

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Decided: February 9, 1994

Petitioner,

v

Case No 90-98-GA;
91-146-GA

Russell G Slade, P 24726

Respondent.

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

v

Case No. 93-48-GA;
93-67-FA

David M Blake, P 30637,

Respondent.

BOARD OPINION

The Grievance Administrator has filed motions to set aside notices of discontinuance in two unrelated but procedurally similar cases. In discipline proceedings against respondents Russell G Slade and David M Blake, orders were entered revoking the respondents' licenses to practice law in Michigan. In both cases, the appropriate appeal period has expired and the orders are considered to be final. At the time their licenses were revoked, both respondents were the subject of other, unrelated discipline proceedings pending before hearing panels. In each case, the Board's Executive Director entered a Notice of Discontinuance administratively discontinuing all pending proceedings against the disbarred attorney,¹ without prejudice, on the grounds that the respondents were no longer attorneys as defined by MCR 9.101(5) and

¹ MCR 9.101(13) states that "disbarment means revocation of the license to practice law". The terms "revocation" and "disbarment" both appear in sub-chapter 9.100 and both terms are used in this opinion.

were therefore no longer subject to the jurisdiction of a hearing panel or the Attorney Discipline Board.

The Grievance Administrator now asks the Board to set aside those notices of discontinuance to allow further disciplinary prosecution against respondents Slade and Blake. The Grievance Administrator's motions present two questions: 1) Do the Attorney Grievance Commission and Attorney Discipline Board have jurisdiction to prosecute and adjudicate alleged acts of professional misconduct against an individual whose license to practice law in Michigan has been revoked? and 2) Did the Board's Executive Director act without authority by taking action to discontinue pending discipline proceedings against two disbarred attorneys? We believe that the answers to both questions are "no".

Background

On May 3, 1993, a hearing panel of the Attorney Discipline Board issued an order revoking the respondent's license to practice law in Michigan. See Matter of Russell G Slade, 91-249-JC. That case was based upon the respondent's conviction of a felony on October 21, 1991. The respondent was subject to an interim suspension of his license since the date of his conviction pursuant to MCR 9.120(B)(1). The revocation of the respondent's license was entered retroactively to the date of his conviction and interim suspension on October 21, 1991.

During the proceedings which resulted in the revocation of his license, Russell G Slade was the subject of two other formal complaints, Case No. 90-98-GA and 91-146-GA which were consolidated and were scheduled to be heard before an Upper Peninsula Hearing Panel in Bessemer, Michigan on June 1, 1993. On May 28, 1993, the Executive Director of the Attorney Discipline Board executed a "Notice of Discontinuance" in Case No. 90-98-GA; 91-146-GA. The notice recited the entry of an order of revocation as the result of the respondent's felony conviction and continued:

"By virtue of that Order of Revocation, respondent Russell G Slade is no longer an attorney as defined by MCR 9.101(5) and is not subject to the jurisdiction of a hearing panel or the Attorney Discipline Board for the purpose of determining professional misconduct or imposing further discipline.

Notice is therefore given that the proceedings against respondent Russell G Slade instituted by the filing of the above-entitled formal complaints are deemed to be DISCONTINUED and those cases are CLOSED. Discontinuance of this matter is without prejudice to further proceedings in the event the respondent is

readmitted to the practice of law in Michigan or is otherwise deemed to be an attorney subject to discipline for professional misconduct."

The Grievance Administrator's motion asks that the Notice of Discontinuance be set aside and that hearings be rescheduled so that the Attorney Grievance Commission may proceed with prosecution of these cases.

The situation involved in the cases against respondent David M Blake differs slightly. A formal complaint, Case No. 93-16-GA was filed against respondent Blake on February 10, 1993. A hearing was conducted on March 2, 1993 and an order revoking the respondent's license was issued by the panel on May 21, 1993. No petitions for review were filed by any party and the revocation of the respondent's license became effective on June 12, 1993.

While that case was pending, a new complaint charging further acts of misconduct was filed against Blake on March 31, 1993, Case No. 93-48-GA. Blake's failure to answer that complaint resulted in a supplemental complaint, Case No. 93-67-FA. Those consolidated cases were assigned to Tri-County Hearing Panel #64 which filed a report on June 28, 1993 containing its findings that the respondent had engaged in professional misconduct and concluding that the respondent's license to practice law should be revoked. The panel reported that costs would be assessed against the respondent in the amount of \$143.46. The hearing panel's report was filed and mailed on June 28, 1993 along with a Notice of Discontinuance signed by the Board's Executive Director.

That notice was substantially similar to the Notice of Discontinuance issued in the Slade matter. It included identical language regarding the lack of jurisdiction over an individual who is not an attorney and the lack of prejudice to further proceedings in the event that respondent Blake is readmitted to the practice of law or otherwise deemed to be an attorney subject to discipline.

In Blake, the Grievance Administrator seeks to have the Notice of Discontinuance set aside and asks that, in addition to the order of revocation already entered in Case No. 93-16-GA, that a second order of revocation be entered in Case No. 93-48-GA; 93-67-FA. Unless such action is taken by the Board, the Grievance Administrator claims, the second hearing panel's decision to revoke the respondent's license and the requirement that the respondent pay an additional \$143.46 in costs will have been "rendered meaningless".

Discussion

Since the creation of the current bifurcated system of discipline in 1978, pending matters against attorneys whose licenses have been revoked have routinely been dismissed or

discontinued without objection by the current Grievance Administrator or his predecessors. In calendar year 1992 alone, twenty-two formal complaints involving thirteen consolidated cases against seven disbarred lawyers were discontinued following revocation of the respondent's license.²

The action taken in this case (and every similar case since 1978) is based upon two definitions found in MCR 9.101. As used in sub-chapter 9.100, "Respondent" means an attorney named in a Request for Investigation or complaint [MCR 9.101(6)]. The word "Attorney" is defined as "a person regularly licensed or specially admitted to practice law in Michigan". [MCR 9.101(5)]. Heretofore, the discipline agencies and published commentators in Michigan have interpreted the definition of "attorney" in that Court Rule as referring to a person's status at a particular point in time. Under that interpretation, a person who holds a license to practice law, even if it is a suspended license, is an attorney for purposes of these rules but a person whose license has been taken away by an order of revocation is not.

The Grievance Administrator now urges a new interpretation and argues that if an individual was ever licensed to practice law in Michigan at any time in his or her life, that person is thereafter subject to the continuing jurisdiction of the Attorney Grievance Commission and Attorney Discipline Board regardless of any subsequent action which may be taken against that license, including revocation. On this point, the Administrator is quite specific, arguing that:

"Therefore, the Commission and the Board have jurisdiction over such persons upon their regular or special admission to the State Bar, and forever retain jurisdiction over such individuals once they are conferred such status". (emphasis added, Administrator's Brief, Matter of Russell G Slade, p. 3)

² The following cases were discontinued without prejudice by the Attorney Discipline Board in 1992 following the revocation of the attorney's license: Matter of James R Bandy, 92-77-GA; Matter of James R Bandy, 91-244-GA, 91-271-FA; Matter of Jeffrey B Friedland, 91-106-GA, 91-151-FA; Matter of Jeffrey B Friedland, 91-154-GA, 92-2-FA; Matter of Jeffrey B Friedland, 92-20-GA; Matter of Craig V Matte, 92-125-GA, 92-161-FA; Matter of David B Scholfield, 92-142-GA; Matter of David B Scholfield, 92-155-GA; Matter of Sherman Sharpe, Jr., 92-9114-GA, 92-145-FA; Matter of Michael R Tovey, 91-187-GA, 91-252-GA; Matter of Timothy A Wright, 91-51-GA, 91-74-FA; Matter of Timothy A Wright, 91-199-GA, 91-229-FA; Matter of Timothy A Wright, 92-9-GA, 92-38-FA.

The immediate problem with this concept of eternal licensure is its incompatibility with the accepted meaning of a revocation of one's license. To revoke, according to Webster's New Twentieth Century Dictionary, Second Edition, is "to withdraw, to rescind, to repeal, to cancel, to annul, as, to revoke a law, will, license, charter, or grant". Similarly, Black's Law Dictionary, Fifth Edition, (1979) defines revocation as:

The recall of some power, authority or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void. It may be either general, of all acts and things done before; or special, revoking a particular thing.

In the cases of Slade and Blake, the thing which has been recalled, cancelled or annulled is the license to practice law in Michigan. Once a hearing panel, the Board or the Supreme Court declares in an order of revocation that an individual's license to practice law no longer exists, further proceedings to suspend or again revoke that license would not appear to be warranted.

The power of a hearing panel, the Board or the Supreme Court to reinstate an individual's license to practice law under MCR 9.124 or the Grievance Administrator's authority to seek contempt proceedings against an individual in a circuit court to enforce a disbarment order [MCR 9.127(B)] are not inconsistent with the notion of the complete loss of the license to practice law following an order of revocation.

The Board's action in these cases is consistent with the prevailing view in Michigan that revocation of a license to practice law ends the jurisdiction of the discipline agencies. For example, the author's comment to MCR 9.106 in West's Michigan Court Rules Practice, Martin, Dean and Webster (1992) states:

"The difference between a five-year suspension and a disbarment would seem to be: 1) A difference in terminology with greater stigma being attached to disbarment; 2) 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; and, 3) A suspended lawyer will usually have an easier burden in establishing entitlement to reinstatement than a disbarred lawyer." (emphasis added) Michigan Court Rules Practice, p. 514.

Similarly, Michigan Rules of Professional Conduct and Disciplinary Conduct published by the Institute for Continuing

Education and written by Lawrence Dubin, former Chairperson of the Attorney Grievance Commission, and former Grievance Administrator Michael Alan Schwartz states:

"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. Thus an attorney who violates a suspension order may receive additional discipline as well as contempt citations." Dubin and Schwartz, Sec. 15.7

Other commentaries on discipline law and procedure have reached the same conclusion. The American Bar Association's Standards for Imposing Lawyer Sanctions, approved February 1986 by the American Bar Association House of Delegates, states in its definition of sanctions that "Disbarment terminates the individuals status as a lawyer". ABA Standards for Imposing Lawyer Sanctions, Sec. 2.2.

According to the ABA/BNA Lawyer's Manual On Professional Conduct:

"Although a disbarred lawyer is no longer subject to the disciplinary authority of the state court, a court has power to hold a former member of its bar in contempt of court for continuing to practice law after disbarment." See In Re Salburg, 106 WI2d 242; 316 NW2d 347 (1982).

The Administrator points out that the Supreme Courts in at least three jurisdictions have, by case law or court rule, allowed the continuation of disciplinary proceedings against an attorney following his disbarment. See Louisiana State Bar Association v Krasnoff, 502 SO2d 1018, (LA 1987); Application of Kraemer, 411 NW2d 71 (ND 1987); In re Prisock, 143 SO2d 434 (MISS 1962).

We also note that the Model Rules for Disciplinary Enforcement adopted by the American Bar Association House of Delegates in 1989

includes the following proposal for jurisdiction in matters of attorney discipline:

"Any lawyer admitted to practice in this state, including any formerly admitted lawyer with respects to acts committed prior to resignation, suspension, disbarment or transfer to inactive status. . .is subject to the disciplinary jurisdiction of this court and the board". MRLDE Rule 6(a).

There may be legitimate reasons why discipline authorities should be able to proceed against a lawyer following disbarment. In the case of an attorney whose disbarment is based upon a criminal conviction, the possibility exists under MCR 9.120(C) that the Board might be required to vacate the order of discipline in the event that the conviction is subsequently reversed. Although that rule makes it clear that the Administrator may nevertheless proceed against a respondent in that case for the misconduct which led to the criminal charge, witnesses may be unavailable and further proceedings could be difficult, if not impossible. Similarly, although other pending matters against a disbarred attorney are discontinued without prejudice, further disciplinary prosecution may not be possible if the disbarred lawyer successfully gains reinstatement and evidence of his or her other misconduct is no longer available.

Finally, to the extent that the Supreme Court's opinion in Grievance Administrator v Irving August, 438 Mich 296; 475 NW2d 256 (1991) suggests that the full scope of a disbarred attorney's misconduct should be considered at the time of reinstatement, discontinuance of pending matters could hamper full consideration of the petitioner's character during reinstatement proceedings.

Without question, the Supreme Court has authority, in the exercise of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys, to modify sub-chapter 9.100 to extend the jurisdiction of the Board to individuals whose licenses to practice law have been revoked. Without such a change in the rules, however, the definition of "attorney" promulgated by the Court in MCR 9.101(5) limits the Board's jurisdiction to individuals who are, at the time of the proceeding, regularly licensed or specially admitted to practice law in Michigan, to the exclusion of individuals whose licenses have been revoked.

The Grievance Administrator characterizes the notices of discontinuance in these matters as "unauthorized" dismissals of the Grievance Commission's formal complaints against respondents Slade and Blake. The Administrator further argues that the actions of the Board's executive director were the result of his "erroneous" interpretation of MCR 9.101(5) and the Notices of Discontinuance are therefore "without legal effect".

The notices of discontinuance in the Matters of Russell G Slade and David M Blake were executed in a ministerial fashion by the Board's Executive Director and General Counsel, who was carrying out the policy of the Board. Since October 1, 1978, it has been the policy of the Attorney Discipline Board that pending disciplinary matters against a disbarred attorney should be dismissed or discontinued. The orders of dismissal and/or notices of discontinuance issued by the Board in such matters since 1978, including the notices of discontinuance in the Matter of Russell G Slade and David M Blake, have been issued under the authority of the Attorney Discipline Board and are consistent with the prevailing interpretation of MCR 9.101(5) in this state.