State of Michigan
Attorney Grievance Commission
Grievance Administrator,

Petitioner/Appellee,

v

Owen Patrick O'Neill, P 25734,

Respondent/Appellant.

94-63-JC

Decided: February 16, 1995

BOARD OPINION

The respondent, Owen Patrick O'Neill pleaded guilty to the crime of armed robbery, a felony. On March 11, 1994, he was sentenced to one and one-half to ten years in prison. In accordance with MCR 9.120(C), the Grievance Administrator filed a copy of the judgment of conviction with the Attorney Discipline Board and the respondent was ordered to show cause to a hearing panel why a final order of discipline should not be entered.

At the time of his conviction, the respondent's license to practice law in Michigan had been suspended continuously since September 6, 1989. [1] During the panel proceedings, the respondent filed a motion to dismiss for lack of jurisdiction, arguing that:

> O'Neill's position on this case is astonishingly simple. He claims that because

[1] September 6, 1989 was the effective date of concurrent suspension orders in the following cases: Matter of Owen P O'Neill, DP 11/85; DP 59/86--120-day suspension; Matter of Owen P O'Neill, ADB 231-87; ADB 1-88--120-day suspension; Matter of Owen P O'Neill, ADB 141-88; ADB 161-88--180-day suspension. Although the respondent was eligible to file a petition for reinstatement in accordance with MCR 9.123(B) in March 1990, no petition has been filed and it is undisputed that the respondent's license has been suspended since September 6, 1989.

> he has been suspended from the State Bar of Michigan since September, 1989, he is not presently an "attorney." While O'Neill's 1989 suspension prohibited him from practicing law, it also relieved him of his obligations under the Professional Code of Discipline because he was no longer a member of the profession.
>
> It is reasonably clear that the rules governing professional disciplinary proceedings do not include procedures for subjecting those who have already been suspended or disbarred to further professional punishment for acts committed after suspension.(Respondent's Memorandum of Law May 3, 1994).

On May 20, 1994, the hearing panel entered an order denying the respondent's motion to dismiss noting, that:

> The panel ascribes to the words "suspended" and "suspension" their plain and ordinary meaning--that a suspended license to practice law is not extinguished or destroyed by the suspension but it is merely temporarily unavailable.

In support of this interpretation, the panel's order quoted from Michigan Rules of Professional Conduct and Disciplinary Procedure, Lawrence Dubin and Michael Schwartz, Institute for Continuing Legal Education:

> However, there is a distinction between a five-year suspension and a disbarment, albeit a technical one. An attorney who has been disbarred is reverted to lay-person status; he or she is no longer subject to disciplinary jurisdiction, except for MCR 9.127, under which he or she may be subject to a contempt adjudication for violating the order of discipline. An attorney who has been suspended for five years remains subject to disciplinary jurisdiction because the attorney's license is not extinguished but merely dormant. Dubin and Schwartz, Sec. 15.7

The panel also cited the comment to MCR 9.106, West's Michigan Court Rules Practice, Martin, Dean and Webster, 1992.

> The disbarred lawyer is not a lawyer in any sense while a suspended lawyer is still within

> the jurisdiction of the disciplinary machinery and could be disciplined by an increase in the length of suspension. Michigan Court Rules Practice, p 514.

Following a public hearing, the hearing panel entered an order on July 8, 1994 revoking the respondent's license to practice law. The revocation was deemed to be effective December 23, 1993, the date of the respondent's criminal conviction.

The respondent's petition for review is limited to the issue presented in the motion to dismiss filed with the panel, that is, whether or not an attorney is subject to further discipline for conduct which occurred while his or her license was suspended.

In an opinion issued February 9, 1994, the Board ruled that pending complaints against two attorneys whose licenses had been revoked in prior matters were properly discontinued, without prejudice, on the grounds that a person who holds a license to practice law, even if it is a suspended license, is an attorney for purposes of MCR 9.100, et seq but that a person whose license has been taken away by an order of revocation is not. Matter of Russell G Slade, 90-98-GA; 91-146-GA and Matter of David M Blake, 93-48-GA; 93-67-FA.

The Board's opinion in Slade and Blake was the subject of a complaint for mandamus filed against the Board by the Grievance Administrator in the Michigan Supreme Court. In a memorandum opinion filed October 31, 1994, the Supreme Court vacated the Board's discontinuance orders and stated:

> Under our Court Rules, the ADB retains jurisdiction to consider misconduct committed during the period of licensure of attorneys whose licenses were later revoked. Grievance Administrator v Attorney Discipline Board, #99015, dec'd October 31, 1994; _____ NW2d _____.

Respondent insists that this decision by the Court is not

dispositive in his case but, indeed, supports his argument that the Board's jurisdiction is limited to misconduct committed "during the period of licensure." The respondent further insists that this phrase should be given its narrowest possible meaning, i.e. that the definition of "attorney" found at MCR 9.101(5) refers only to a person who is currently regularly or specially licensed to practice law and is currently able to engage in active practice by virtue of that license.

The respondent's arguments on this point are not persuasive. While the views of the commentators cited by the hearing panel do not enjoy the status of binding precedent, they are founded upon common sense and express the prevailing view in this state that a suspended attorney remains subject to disciplinary jurisdiction because the attorney's license is not extinguished but merely dormant.

The argument advanced by the respondent is also incompatible with the Supreme Court's October 31, 1994 opinion in Grievance Administrator v Attorney Discipline Board, #99015, _____; NW2d _____.

Referring to the Grievance Administrator's position that the definition of "attorney" in these proceedings should be understood to include any person who has been regularly or specially admitted to practice law in Michigan even if the license is subsequently suspended or revoked, the Court ruled that "the Grievance Administrator's arguments are persuasive".

We must conclude that this endorsement extends to the Administrator's argument that an attorney includes "any person who has been regularly licensed or specially admitted to practice law in Michigan even if the license to practice is suspended or revoked". Grievance Administrator v Attorney Discipline Board, supra p 2, Ftnote 6.

Citing the fundamental principle that the primary purpose of disciplinary proceedings is not punishment but the protection of the public, the courts and the legal profession, the respondent argues that such protection is provided when an attorney is denied the right to practice law, whether as the result of a suspension or revocation. He argues that the public is further protected in his case because his suspension can be terminated only by his filing of a petition for reinstatement in accordance with MCR 9.123(B). Should he file such a petition, his criminal convictions would then be considered by a hearing panel in connection with the requirement of MCR 9.123(B)(5) that he establish that his conduct since the order of discipline has been exemplary and above reproach.

These arguments presume that our system of discipline is limited to the protection of the public from acts of misconduct occurring during the practice of law. However, MCR 9.104 specifically states that certain acts or omissions by an attorney are misconduct and are grounds for discipline "whether or not occurring in the course of an attorney/client relationship". The respondent's conviction of armed robbery is a good example of misconduct warranting discipline notwithstanding the fact that the respondent was not able to counsel or represent clients when the robbery occurred. We are surely obligated to protect the public and the profession from individuals who commit armed robbery (an offense clearly related to trustworthiness) as well as from those who neglect, deceive, overcharge or otherwise mistreat their clients.

Furthermore, the respondent's argument in this respect would apply equally to attorneys whose suspension subject them to the reinstatement process, attorneys whose shorter suspensions allow them to file affidavits for automatic reinstatement under MCR 9.123(A) and attorneys who have been automatically suspended for failure to pay disciplinary costs [MCR 9.128(A)] or for their failure to pay their annual bar dues [Rule 4(B) of the Rules

Concerning State Bar]. Adoption of the position urged by the respondent would essentially immunize a suspended attorney from disciplinary prosecution for criminal conduct during the period of suspension and the respondent alone could extend that immunity by deciding when to seek reinstatement.

The hearing panel acted appropriately in ruling that a lawyer whose license has been suspended may nevertheless be disciplined for acts of misconduct committed during the period of suspension. The hearing panel order of revocation is affirmed.

Board Members George E Bushnell, Jr, Marie Farrell-Donaldson, Elaine Fieldman, Miles A Hurwitz and Paul D Newman concur.

Board Members John F Burns, C Beth DunCombe, Barbara B Gattorn and Albert L Holtz did not participate.