

STATE OF MICHIGAN

Attorney Discipline Board

FILED
ATTORNEY DISCIPLINE BOARD

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GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 18-114-GA

DAVID G. LUTZ, P 53665,

Respondent.

ORDER OF DISCONTINUANCE WITHOUT PREJUDICE

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

On June 29, 2017, the Grievance Administrator filed a reciprocal discipline action pursuant to MCR 9.120(C), against David G. Lutz, after he was suspended from practicing law in federal court for 18 months, effective June 1, 2017, and sanctioned by the U.S. District Court, Western District of Michigan. *Grievance Administrator v David G. Lutz*, 17-74-RD. Mr. Lutz, through counsel, filed an objection arguing that he was denied due process and that the imposition of comparable discipline in Michigan would be inappropriate. The matter was assigned to Tri-County Hearing Panel #70.

On September 28, 2017, the Administrator filed a formal complaint against Mr. Lutz that contained an allegation that Mr. Lutz was "incapacitated to continue the practice of law because of physical disability caused by an ongoing medical condition. Respondent's medical condition and/or the treatment for the condition is further causing a mental disability in the form of deficits of concentration and memory loss, which incapacitates him from the practice of law." The complaint specifically indicated that the Administrator was seeking an order transferring Mr. Lutz to inactive status in accordance with MCR 9.121(B)(3). The complaint also contained three additional counts of misconduct. *Grievance Administrator v David G. Lutz*, 17-115-GA; 17-119-PI.¹

The matters were subsequently consolidated and assigned to Tri-County Hearing Panel #70, and on October 6, 2017, the charges of misconduct contained in the reciprocal matter and the formal complaint were held in abeyance while the panel determined whether Mr. Lutz was incapacitated from continuing to practice law under MCR 9.121(B)(1), (3), and (4).

On November 29, 2017, the parties filed a stipulation to transfer to inactive status pursuant to MCR 9.121(B), in which they stipulated, based on medical documentation, that Mr. Lutz was incapacitated and unable to engage in the practice of law, that he should be immediately transferred to inactive status for an indefinite period and until further order of the Board, and that the remaining counts of the formal complaint and the reciprocal discipline matter continue to be

¹ In light of the Administrator's request that respondent be transferred to inactive status pursuant to MCR 9.121(B), the caption of the case was changed to *In the Matter of David G. Lutz*, 17-74-RD; 17-115-GA; 17-119-PI.

held in abeyance. An order to that effect was entered on December 8, 2017. There has been no determination under MCR 9.121(E) that Mr. Lutz's incapacity/disability has been removed, thus he remains on inactive status under that order today.

On May 30, 2018, the Administrator filed a new formal complaint against Mr. Lutz. While the complaint references the December 8, 2017 order transferring Mr. Lutz to inactive status, it contains two counts of alleged misconduct that occurred between March and late June 2017. On June 21, 2018, the Administrator filed a motion to consolidate this new formal complaint with the prior proceedings, ADB Case Nos. 17-74-RD; 17-115-GA; 17-119-PI, and to hold the new matter in abeyance. The motion specifically stated:

Petitioner believes that the filing of the new formal complaint is appropriate given that the alleged misconduct pre-dates the effective date of the order transferring respondent to disability inactive status. If respondent ever seeks reinstatement under MCR 9.121(E) and is reinstated, respondent should be held responsible for all his alleged misconduct. Otherwise, respondent remains on disability inactive status and is ineligible to practice law.

The motion to consolidate the present formal complaint is premised on the assumption that the previously filed reciprocal discipline matter (17-74-RD) and formal complaint (17-115-GA) are currently pending, although held in abeyance. This is somewhat understandable in light of the fact that the December 8, 2017 order transferring Mr. Lutz to inactive status indicates, in its final paragraph, "that the charges of misconduct contained in the reciprocal discipline action and formal complaint, filed June 29, 2017 and September 28, 2017 respectively, shall be held in abeyance." However, consistent with the Board's regular practice, these cases were discontinued and closed upon the entry of the order transferring Mr. Lutz to inactive status.

Although it may not be absolutely clear, it is the Board's reading of MCR 9.121(B) that disciplinary matters pending at the time it is alleged that an attorney is incapacitated to practice law must be held in abeyance. The rule does not provide that "abeyance" must continue past the transfer of an attorney to inactive status and indefinitely thereafter. This reading would make no sense. It is frequently the case that an attorney remains inactive for years, and many are not reinstated pursuant to MCR 9.121(E) at all. To keep cases open in these circumstances would not be efficient or provide useful reporting. Nor would it result in the preservation of evidence or otherwise serve to protect the public. Finally, and perhaps most important, it is inconsistent with the practice of discontinuing cases when an attorney is not competent to defend himself or herself. *Grievance Administrator v Alphonse Lewis, Jr.*, 04-75-GA (2005), and *Grievance Administrator v Neftara O. Clark*, 12-30-GA (2013).

Thus, in light of the fact that pending disciplinary matters against an attorney are discontinued when that attorney is determined to be incapacitated, there is no need to file a disciplinary matter in conjunction with a petition to transfer an attorney to inactive status under MCR 9.121(B) or after a finding of incapacity. If an attorney recovers from his or her incapacity and is reinstated pursuant to MCR 9.121(E), then petitioner will certainly be able to file a formal complaint, judgment of conviction, or reciprocal discipline proceeding for any conduct it knew of prior to, or contemporaneous with, the filing of the petition for transfer to inactive status, or, indeed, conduct learned of by petitioner after the transfer.

Accordingly, the Attorney Discipline Board, on its own motion, has considered the new formal complaint and motion, in light of the December 8, 2017 order transferring respondent to inactive status pursuant to MCR 9.121(B) and in conjunction with the Board's discretion to enter appropriate orders in discipline proceedings based on the particular circumstances of an individual case, as contemplated by the Supreme Court in *Grievance Administrator v Attorney Discipline Board*, 447 Mich 411 (1994) and *Grievance Administrator v Hibler*, 457 Mich 258 (1998), and, being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the matter of *Grievance Administrator v David G. Lutz*, 18-114-GA, is **DISCONTINUED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that petitioner's motion to consolidate and to hold proceeding in abeyance is **DENIED** as moot.

IT IS FURTHER ORDERED that nothing herein precludes petitioner from refiling any of the aforementioned discipline matters, any new matters which may arise, or from filing motions to consolidate the same upon respondent's reinstatement pursuant to MCR 9.121(E).

ATTORNEY DISCIPLINE BOARD

By: Michael Murray
Rev. Michael Murray, Chairperson

Dated: October 22, 2018