STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement
Petition of James M. Cohen, P 12017,

Petitioner/Appellee,

v

Grievance Administrator,

Appellant.

Case No. 91-159-RP

Decided: June 11, 1992

BOARD OPINION

The Grievance Administrator filed a petition for review seeking reversal of an Order of Reinstatement issued by a bearing panel. The Board is persuaded that the petitioner's failure to seek the consent of certain clients before arranging for substitute counsel and his failure to transmit the unearned fees paid by a client to substitute counsel demonstrates a serious lack of understanding of his professional obligations. This conduct precludes the necessary findings under MCR 9.123(B)(5,6,7) that the petitioner's conduct since the order of discipline has been exemplary and above reproach; that he has a proper understanding of and attitude toward the standards that are imposed on members of the Bar and will conduct himself in conformity with those standards; and that he can, at this time, 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 as a member of the Bar and as an officer of the court. The hearing panel Order of Reinstatement must therefore be reversed.

The petitioner's license to practice law was originally suspended for 119 days by a hearing panel which considered the circumstances surrounding his conviction of the misdemeanor of attempted conspiracy to manufacture, deliver or possess marijuana with the intent to deliver or manufacture that controlled substance.

A petition for review was filed by the Grievance Administrator seeking an increase in discipline. While the petition for review was pending, the petitioner completed the 119-day suspension and was reinstated upon the filing of an affidavit of compliance in accordance with MCR 9.123(A). On July 30, 1990, the Board entered an order increasing the discipline to a 120-day suspension. Matter of James M. Cohen, ADB 147-899 (Brd. Opn. 7/30/90).

The petitioner filed a petition for reinstatement in accordance with MCR 9.123(B) on May 23, 1991. The matter was assigned to a hearing panel and hearings were conducted on October 4, October 31 and November 19, 1991.

In addition to the testimony of the petitioner, the hearing panel heard testimony from eight other witnesses. Various exhibits and the Grievance Administrator's written report were introduced into the record. The panel concluded unanimously that petitioner Cohen had established his eligibility for reinstatement by clear and convincing evidence.

The Grievance Administrator's petition for review asserts generally that the hearing panel's findings were not supported by the evidence. More detailed objections appear in the Administrator's supporting brief.

The Board has reviewed the issues raised by the petitioner's participation as an investor and officer of Exterior Design Centers of Michigan Inc., a corporation involved in the construction of outdoor decks; the issuance of checks by the corporation which were returned for nonsufficient funds and the filing of the petition for reinstatement on May 23, 1991. Each of these issues is addressed in the hearing panel's report with appropriate references to the relevant evidence. We find adequate evidentiary support for the panel's conclusions as to each of these issues.

The Board has further considered the Grievance Administrator's assertion that the hearing panel erred in refusing to consider the circumstances underlying petitioner's suspension in determining whether he should be reinstated. The Grievance Administrator relies on Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991).

August involved the reinstatement of a lawyer whose license had been revoked. We do not believe that the Supreme Court's decision in August is applicable in reinstatement petitions of suspended lawyers. The essence of the Court's opinion in that case is reflected in its conclusion, which states:

> We hold today that the nature of the offense and the time elapsed since its commission and since disbarment are relevant and important considerations in determining whether a disbarred attorney should be recommended to the position of public trust that it is held by members of Michigan State Bar. Moreover, an attorney may be denied readmission on the grounds that sufficient time has not past to determine the present fitness of the applicant for readmission. Such a denial should not be deemed a permanent disbarment.
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> Grievance Administrator v August, 438 Mich 296, 314 (Emphasis Added).

The August decision points out that disbarment is the most severe sanction which -may be imposed. While a disbarred attorney may petition for reinstatement after five years [MCR 9.123(B)(2)], the Court explained that the expiration of five years is viewed only as a temporal milepost and a minimum period in which to demonstrate rehabilitation. Accordingly, the Court held that it is appropriate to consider the nature of the misconduct balanced against the passage of time in reinstatement cases following disbarment. The Court declared "Obviously, the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney disbarred for corrupting the administration of law than in the case of an

attorney whose disbarment resulted from conduct unrelated to the practice of law." August at 310.

Notwithstanding the Court's consistent references to "disbarment" and "revocation", the Grievance Administrator urges us to extend the applicability of the Court's rulings in August to all reinstatement cases because the opinion is not explicitly limited to disbarments. The Administrator argues that, assuming the lawyer has met all the requirements of MCR 9.123(B), a suspended lawyer may be denied reinstatement because a sufficient period of time has not passed on the underlying offense. This argument is not persuasive.

By imposing a suspension for a period of time, the panel, Board or Court has already determined that a greater term of suspension, or disbarment, is not appropriate. To permit the panel to revisit the misconduct to determine whether a sufficient length of time has passed in a suspension case would permit the panel and the Board to impose greater discipline ex post facto. We believe that a suspended attorney may not be denied reinstatement solely on the grounds that the reinstatement tribunal may believe that the original misconduct warranted a lengthier suspension.

Our decision to deny reinstatement at this time is based upon the circumstances surrounding the petitioner's preparation and signing of Substitution of Counsel notices in three criminal matters and his continued failure to refund unearned fees paid in advance on behalf of one of those clients. Based upon its review of the testimony of petitioner Cohen and attorney Thomas Warshaw, the panel concluded:

> After exhaustion of his own appeals from the Order of Suspension and realizing that the additional one day suspension would be imposed and that this additional one day would require another withdrawal from the practice of law, the petitioner executed a Substitution of Counsel in three criminal appellate matters, signing the name of attorney Thomas Warshaw as new counsel for the clients. The panel finds that such a substitution was impliedly authorized by attorney Thomas Warshaw although the details of the three specific cases were not discussed. At the hearing, attorney Thomas Warshaw clearly and convincingly testified that the petitioner had implicit authority to execute the substitutions and ratify the signatures as his own.
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> The panel finds that the petitioner acted in good faith and with the interests of his client in attempting to achieve continuity of counsel for his clients in their appeal. The panel finds no evidence of an intent to obtain a personal or pecuniary advantage from the substitutions nor do we find any fraudulent or dishonest intent on the petitioner's part. It is the uncontroverted testimony that petitioner has made arrangements to refund in full fees paid by client Dickson, who subsequently obtained other counsel. (Hearing Panel Report, p 8).

Applying the standard of review enunciated by the Court, we find that the panel's factual findings have proper evidentiary support on the whole record. Although the testimony of Thomas Warshaw was equivocal at times, there is support for the panel's conclusion that the petitioner had implied, if not expressed, permission to sign Warshaw's name to the three Substitution of Counsel notices. Warshaw testified, for example,

> He [Cohen] probably should have discussed specifics more than he did, but there is no question that he had my underlying permission to do this, as I had his. We have been together for seventeen years, you know, and there are other people in the office, like I said, that did the same thing for him. (T 405)

In light of this and similar testimony, the hearing panel properly rejected the claim that the petitioner's signing of attorney Warshaw's name constituted "forgery".

However, while we affirm those factual findings, the Board must exercise its discretion with regard to the ultimate decision. In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981). Regardless of the circumstances surrounding the actual signing of the Substitution of Counsel by the petitioner, it is clear from the record that the petitioner not only failed to discuss the matters specifically with Mr. Warshaw but failed to provide notice to the three clients that he would be unable to continue as their attorney and failed to obtain consent to substitution by Mr. Warshaw in at least one case. Whether the petitioner acted in "good faith and with the interests of his client" does not end the inquiry. The panel failed to address the issue of the petitioner's failure to communicate with his clients as it bears upon the petitioner's eligibility for reinstatement under MCR 9.123(B)(6,7).

The circumstances surrounding the petitioner's acceptance of employment on behalf of clients DeWolf, Floyd and Dickson and his subsequent withdrawal in each case demonstrates the petitioner's lack of understanding of his obligation to keep his clients informed. Michigan Rule of Professional Conduct 1.4(a) directs that "A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information." The comment to that rule notes that "the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and a means by which they are to be pursued to the extent the client is willing and able to do so." Under the heading "Withholding Information", the comment to Rule 1.4 further warns "A lawyer may not withhold information to serve the lawyer's own interest or convenience."

The Attorney Discipline Board's order increasing his suspension from a 119-day suspension to a suspension of 120 days was filed July 30, 1990. Until the Supreme Court's order denying his leave to appeal was entered and all subsequent extensions were exhausted, the petitioner was able to continue practicing law, but with the knowledge that his license was in jeopardy and that an adverse ruling would result in an immediate suspension. Nevertheless, the petitioner testified, he did not feel that it was necessary to discuss with Steven Dickson in early 1991 the fact that he was facing the possibility

of additional suspension. (T 31) Nor did he discuss his status with Mr. DeWolf when he was retained in November 1990 or with Mr. Floyd in the fall of 1990. (T 350-352) When asked whether he had discussed with each client his plan to have Mr. Warshaw substitute as attorney, the petitioner testified that he discussed the substitution with Floyd prior to executing the consent (T 330); he "believes" he discussed it with DeWolf (T 330); and he acknowledged that he did not ask Dickson's permission to have attorney Warshaw substitute in as Dickson's counsel. (T 320)

The situation involving the petitioner's representation of Steven Dickson is exacerbated by the petitioner's admitted failure to return an unearned retainer fee.

The petitioner admitted to the panel that he accepted a retainer fee of $11,500 to represent Steven Dickson and that while he believed that some portion of that fee had been earned, he had agreed to refund the entire amount to Dickson or his family. At the time of the reinstatement hearing none of these fees had been returned.

The Board is not prepared at this time to adopt the argument put forward by the Grievance Administrator that MRPC 1.16 in conjunction with Informal Ethics Opinion RI-10 requires that all retainer fees be placed in a client trust account until such fees have been earned or that deposit of a retainer fee into an attorney's general business account constitutes an improper commingling of funds.

Our decision to deny reinstatement is based upon a conclusion that there is insufficient evidentiary support at this time for the panel's conclusion that the respondent established by clear and convincing evidence that he has a proper understanding of and attitude toward the standards that are imposed on members of the bar and, as a result, that he can safely be recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to aid in the administration of justice as a member of the bar and as an officer of the court.

This conclusion is based on the evidence presented to this hearing panel and should not be construed as a permanent bar to the petitioner's reinstatement. MCR 9.123 and 9.124 do not prevent the immediate filing of another petition for reinstatement. Upon an appropriate demonstration by the petitioner that he has achieved the proper understanding of his ethical obligation to communicate with his clients, and upon a further showing that he has discharged his obligation to Mr. Dickson, a different result would, of course, be possible.