date when he was serving as a

> visiting circuit judge with jurisdiction over such a felony charge.
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> At the government's prompting, Judeh also placed a call to Richard Debs, a local union official and probation officer. Debs was another associate of Judge Callanan, a defendant acquitted in this case [Debs was acquitted; the judge was not]. Debs subsequently appeared with Evan Callanan, Jr. at the gas station where Judeh was employed. They agreed to help Judeh if he would fire his present lawyer and hire Callanan, Jr.'s firm. After Judeh retained Callanan's firm, Callanan, Jr. assured Judeh of receiving probation once his father heard Judeh's case as a circuit judge. Judeh paid him $2,500, in cash, accordingly.
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> Judeh was sentenced by Judge Callanan on November 22, 1981 to three years probation. The judge based the probation on a psychiatric analysis of Judeh arranged by Callanan, Jr.
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> * * *
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> On July 6, 1982 Callanan, Jr. appeared before the federal grand jury. He denied telling Judeh that the other member of his firm would only be the attorney of record in his sex conduct case. Callanan, Jr. also denied telling Judeh that he had talked to his father about the case. This conversation in which Callanan, Jr. made these statements was tape recorded.
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> Callanan, Jr. and other associates subsequently had a meeting with Judeh at the service station. Callanan, Jr. threatened more legal problems for Judeh on his probation unless he kept quiet. [United States v Qaoud, 777 F2d 1105, 1109, 1110 (CA6, 1985), cert den 106 S Ct 1499 (1986); emphasis added.]

Thus, Callanan was convicted for making false declarations to a grand jury because he denied telling the informant (1) that another attorney would "only be the attorney of record in [the informant's] case," and (2) that he had talked to his father about the case. Callanan was convicted of obstructing a criminal investigation because he threatened "more legal problems for Judeh on his probation unless he kept quiet." Callanan's convictions for

mail fraud, racketeering, and conspiracy were reversed in a subsequent appeal.

If the burden of providing "clear and convincing" evidence of rehabilitation and fitness to practice law in seeking reinstatement has any meaning, Callanan has not been tested. MCR 9.123(B). Sufficient time had not elapsed when reinstatement proceedings took place before the hearing panel which garnered evidence herein. In my previous dissent (attachment I) I referred to this flawed standard as well as Callanan's failure to provide sufficient evidence in support of his claim for reinstatement. I continue to adhere to the view that the time between Callanan's release from parole and the panel proceedings was insufficient. However, reversal on the basis of McWhorter alone may hold out the false hope that Callanan should immediately file a third petition because five years have passed since termination of his parole. If he did so, and proceeded to introduce the same proofs, I would still deny reinstatement.

Callanan has failed to provide sufficient evidence in support of his claim for reinstatement. I continue to question Callanan's ability to establish (1) his fitness for reinstatement at this time in light of the nature of his misconduct, MCR 9.123(B)(7); August, supra, and (2) the passage of sufficient time to ameliorate the taint on the legal profession caused by the conduct for which he was convicted, In Re Reinstatement of August, 441 Mich 1207, 1208, 1219-1220 (1993).

Board Members Marie Farrell-Donaldson and Albert L. Holtz, and Paul D. Newman did not participate.