

In the Matter of the Reinstatement  
Petition of Irving A. August, P-10296,  
Petitioner/Appellant.

ADB 241-88

Decided December 22, 1989

BOARD OPINION

The Attorney Discipline Board has considered the Petition for Review filed by the Petitioner, Irving A. August, seeking reversal of a hearing panel order denying his petition for reinstatement. The hearing panel's decision to deny reinstatement is reversed. The petitioner shall be reinstated to the practice of law upon fulfillment of the conditions set forth in the accompanying order.

The petitioner in this reinstatement case was disbarred following his conviction in the United States District Court for the Eastern District of Michigan of three felony counts of obstruction of justice. Mr. August, a prominent bankruptcy lawyer, was convicted of conspiring with an intake clerk of the United States Bankruptcy Court in Detroit to manipulate the blind-draw system of assigning Chapter 11 bankruptcy petitions to judges. It was alleged that the purpose of the conspiracy was to steer cases handled by the petitioner and his law firm away from a judge known to scrutinize requests for attorney fees and toward another judge with a reputation for approving more generous fees. The petitioner was sentenced to three concurrent two-year federal prison terms and fined \$20,000. He was incarcerated for approximately one year and was discharged in November 1985.

The Petition for Reinstatement was filed October 25, 1988 and hearings were conducted before a three-member panel of the Attorney Discipline Board on February 15-16 and April 13-14, 1989. The procedure for reinstatement in the case of an attorney whose license was been revoked is set forth in Michigan Court Rule 9.123(B)(C) and MCR 9.124. The petitioner is required to establish by clear and convincing evidence the criteria enumerated in MCR 9.123(B)(1)-(9). On August 17, 1989, Wayne County Hearing Panel #8 issued its order denying reinstatement.

The panel's accompanying report disclosed that the panel's decision was not unanimous. The panel's chairman concluded that petitioner August had established each of the criteria and should be eligible for reinstatement upon his recertification by the Board of Law Examiners (this requirement is applicable to all cases where an attorney's license has been revoked or suspended for more than three years). The panel majority adopted the chairman's findings of fact and concurred in his conclusions with one significant exception.

The majority concluded that the crime committed by the petitioner resulted in such harm to the system of justice, the

public, the legal profession and the judiciary that the petitioner's subsequent conduct, no matter how exemplary, had not sufficiently ameliorated the "taint" placed upon the legal profession. For that reason, the majority was not persuaded that the petitioner could now 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 in matters of trust and confidence or to aid in the administration of justice as a member of the Bar and as an officer of the court, as required by sub-section 7 of MCR 9.123(B).

In considering this Petition for Review the Board is guided by the standard of review enunciated by the Supreme Court and the panel's findings will be upheld where there is proper evidentiary support in the whole record. In re Del Rio, 407 Mich 356; 285 NW2d 277 (1977). In this case, no challenge has been raised to the panel's findings that Mr. August's conduct since the revocation of his license in June 1983 has been exemplary and above reproach, that he has complied with the order in all respects and that he now has a proper understanding of the standards imposed on members of the Bar and will conduct himself in conformity with those standards in the future. We are presented, therefore, with the narrow issue of whether there is proper evidentiary support in the record for the conclusion of the hearing panel majority that the nature of his criminal conduct constitutes a bar to his reinstatement, regardless of his subsequent exemplary behavior. We are unable to find a basis, in the record of this case or in the jurisprudence of this state, for that conclusion.

The hearing panel majority agreed that the petitioner had satisfied the requirements of MCR 9.123(B)(6) and had 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 will conduct himself . . . in conformity with those standards." (emphasis added) There appears to be a fundamental incongruity between this finding and the majority's conclusion that petitioner cannot, nevertheless, be recommended to the public as a person fit to be consulted in matters of trust and confidence. It is clear that the denial of reinstatement in this case was based not upon a reasonable expectation of how Mr. August will conduct himself in the future but is, in effect, a decision to continue the disciplinary sanction which has been in effect since June 1983 based upon the seriousness of his prior misconduct.

Affirmation of the denial of reinstatement in this case demands a ruling that there are certain types of professional misconduct which are so egregious that reinstatement should never be granted. While we do not necessarily disagree with this proposition, it is our belief that the Supreme Court alone has the authority to promulgate such a rule.

The Board has previously been presented with this issue. In a 1988 opinion, we considered a petition filed by the Grievance Administrator seeking reversal of a hearing panel decision to

reinstate an attorney who has been convicted of a felony and was disbarred. In Matter of the Reinstatement Petition of Joseph Covington, DP 128/87 (Brd. Opn. August 29, 1988), the petitioner had been convicted in the Detroit Recorder's Court of the felony of attempting to obtain money over \$100 by false pretenses where the attorney had represented to a client in a criminal matter that he could "fix" the case by paying a substantial amount of money to an assistant prosecutor. The two-year suspension imposed by the hearing panel in that case was appealed by the Grievance Administrator to the Attorney Discipline Board which increased discipline to revocation. The Board noted in its opinion that the misconduct

"ranks among the most grave and offensive to come before this Board . . . such conduct not only violates the essence of the attorney/client relationship, it raises, among other things, the question of whether the respondent ever has or will have the requisite character which is the basis of the Court's endorsement of every member of the Bar." Matter of Joseph Covington, DP 39/82 (Brd. Opn., March 18, 1983, p. 256)

If the offense in Covington ranked among the most grave and offensive to come before the Board, petitioner August's conduct must also be included in that select category. Like Mr. Covington, Mr. August was convicted of a felony which involved a subversion of the system of justice which, as an officer of the court, he was sworn to uphold. As we noted in Covington, we cannot necessarily disagree with the argument that there may be certain types of misconduct which are, by their very nature, so very reprehensible and inimical to basic principles of justice that the offending attorney's license should be permanently revoked. We did not, however, apply such a rule in that case. "Disbarment is not necessarily permanent in Michigan and the Supreme Court has not ruled that it should be, even in the most extreme cases." Matter of the Reinstatement of Covington, supra, p. 3.

As in the instant case, petitioner Covington demonstrated to a reinstatement panel that his conduct since his disbarment had been exemplary and above reproach, and that he now understood his obligations as an attorney. The Grievance Administrator argued that the petitioner's felony conviction was for conduct which was so heinous that a genuine question existed as to whether or not he could ever satisfy the requirements of MCR 9.123(B)(6,7). The Grievance Administrator urged that a separate standard of review should be employed in these reinstatement proceedings in recognition of a distinction between an order of suspension and an order of revocation. In its report, the hearing panel in Covington noted:

"Obtaining money from a client upon the representation that it was to be used to

subvert the criminal system is about as serious an ethical offense as the panel can imagine . . . however, if the Supreme Court had wished disbarment to be forever, it has had ample opportunity to so state. It has not chosen to do so either in its opinions or its rule-making capacity." Matter of the Reinstatement Petition of Covington, supra, p. 2.

It has now been more than ten years since our Supreme Court addressed its attention to the reinstatement process in a written opinion. In that case, Petition of Albert, 403 Mich 346; 269 NW2d 173 (1978), the Court ruled that it was improper to deny reinstatement to a suspended attorney on the ground that he had not shown proper remorse for his wrongdoing. The most wide-ranging of three separate opinions filed in that case contains Justice Levin's references to the lack of clear guidelines to be followed by the petitioner or the hearing panel in the reinstatement process.

"A suspended lawyer petitioning for reinstatement should not feel compelled to present an exhaustive account of his life and character in the hope that he will, at some point, stumble on the essence of the problem as perceived by the panel and convince it that he is basically a good person who should be permitted to practice law . . . the suspended lawyer should not be put in the position of a supplicant searching for the formula which will enable him to return to practice." Petition of Albert, supra, 269 NW2d 178, 179.

In the instant case, it is clear from the record below that petitioner August presented, during four days of hearing, a close approximation to the exhaustive account of his life and character referred to by Justice Levin. It is also clear, however, that whether or not he convinced the panel that he was "a good person", the nature of the criminal conviction would have prevented him from convincing the panel majority of his eligibility for reinstatement.

Applying the Board's conclusion in Covington, we note that the Court Rules have extended to Mr. August the promise that he could file a petition for reinstatement after five years. [MCR 9.123(B)(2)] Neither the Court Rules or the opinions of the Board or the Supreme Court has identified any class of petitioners for whom the standards of MCR 9.123(B) should be applied more stringently. That observation was echoed by the hearing panel chairman in this case in his minority opinion:

"As serious as August's crimes were, the Court Rules have, at all time since his disbarment, led the petitioner to believe that he could file a petition for reinstatement after five

years. Nowhere is it stated in the rules that a person convicted of a heinous crime, or manipulation [of] the justice system or committing homicide, or some other crime, shall be permanently disbarred. Had the Supreme Court wished to preclude certain offenders from ever applying for reinstatement, it would have said so pursuant to its rule making powers. It is not the function of this panel to make a determination as to what is, or what is not, the basis of permanent revocation." (Minority Opinion, p. 16.)

Although we support the proposition that there may be certain types of misconduct which are so heinous or inimical to the justice system that the permanent removal of that individual from the legal profession is warranted, we agree with the conclusion drawn in the hearing panel minority report that petitioner August has established his eligibility for reinstatement in accordance with the present rules. That report is therefore adopted as the basis for our decision to grant the petition for reinstatement in this case.

John F. Burns; Hon. Martin M. Doctoroff; Remona A. Green; Theodore P. Zegouras

DISSENT

By Linda S. Hotchkiss, M.D.

I would affirm the decision of the hearing panel to deny reinstatement in this case. The panel majority stated its rationale for finding that reinstatement of a former attorney whose crime goes to "the very heart of the administration of judicial system and to the jugular of the judiciary" would only "further erode an already diminished public confidence in the legal system." The fundamental goal of this disciplinary system is, according to MCR 9.105, "the protection of the public, the courts and the legal profession." The hearing panel decision in this case was clearly consistent with that goal. My colleagues on the Board acknowledge that the petitioner's conduct which led to his conviction was particularly reprehensible. I am not persuaded that the hearing panel below abused its discretion.

Furthermore, I do not agree with the implication that these reinstatement proceedings were unfair by allowing the petitioner to seek reinstatement and then denying reinstatement where he failed, in the panel's opinion, to establish his eligibility by clear and convincing evidence. Mr. August was not merely suspended from the practice of law. His license to practice law was revoked. The Order of Revocation entered in June 1983 declared that he was no longer entitled to the rights and privileges afforded to members of this honored profession. While the Court Rules grant a disbarred

attorney the right to petition for reinstatement after five years, there is certainly no expressed or implied guarantee that the license to practice law will be restored. I agree with the panel majority that reinstatement in this case will inevitably erode public confidence in the legal system and that that consideration was relevant to the finding that the petitioner cannot be safely recommended to the public as a person fit to act in matters of trust and confidence.

(Board Members Hanley M. Gurwin and Robert S. Harrison recused themselves and did not participate in the discussion or decision in this case.)