STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Elbert L. Hatchett, P 14735,

Respondent/Cross-Appellant.

Case No. 91-10-JC

Decided: February 14, 1992

BOARD OPINION

Respondent was convicted in the United States District Court for the Eastern District of Michigan of four misdemeanor counts of failure to pay income tax in violation of 26 USC 7203. In discipline proceedings instituted by the filing of a Judgment of Conviction and conducted under the provisions of MCR 9.120, the hearing panel concluded that the respondent's violation of the laws of the United States constituted misconduct warranting discipline. The hearing panel considered the sentence imposed by a United States District Judge which included three consecutive one-year terms of imprisonment, five years of probation thereafter and the payment of substantial fines and back taxes. At the time of the respondent's appearance before the panel, this sentence remained the subject of an appeal. The hearing panel ordered that the respondent's license to practice law in Michigan be suspended for a period of 120 days with the condition that he be unable to file a petition for reinstatement in accordance with MCR 9.123(B) until he was released from "incarceration".

The petition for review filed by the Grievance Administrator seeks an increase in discipline, urging that "there is nothing in the record to suggest that a discipline of less than three years Is appropriate". The cross-petition for review filed by the respondent argues that the discipline imposed should be reduced. The Board was advised by respondent's counsel that a second argument that the respondent's criminal conviction did not warrant the imposition of discipline, would not be pursued.

Having had an opportunity to review the arguments of the parties and the authorities cited, we conclude that the hearing panel's order should be modified by reducing the term of suspension to 119 days. The respondent shall not be eligible to file an affidavit in support of reinstatement in accordance with MCR 9.123(A) while he is imprisoned in a federal correctional facility. We adopt the hearing panel's conclusion that, for purposes of this order, federal correctional facility does not include a community correction center, half-way house or equivalent facility.

We agree with the Supreme Court that attorney misconduct cases generally must stand on their own facts but that we may be mindful of the sanctions meted out in similar cases. ' Matter of Grimes, supra. It has not escaped the Board's attention that of the ten cases cited by the parties involving misdemeanor tax convictions, four attorneys were reprimanded, five received suspensions which did not require the filing of a petition for reinstatement under MCR 9.123(B) or its predecessor rule and only one case resulted in a suspension requiring reinstatement proceedings. In that case, State Bar Grievance Administrator v Lewis, 389 Mich 668 (1973) and State Bar Grievance Administrator v Levis, 394 Mich 224 (1975), the Michigan Supreme Court approved a 130-day suspension of an attorney as the result of his misdemeanor conviction of the offense of willful failure to file an income tax return.

The 120-day suspension imposed by the hearing panel in this case would, at first glance, appear to be well within the range of discipline to be expected for this type of misconduct. According to the Grievance Administrator, the distinguishing factor which requires that the respondent be suspended from the practice of law for three years or more is the sentence of three consecutive one-year terms of imprisonment imposed by the sentencing judge. We are not persuaded that this factor warrants the discipline urged by the Administrator.

Like the hearing panel, we do not disagree with the Grievance Administrator's argument that It is not in the interest of the public, the legal profession or the courts of our state to broaden the term "jailhouse lawyer" to include the active practice of law by an attorney serving time in a federal correctional facility. Therefore,, we adopt the panel's conclusion that the respondent's incarceration should be accompanied by a concurrent suspension of his license to practice law and that reinstatement of his license should not precede his release from a penal facility.

We differ with the panel only on the issue of whether the respondent should be required to establish his fitness to practice law at some time in the future by undergoing scrutiny by the Grievance Administrator and appearing before a hearing panel as part of the reinstatement proceedings described by MCR 9.124. We strongly believe that the conduct for which the respondent was convicted and sentenced, constitutes professional misconduct and warrants discipline. We do not believe, however, that the record in this case establishes that such conduct is sufficiently related to his fitness to practice law to warrant the need for such scrutiny.

We are not persuaded by the Grievance Administrator's argument that the respondent should be excluded from the practice of law for a fixed period of three years despite the likelihood that, during the next three years, he will be released to a half-way house or equivalent facility, if not released completely from constraints on his person.

In support of this position, the Grievance Administrator relies heavily upon the majority opinion denying reinstatement to the federal bar of an attorney on parole in the matter of In re: W. Otis Culpepper, 88-0674 (US Dist Crt ED 1991). However, we note that the attorney in Culpepper was

convicted of a felony and that the majority opinion of Judges Rosen and DeMascio relied heavily on Matter of Reinstatement of Walgren, 708 P2d 380 (1985) in which the Washington Supreme Court noted that:

> "Our research indicates that the question of whether an attorney on parole for a felony conviction may be reinstated has not been squarely addressed by an American court. - ." 708 P2d at 387-388. (Emphasis added)

In that decision, the questions of an attorney on parole following a misdemeanor conviction was not directly addressed.

We also note that the decision in Culpepper is confined to the issue of the reinstatement of an attorney to federal practice following his conviction of a federal felony. Prior to his application for readmission to practice before the United States District for the Eastern District, Culpepper successfully petitioned for the reinstatement of his license to practice law in Michigan. Notwithstanding his federal parole status at the time of the state reinstatement proceedings, that status was not cited by the Grievance Administrator in opposition to the restoration of his right to practice in the Michigan courts nor was the hearing panel's Order of Reinstatement appealed. Matter of W. Otis Culpepper, 90-95-RP (Hrg. Pnl. Order of Reinstatement 11/8/90).

The term of 119 days having expired, the respondent shall be eligible to file an affidavit as described by MCR 9.123(A) upon his release from a federal correctional institution as defined in the accompanying order.

All Concur.