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Opinion Committee

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SMITH COUNTY COURTHOUSE  
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November 6, 1997

Ms. Sarah Shirley  
Chair-Opinion Committee  
Attorney General's Office  
P.O. Box 12548  
Austin, Texas 78711-2548

*RD-1027*

PLEASE EXPEDITE

# ML-39899-97  
39899

Re: Once an attorney, who is not in good standing due to non-payment of Texas State Bar dues, pays his outstanding membership dues, does this entitle him to reinstatement in "good standing" that is retroactive to the time of suspension which would prevent prosecution and conviction under Section 38.122 of the Texas Penal Code, Falsely Holding Oneself Out as a Lawyer, for representing a criminal defendant in court during the time of suspension?

Dear Ms. Shirley:

This letter is written to request an opinion on an issue affecting the public interest, that of the application of Section 38.122 of the Texas Penal Code to the status of ineligible attorneys who are delinquent in paying their membership dues at the times they represent criminal defendants in a District or County Courtroom.

Section 38.122 of the Texas Penal Code, states:

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country, and is in good standing with the State of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.

© Final conviction of falsely holding oneself out to be a lawyer is a serious crime for all purposes and acts, specifically including the State Bar Rules.

In October 10, 1997 a list was published by the State Bar of Texas of Licensed Texas Attorneys not eligible to practice law in Texas for failure to pay membership dues and

occupational tax. There were attorneys on this list, that although ineligible to practice law, did in fact appear in court and represent criminal defendants. These attorneys were suspended on September 1, 1997 and were reinstated in October, 1997.

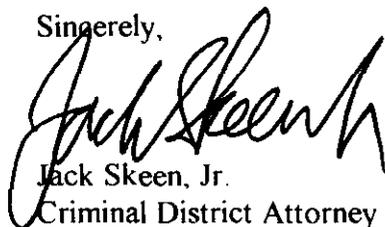
The Texas Court of Criminal Appeals in Hill v. State, Tex.Cr.App.1965, 393 S.W.2d 901, 904, held that " the status of a delinquent attorney not being a member of the State Bar of Texas does not place him in the position of being 'unlicensed to practice law in this State'. He only has to pay his dues . . .to resume his status as a practicing lawyer." The State Bar Act was considered retroactive in its application; and thus when the delinquent attorney pays his dues, he is restored to the status he occupied prior to becoming delinquent. Is the attorney restored to the status of "good standing" retroactively as to prevent prosecution and conviction under Section 38.122 of the Penal Code of Texas?

A Judge of a State District Court of Smith County has referred a case to the Criminal District Attorney's Office for presentation to a grand jury on an attorney who practiced law by representing a criminal defendant in the District Court while suspended from the practice of law and not in good standing, but later paid his bar dues and was reinstated in good standing. Therefore, our question is whether or not the attorney is subject to criminal prosecution by the Criminal District Attorney's Office for violation of Penal Code, Section 38.122 in representing a criminal defendant by guilty plea or trial or other action during the time he was suspended from the practice of law even though he later paid the delinquent dues and received a letter reinstating him to practice law back to the time of the suspension?

We have researched the application of Section 38.122 of the Penal Code as it applies to the caselaw that holds the attorney is restored to the status he occupied prior to becoming delinquent upon payment of the delinquent bar dues. I have attached that research to this letter.

Please advise, if in fact, the ineligible attorney is restored to the good standing status after payment of all delinquent membership dues and fees retroactive that would prevent prosecution and conviction under the criminal statute section 38.122, *Falsely Holding Oneself Out as a Lawyer*, for acts constituting practicing law while not in good standing during the time of the suspension? Also please advise if occupational taxes are included in the category of membership dues?

Sincerely,



Jack Skeen, Jr.  
Criminal District Attorney  
Smith County Courthouse  
100 N. Broadway  
Tyler, Texas 75702

**Once an attorney, who is not in good standing due to non-payment of Texas State Bar dues, pays his outstanding membership dues, does this entitle him to reinstatement in “good standing” that is retroactive to the time of suspension which would prevent prosecution and conviction under Section 38.122 of the Texas Penal Code, **Falsely Holding Oneself Out as a Lawyer, for representing a criminal defendant in court during the time of the suspension?****

Section 38.122. of the Texas Penal Code states:

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country, and is in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.

(c) Final conviction of falsely holding oneself out to be a lawyer is a serious crime for all purposes and acts, specifically including the State Bar Rules.

Article III. Section 5 of the State Bar Rules states:

If a member is in default of payment of membership fees or any assessment levied by the Court on the thirtieth day after the due date, the clerk shall forthwith notify the member of default. If the fees and assessments are not paid on or before sixty (60) days after the mailing of the notice of default, the defaulting member shall automatically be suspended from the practice of law. Any practice of law during such suspension shall constitute professional misconduct and subject the member to discipline.

Article III. Section 7(A) of the State Bar Rules states:

When a member, who has been suspended for nonpayment of fees or assessments, removes such default by payment of fees or assessments then owing, plus an additional amount equivalent to one-half the delinquency, the suspension shall automatically be lifted and the member restored to former status. Return to former status shall be retroactive to inception of suspension, but shall not affect any proceeding for discipline of the member for professional misconduct.

“The status of a delinquent attorney not being a member of the State Bar of Texas does not place him in the position of being ‘unlicensed to practice law in this State’. He only has to pay his dues (he does not vacate the office of Attorney-at-law) to resume his status as a ‘practicing lawyer’. Such attorney does not have to again show his fitness or qualifications to practice law. He does not have to be re-admitted to the practice. His competency as an attorney has not been diminished. He faces no disbarment proceedings. He automatically resumes his status as an active member of the State Bar of Texas. The payment of his delinquent dues has the same effect for him as a nunc pro tunc judgment. He, in effect, enters a nunc pro tunc judgment for himself.” Ex parte Lefers, 171 Tex. Cr. R. 229, 347 S. W. 2d 254, 255.

“It is clear to us that the State Bar Act is retroactive in its applications. When the delinquent attorney-member pays his delinquent dues he then is restored to the status that he occupied prior to becoming delinquent.” Attorney was not precluded from recovering compensation for legal services rendered during time of delinquency on grounds that he was disqualified to practice law because of forfeiture of his bar membership for non-payment of dues. Stokes v. Sundermeyer, Tex.Civ.App., 170 S.W.2d 583. Writ of error was refused, no reversible error, by our Supreme Court of Texas.

The Court of Criminal Appeals held that attorney who tried criminal cases two weeks before paying delinquent state bar dues and who was reinstated a week after paying those dues had purged himself of delinquency, and his acts during the period when his name was removed from membership of State Bar were valid and revitalized and did not entitle defendant to reversal of convictions. Elbert Hill v. The State of Texas, 393 S.W. 2d 901(Tex.Cr.App. 1965). Hill stating that it has overruled Martinez v. The State of Texas, 318 S.W.2d 66, (Tex.Cr.App. 1958), finds the State Bar Act to be retroactive in its application.

In Beto v. Barfield, 391 F.2d 275 (Fifth Cir. 1968) certiorari denied 89 S.Ct. 205, 393 U.S.888, the court recognizing that Hill had overruled Martinez, held that Texas courts now consider that lawyers who are delinquent in paying bar dues are still practicing attorneys and so shall they, the Fifth Circuit, and in doing so, the failure of appointed counsel to have paid dues did not invalidate defendant's conviction.

Attorney's act of practicing law while his license was suspended for failure to pay bar dues constituted professional misconduct and subjected him to discipline by bar; all actions by attorney were not ratified after he paid his delinquent dues, and once he paid his dues, alleged ratification was not retroactive such that no professional misconduct occurred in Commission For Lawyer Discipline v. David G. Sherman, No.01-96-00869-CV, (Tex.Civ.App.--Houston [1st District] 1997). However, when Sherman attempted to defend his case by relying on Hill, the court stated that the Hill case is distinguishable from the case at bar since it does not deal with State Bar disciplinary proceedings. Id. At 229.

The Sherman court holds that all actions by the attorney are not ratified by the payment of the delinquent dues to place him in good standing retroactively for the purpose of State Bar disciplinary proceedings. But then the Sherman court distinguishes between those State Bar disciplinary proceedings and those proceedings to determine the validity of criminal verdicts in Hill, where criminal verdicts of defendants represented by attorneys delinquent in payment of dues have been upheld.

The literal reading of Section 38.122 clearly defines the offense to be that of having intent to obtain an economic benefit by holding oneself out as a lawyer. The only defense is that of being currently licensed to practice law and being in good standing with the State Bar. The statute calls this a serious crime and specifically includes the State Bar Rules.



## MEMORANDUM

TO: Interested Parties  
FROM: Sarah J. Shirley, Chair, Opinion Committee   
SUBJECT: Attached Opinion Request

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If you are interested in submitting a brief regarding the attached opinion request, we ask that you do so within thirty days of the date on the attached acknowledgement letter. We have informally set this thirty-day briefing period as a matter of policy to ensure that the Opinion Committee will have adequate time to review and consider arguments relevant to the request from all interested parties. If you need additional time in which to submit your comments, please let us know by calling (512) 463-2110, so that we can make the appropriate file notation.

This office is happy to provide you with copies of briefs submitted by other interested parties. However, in order to expedite receipt of those briefs, I suggest that you contact those parties directly and request that they provide you with a copy of their submission.

Thank you for your cooperation.