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OPINION	:	No. 80-123
	:	
of	:	<u>April 3, 1980</u>
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SUBJECT: ELIGIBILITY REQUIREMENTS FOR SUPERIOR COURT JUDGE—A person is not eligible to be elected a judge of the Superior Court if, during the ten years prior to the election, that person was suspended from membership in the State Bar for over two years for nonpayment of fees.

The Honorable Joseph D. Allen, District Attorney, County of Mendocino, has requested an opinion on the following question:

Is a person eligible to be elected a judge of the Superior Court if, during the ten years prior to the election, that person was suspended from membership in the State Bar for over two years for nonpayment of fees?

CONCLUSION

A person is not eligible to be elected a judge of the Superior Court if, during the ten years prior to the election, that person was suspended from membership in the State Bar for over two years for nonpayment of fees.

ANALYSIS

The District Attorney has informed us that a person desiring to be a candidate for election to the position of judge of the Superior Court at the June, 1980, election was admitted to the State Bar in January, 1969, and is currently an active member of the State Bar in good standing. Since June, 1970, however, this person was suspended from State Bar membership for a total of two years and four months during the period January, 1976, to May, 1978, for nonpayment of State Bar fees.

California Constitution Article VI, section 15 provides:

“A person is ineligible to be a judge of a court of record unless for 5 years immediately preceding selection to a municipal court or 10 years immediately preceding selection to other courts, the person has been a member of the State Bar or served as a judge of a court of record in this State. A judge eligible for municipal court service may be assigned by the Chief Justice to serve on any court.”

The question presented is whether suspension from membership in the State Bar for nonpayment of Bar fees during the ten-year period preceding election as a judge renders a candidate ineligible for that office. Our review of the history and court interpretation of the constitutional provision and the State Bar Act (Bus. & Prof. Code, § 6000 *et seq.*) leads us to conclude that the candidate is ineligible for the office.

The predecessor section to Article VI, section 15 (Art. VI, § 23) was adopted as part of the 1879 Constitution and read:

“No one shall be eligible to the office of Justice of the Supreme Court, or to the office of Judge of a Superior Court, unless he shall have been admitted to practice before the Supreme Court of the State.”

In 1904, the section was amended to add justices of the newly created district courts of appeal. In 1924, judges of the newly created municipal courts were added to the list and a five year eligibility requirement inserted, so that the provision read:

“No person shall be eligible to the office of a justice of the supreme court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the supreme court of the state for a period of at least five years immediately preceding his

election or appointment to such office.”¹

As part of a constitutional revision proposition in 1966, former section 23 was repealed and replaced by section 15:

“A person is ineligible to be a judge of a court of record unless for 5 years immediately preceding selection to a municipal court or 10 years immediately preceding selection to other courts, he has been a member of the State Bar or served as a judge of a court of record in this State. A judge eligible for municipal court service may be assigned by the chairman of the Judicial Council to serve on any court.”²

The Constitutional Revision Commission had proposed to the Legislature a new section to replace the former section 23, with three substantive changes: 1) to remove the now obsolete municipal court grandfather clause; 2) to increase the eligibility requirement from five to ten years for all judges above the municipal court level; and 3) to authorize the practice of allowing municipal court judges to serve on assignment to a higher court. The critical language proposed relating to eligibility was:

“... unless for . . . 10 years immediately preceding selection to other courts, he has in this State been admitted to practice law” (Cal. Const. Rev. Comm., Report to Joint Committee on Legislative Organization (1966) p. 93.)³

The Legislature changed the words “he has in this State been admitted to practice law” to “he has been a member of the State Bar.” The Ballot arguments give no indication that this change was one of substance. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 8, 1966) pp. 1–2), nor was any change in the meaning intended. Judicial Council Report to the Governor and the Legislature (1967) pp. 78–79; 52 Ops. Cal. Atty. Gen. 101, 102 (1969).) Indeed, the change only conforms to the existing

¹ A 1950 Amendment added a grandfather clause for judges of superseded courts, and is not relevant to this discussion.

² 1974 Amendment, as part of Proposition 11 in the November election, desexed section 15, and it now reads as set out at the beginning of this analysis.

³ The California Constitution Revision Commission proposed a new section 16 as follows:

“A person is ineligible to be a judge of a court of record unless for 5 years immediately preceding selection to a municipal court or 10 years immediately preceding selection to other courts, he has in this State been admitted to practice law or served as a judge of a court of record. A judge eligible for municipal court service may be assigned by the chairman of the Judicial Council to serve on any court.”

requirement that a person must be a member of the State Bar in order to practice law in the state. (Bus. & Prof. Code, § 6125.)

We conclude from this history that the eligibility language of “10 [or 5] years immediately preceding selection” contained in present Article VI section 15 has the same meaning and requirements as its predecessor Article VI section 23 had since its adoption in 1924, and that the cases interpreting section 23 are applicable to the present language in section 15.

The State Bar act provides for two classes of members, active and inactive. (Bus. & Prof. Code, § 6003.)⁴ Active membership in the State Bar is required in order to practice law (§ 6125),⁵ and practicing law without being an active member is a misdemeanor. (§ 6126.) This section provides:

Any person advertising himself as practicing or entitled to practice law or otherwise practicing law, after he has been disbarred or *while suspended from membership in the State Bar*, or who is not an active member of the State Bar, is guilty of a misdemeanor.” (Emphasis added.)

Suspension from membership in the State Bar can come from two sources. The first is disciplinary suspension by the Supreme Court for violation of the Rules of Professional Conduct (§ 6177) or any other laws providing such discipline. (§§ 6078; 6100.)⁶

⁴ All references to unidentified code sections hereinafter are to the Business and Professions Code.

⁵ We note that the Legislature has authorized the creation of temporary justice court judgeships (Gov. Code, § 71700 *et seq.*) known as Circuit Justice Court Judges. Government Code section 71702 (a) (2) requires circuit justice court judges to become inactive members of the State Bar. We express no opinion herein as to whether the time served in this capacity counts for eligibility for appointment or election to a municipal or higher court under Article VI section 15, but do note that inactive members are members of the State Bar. (§ 6006.) See also unpublished opinion of this office dated February 27, 1973 (IL 73–41) relating to service as a traffic referee qualifying for selection as a judge.

⁶ These statutes seem to cloak the authority to suspend in terms of suspension from the practice of law. Section 6126, above, talks of suspension from membership. The typical Supreme Court order for suspension for nonpayment of dues talks of suspension from membership and from “the rights and privileges of an attorney”:

“IT IS ORDERED that the persons hereinafter named are and each of them is suspended from membership in The State Bar of California and from the rights and privileges of an attorney at law from and after the date of this order, and until payment of all accrued fees and penalties now delinquent and all of which may hereafter become due before date of payment;

Secondly, a State Bar membership may be suspended by the Supreme Court for nonpayment of annual fees. Section 6143 provides:

“Any member, active or inactive, failing to pay any fees after they become due, and after two months written notice of his delinquency, shall be suspended from membership in the State Bar.

“He may be reinstated upon the payment of accrued fees and such penalties as may be imposed by the board, not exceeding double the amount of delinquent dues.”

As noted, one who is suspended and then practices law is guilty of a misdemeanor. (§ 6126; *Hill v. State Bar of California* (1939) 14 Cal. 2d 732, 733.) Further, practicing law while suspended for non-payment of State Bar fees is grounds for disciplinary suspension. (*Taylor v. State Bar* (1974) 11 Cal. 3d 424, 428; *Herron v. State Bar* (1944) 24 Cal. 2d 53.)

The Supreme Court in 1925 said of the then requirement of Article VI section 23 relating to a period of at least five years immediately preceding his election . . .”:

“ . . . [I]t seems to us that section 23 of said [1942] amendment was intended to define and state an essential qualification of those persons who were to become and be and act as judges of . . . courts . . . “ (*Helwig v. Payne* (1925) 197 Cal. 524, 527.)

Thus, as of the time of election (*Id.* At 528; 52 Ops. Cal. Atty. Gen. 101 (1969)) a candidate for the Superior Court must have been a member of the State Bar (or a judge of a court of record) for the ten years immediately preceding that election.

The Supreme Court has also held that a person who has been suspended from practice during the requisite period (then five years) is ineligible for the office. (*Johnson v. State Bar* (1937) 10 Cal. 2d 212, 215–216.) As the court stated there:

“IT IS FURTHER ORDERED that upon payment by any person so suspended of all fees and penalties due, the suspension shall terminate and such person be fully restored to membership in The State Bar of California, and to all rights and privileges, duties and responsibilities incident thereto.”

We have little doubt that the legal effect is the same whether the attorney is suspended from membership or from the practice of law.

“... Article VI, section 23, of the California Constitution provides that, ‘No person shall be eligible to the office of . . . a judge of a superior court . . . unless he shall have been admitted to practice before the Supreme Court of the state for a period of at least five years immediately preceding his election or appointment to such office.’ It follows that no one is eligible to hold the office of superior judge who has not been an admitted practitioner before the Supreme Court of this state for a period of five consecutive years immediately preceding his election or appointment to such office. Certainly an attorney who has been suspended from the practice of law during this period cannot successfully claim to be eligible. (*State v. Monfort*, 93 Wash. 4.) It is self-evident, we think, that said provision requires as a fundamental qualification for the office of superior judge, that the candidate for such position be qualified as an attorney actually entitled to practice in the state courts” (*Id.* at 216; see also *Townsend v. State Bar* (1935) 4 Cal. 2d 619.)

Mr. Johnson was under suspension for disciplinary reasons (See *Johnson v. State Bar* (1935) 4 Cal. 2d 744.) Thus, the question remains as to whether there is a qualitative difference between suspension for disciplinary reasons and suspension for nonpayment of fees to warrant a conclusion that the latter does not affect eligibility under Article VI section 15 of the constitution. We think not.

First, reading Article VI section 15 literally, as the court did in the *Johnson* case, one must conclude that one who is suspended for nonpayment of fees during the requisite time is not eligible because that person has not for ten years immediately preceding election to the Superior Court been a member of the State Bar. Secondly, a suspension for nonpayment of dues has all the serious effects and attributes of a suspension for disciplinary reasons. The attorney is not authorized or permitted to practice law during that suspension, and such practice, if undertaken, is a misdemeanor and subjects the attorney to further discipline. An attorney who holds himself out as practicing law while under suspension is guilty of conduct involving moral turpitude. (*In re Cadwell* (1975) 15 Cal. 3d 762, 771.) Finally, if this period of time involved in a suspension for nonpayment of fees does not have the legal effect of interrupting the Constitutional five or ten-year requirement, a person could obtain admission to the State Bar, not pay the State Bar fees and cease practicing for a period of years, and then by the simple expedient of paying up his fees,⁷ be eligible for the Municipal or Superior Court. We believe the requirement of

⁷ We do note that under the Rules and Regulations of State Bar Article I, section 10, a member of the State Bar who has been suspended for nonpayment of membership fees may be automatically reinstated by payment of the delinquent fees, plus a penalty, *plus the fees due for the period of suspension*. In contrast, in cases of suspension for disciplinary reasons, no membership

Article VI section 15 of the constitution is designed, at least in part, to establish a minimum qualification of actual experience and skill in law, demonstrated by uninterrupted membership in the State Bar.⁸ We conclude, therefore, that a person who has, within the ten years immediately preceding his selection to the Superior Court, either by election or appointment, been suspended from membership in the State Bar for nonpayment of fees is ineligible for that office.

fees are charged for the period of suspension. (Rules and Regs. Of State Bar, art. I, § 6 E.) The distinction does not alter our basic conclusion herein. A suspension for nonpayment of fees is a suspension from membership in the State Bar.

⁸ We also note that even if the language of Article VI, section 15 of the Constitution requiring State Bar membership for ten years “immediately preceding” selection is not read literally or is ignored, the individual involved in this inquiry would not meet the constitutional prerequisite. He was, we are informed, admitted to the State Bar in January, 1969. As of June, 1980 (the election date), after subtracting the two years and four months during which he was suspended from membership in the State Bar, he will have had less than ten years total membership and would thus be ineligible for selection to the superior court.