

IN THE MATTER OF JAMES D. O'CONNELL,
Member of the State Bar of Michigan,
Respondent.
No. 34565-A

Decided: May 21, 1980

OPINION OF THE BOARD

FACTS

On October 27, 1976, Respondent was tried and found guilty of two felony counts. Count One was dismissed at the examination; Count Two charged Respondent with receiving and concealing stolen property valued over \$100, and Count Three charged Respondent with conspiring to break and enter a dwelling house with intent to commit larceny.

The Judicial Tenure Commission appointed a Master to review Respondent's case. The Master found no support for Count Three and some evidence for Count Two. The Judicial Tenure Commission reviewed the Master's report and found no support for Counts Two and Three.

A formal complaint was filed by the Grievance Administrator in January, 1978. The first hearing in April was adjourned until July, at which time the panel granted another three-month extension. The panel convened in September to issue an Interim Report stating that the matter was delayed so the panel could view the thirty-three volume transcript of the trial proceedings.

Since the first Hearing Panel Interim Report, the Court of Appeals affirmed Count Two, and dismissed conviction on Count Three, stating:

“Defendant's conviction of conspiracy to break and enter must therefore be set aside, as there simply as no evidence to support even an inference in That regard.”

Count Two was sustained, “Although the evidence to support this charge is at best sketchy, and often conflicting.”

A second Hearing Panel Interim Report was issued in July, 1979, deferring judgment of discipline proceedings against Respondent “until such time as the judicial procedures available to the Respondent be exhausted.” Taking this report as the panel's final disposition, the Board issued an Order to Show Cause in February, 1980.

DISCUSSION

For the purposes of preserving the argument, Respondent, in this oral presentation to the Board, initially attacked the power of the Michigan Supreme Court to formulate the rules of conduct used to govern attorneys. Respondent claims this power is legislative in nature and the formulation of the rules by the Supreme Court is a violation of the “separation of powers” doctrine.

Respondent has overlooked numerous U.S. Supreme Court decisions in which this power to formulate rules governing officers of the court has been recognized as inherent in the judicial system.

The power to regulate conduct and qualifications of a court's officers does not depend on constitutional or statutory grounds. An attorney is not an officer of the state, but an officer of the court, exercising a privilege during good behavior. Ayres v Hadaway, 303 Mich 589, 6 NW2d 905 (1942). The two judicial systems of the court, state and federal, have autonomous control over the conduct of their officers, including lawyers. Theard v United States, 354 US 278, 77 S Ct 1274, 1 L Ed 2d 1342 (1957). Courts of the State of Michigan have exclusive jurisdiction over admission of attorneys, the regulation of the practice of law, and the discipline and disbarment of attorneys in that state. Ginger v Circuit Court for Wayne County, 372 F2d 621, cert. denied, 387 US 935 (1967); see also Winthrow v Larkin, 421 US 35, 58; 98 S Ct 1456, 1470; 43 L Ed 2d 712, 730 (1975); Feldman v State Board of Law Examiners, 438 F2d 699, 702 (8th Cir. 1971). The Michigan Supreme Court in SBGA v Lewis, 389 M 668, 209 NW2d 203 (1973), and In re Sauer, 390 M 449, 213 NW2d 102 (1973), has set forth in great detail the proceedings to be followed when the Grievance Administrator brings a case under GCR 969.1 [formerly 16.17]. Once the Grievance Administrator fulfills his burden by showing evidence of a felony conviction, the Respondent is put to the task of submitting all the evidence he may have in mitigation of disciplinary action. Respondent must be granted sufficient time in which to obtain and submit copies of the trial transcript and have an opportunity to review them to articulate a full defense. An appeal from the conviction should be taken into consideration, as well as the nature of the offense, the sentence imposed, the substantiality of the grounds of appeal and the likelihood of reversal.

However, the pendency of appeal, alone, is clearly not a basis for deferring the entry of an order of discipline or an order to dismiss; GCR 969 would thereby be rendered meaningless. Clearly the intent of the rule was to offer the Board an opportunity to suspend an attorney even if there exists a possibility of reversal on appeal; otherwise, there would be no reason for mandatory vacation of the suspension upon reversal as required by GCR 962.2.

The panel itself has no authority to hold such proceedings in abeyance until the Respondent has exhausted all remedies. The panel in this case misconstrued the scope of its authority in the Second Interim Report by assuming that the judicial procedure to which Respondent is entitled had to be exhausted before any discipline could be ordered. The panel may only choose the extent of discipline to be issued or, if the evidence in mitigation is sufficiently compelling, to dismiss, always keeping in mind the ultimate concern of protecting the public confidence in the administration of justice, as well as safeguarding the Courts and legal profession.

Due to the particularly long delay since the conviction of Respondent, the nature of the offenses and the hearing panel's position in the matter, and pursuant to the discretionary power granted to the Board in GCR 969.1, the Board will enter an Interim suspension until further action of the Board or Supreme Court.

NOTE: The interim suspension was vacated October, 1980 upon reversal of the criminal conviction by the appellate court.