RENDERED: FEBRUARY 20, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000666-OA

CHARLES H. DETERS, ET AL — PETITIONERS

V.

JANE H. HERRICK, ET AL — RESPONDENTS

MEMORANDUM OPINION AND ORDER DENYING WRIT OF PROHIBITION AND DISMISSING REQUEST FOR DECLARATORY JUDGMENT

I. Factual & Procedural Background

Charles Deters' son Eric Deters was temporarily suspended from the practice of law in 2013. Prior to his suspension Eric was the sole owner of the Deters' law firm. Following his suspension, he transferred ownership of the firm to Charles.

Eric recently sought reinstatement to the practice of law. Accordingly, the Character and Fitness Committee (CFC) of the Kentucky Bar Association (KBA) conducted an investigation and hearing regarding whether Eric should be reinstated. Following a hearing on the matter, the CFC determined in its findings of fact and conclusions of law that Eric was working for the Deters' law

firm during his suspension in violation of Supreme Court Rule 3.130(5.7) (Rule 5.7). The CFC specifically noted what appeared to be improper compensation to Eric by the firm.

Based on these findings, the CFC later filed two complaints against Charles alleging Rule 5.7(b) violations for employing Eric at the firm during his suspension. On June 4, 2019, in connection with the complaints filed against Charles, the KBA's Chief Bar Counsel filed an application for a subpoena with the Inquiry Commission. This subpoena was directed at Charles, and a hearing on the application for it was held on June 17, 2019. Charles appeared through counsel and did not object to the subpoena, but instead requested additional time to comply. The Inquiry Commission granted him an extension of time. On June 18, 2019, the Inquiry Commission authorized issuance of the subpoena, with a compliance date of September 3, 2019.

Charles never complied with that subpoena. Instead, six weeks later on August 29, 2019, Charles informed the Inquiry Commission for the first time that he sold the Deters' firm before the hearing on the application for the subpoena. Charles sold the firm to Glenn Feagan via a "Transfer Document" that read, in its entirety:

> Charles H. Deters transfers to Glenn Feagan all his rights and interests in Deters & Associates, P.S.C. This is effective January 1, 2019.

The document was dated June 10, 2019, and was signed by Charles. Therefore, the transfer took place after Bar Counsel filed her application for the

subpoena on June 4th, but before the hearing on the application on June 17th. But, in Charles' response to the subpoena he stated:

> Prior to the date of the subpoena and your request, I no longer have any control or possession of the documents and information you request or authority to respond to your request. Therefore, I cannot legally or ethically produce what you request. I am no longer the owner or affiliate with the law firm. This predated your subpoena.

So, on September 20, 2019, Bar Counsel filed a second application for subpoena seeking information from several banks, including Respondent Heritage Bank. At the hearing on that application, Charles admitted that the scope of the subpoena was reasonable, but that Mr. Feagan could provide that information instead of the subpoenaed banks. Rather than relying on Mr. Feagan, an out-of-state attorney, the Inquiry Commission found good cause to issue the second subpoena. It was issued on October 7, 2019. That subpoena sought copies of the firm's "bank statements, cancelled checks (front & back), deposit items, deposit slips, ACH transaction reports, wire transfer detail reports, bank check purchases, teller journals, and signature cards" from October 1, 2013, Eric's date of suspension, to the present.

On October 11, 2019, Charles and Mr. Feagan (Petitioners) filed a complaint against Bar Counsel and Heritage Bank in Boone Circuit Court to quash the second subpoena. On October 18, Bar Counsel moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. After a hearing on that motion, the Petitioners filed this original action seeking a writ of

prohibition and a declaratory judgment. The Boone Circuit Court dismissed the action on November 26.

II. Relief Requested

In this original action the Petitioners request first that this Court issue a writ of prohibition against Bar Counsel, the Inquiry Commission, the Executive Director of the KBA, and Heritage Bank from executing the second subpoena served on Heritage Bank.[1] They also request a declaratory judgment that the Boone Circuit Court has subject matter jurisdiction to quash the second subpoena served on Heritage Bank.

A. Writ of Prohibition

A writ of prohibition is an extraordinary remedy that this Court may issue only upon a showing that:

> (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable harm will result if the petition is not granted.[2]

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[1] We note that Bar Counsel and the Executive Director of the KBA are not properly named parties to this writ motion, as the Inquiry Commission is the only party with the power to issue subpoenas. *See Moreland v. Helm*, 350 S.W.2d 149, 149 (Ky. 1961) (holding "[t]he remedy of prohibition does not lie against one who neither possesses nor proposes to exercise a judicial or quasi-judicial function.").

[2] *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).

Here, the Petitioners admit that the Inquiry Commission was acting within its jurisdiction in issuing the subpoena. Therefore, to be entitled to a writ they must show: (1) that the Inquiry Commission acted erroneously by issuing the second subpoena to Heritage Bank; (2) there is no adequate remedy on appeal or otherwise; and (3) great injustice and irreparable harm will result if the petition for the writ is not granted.

First, the Inquiry Commission did not act erroneously in issuing the subpoena. SCR 3.180(3) provides:

> Upon application of Bar Counsel to the Inquiry Commission and after a hearing of which Respondent is given at least five (5) days' notice, for good cause shown the inquiry Commission may authorize the Director or the Disciplinary Clerk to issue a subpoena to a Respondent, or any other person or legal entity, to produce to Bar Counsel **any evidence deemed by the Inquiry Commission to be material to the investigation of a complaint** and to testify regarding such production.

(emphasis added). The evidence sought by the subpoena is material to investigating the complaints against Charles for allegedly violating Rule 5.7 by employing Eric, a suspended attorney. In addition, SCR 3.180(3) does not limit the persons or entities to whom the Inquiry Commission may issue a subpoena, and expressly allows issuance to "any other person or legal entity." Finally, the scope of the subpoena is not inherently unreasonable: it is limited to the bank records of the Deters' law firm during the period that Eric was suspended from practicing law in Kentucky. The first prong has therefore not been met.

Second, the Petitioners have not demonstrated that there is no adequate remedy on appeal or otherwise. The Rules governing attorney discipline provide them with adequate remedies at multiple levels of the disciplinary process. At each step in that process from the initial complaint to review of the case by this Court they will have the opportunity to challenge both the subpoena and any documents obtained therefrom.[3] Accordingly, the second prong has not been met.

Finally, the Petitioners have not demonstrated that great injustice and irreparable harm will result if the petition is not granted. The only injury or harm they point to is that they will have to hire a forensic accountant to respond to Bar Counsel's questions about the firm's banking transactions over the last six years. "As to great and irreparable injury, we see none. Inconvenience, expense, annoyance, and other undesirable aspects of litigation may be present, but great and irreparable injury is not."[4] As such, the Petitioners have also failed on the third and final prong of the requirements for a writ of prohibition. Their petition is accordingly denied.

B. Declaratory Judgment

The Petitioners next ask this Court to issue a declaratory judgment stating that the Boone Circuit Court has subject matter jurisdiction to enforce

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[3] *See e.g.*, SCR 3.190; SCR 3.200; SCR 3.285; SCR 3.240; SCR 3.300; SCR 3.340; SCR 3.360; and SCR 3.370.

[4] *Fritsch v. Caudill*, 146 S.W.3d 926, 930 (Ky. 2004).

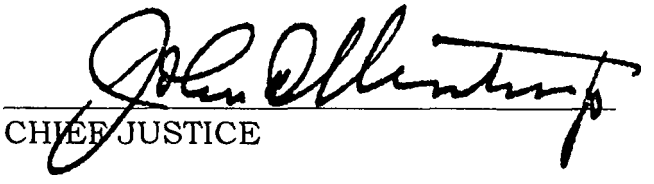
or quash the second subpoena. We decline to do so, as this Court lacks jurisdiction to issue declaratory judgments.[5]

Further, this Court "is vested with the **exclusive jurisdiction** over [attorney] disciplinary proceedings."[6] If we were to hold that the Boone Circuit Court has jurisdiction to rule on the second subpoena, it would undermine this Court's exclusive jurisdiction over attorney discipline actions. We therefore dismiss the Petitioners' petition for declaratory judgment.

III. Conclusion

Based on the foregoing, the Petitioners' petition for a writ of prohibition is denied. Their request for a declaratory judgment is dismissed.

Minton, C.J.; Hughes, Keller, Lambert, Nickell, VanMeter, and Wright, J.J. sitting. Minton, C.J.; Hughes, Lambert, Nickell, VanMeter and Wright, J.J. concur. Keller, J. sitting, concurs in result only.



CHIEF JUSTICE

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[5] *See* Ky. Const. §110(2)(a) ("The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause[.]"); and *Walz v. Northcutt*, 129 S.W.2d 124, 126 (Ky. 1939) ("It is therefore quite clear that the entertainment of declaratory judgment actions is not embraced in the class of cases of which [this Court] has original jurisdiction under section 110 of our Constitution.").

[6] *Kentucky Bar Ass'n v. Shewmaker*, 842 S.W.2d 520, 522 (Ky. 1992) (emphasis added).

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