

FILED MARCH 17, 2017

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 16-R-13205
	)	
STEVEN HOWARD UNGER,	)	OPINION AND ORDER
	)	
Petitioner for Reinstatement.	)	
_____	)	

THE COURT.\*

In 2002, Steven Howard Unger resigned from the State Bar of California with disciplinary charges pending. In 2016, he filed a petition for reinstatement to the practice of law (petition) and attached evidence that he had taken and passed the Attorneys’ Examination administered by the Committee of Bar Examiners (Attorney Exam). On July 27, 2016, a hearing judge dismissed the petition as untimely under rule 9.10(f) of the California Rules of Court (Rule 9.10(f)). Unger appeals, arguing that the hearing judge erroneously interpreted that rule, and requests that his petition proceed on the merits. The Office of the Chief Trial Counsel of the State Bar (OCTC) maintains that the hearing judge ruled correctly. Having reviewed the pleadings submitted in this matter, we reverse the dismissal and remand for further proceedings under rule 5.440 et seq. of the Rules of Procedure of the State Bar.

**I. PROCEDURAL HISTORY ON REVIEW**

On September 1, 2016, we granted Unger’s unopposed request to designate this matter for summary review under rule 5.157 of the Rules of Procedure of the State Bar. Unger and OCTC then submitted briefing. On November 4, 2016, we granted Unger’s unopposed request

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\*Before Purcell, P. J., Honn, J., and McGill, J.

for judicial notice and ordered the record augmented to include a copy of a non-published Hearing Department order filed on August 3, 2016, in *In the Matter of Ellerman* (State Bar Court Case No. 16-R-13066) (*Ellerman*). (Rules Proc. of State Bar, rules 5.156(B), 5.157(D); Evid. Code, § 452, subd. (d).) Oral argument took place on January 25, 2017.

## II. FACTS AND CONCLUSIONS OF LAW

In summary review proceedings, the hearing judge's decision is final as to all material findings of fact, which are binding on the parties. (Rules Proc. of State Bar, rule 5.157(B).) On review, the issues "are limited to: [¶] (1) contentions that the facts support conclusions of law different from those reached by the hearing judge; [¶] (2) disagreement about the appropriate disposition or degree of discipline; or [¶] (3) other questions of law." (Rules Proc. of State Bar, rule 5.157(B).) If the parties do not raise an issue or contention, it is waived. (Rules Proc. of State Bar, rule 5.157(C).)

In this case, the sole question before us is whether Unger timely filed his petition. To answer this, we must determine what triggers the time limitation set forth in Rule 9.10(f). That rule states, in relevant part, that petitioners for reinstatement who resigned with charges pending "must establish present ability and learning in the general law by providing proof, at the time of filing the application for readmission or reinstatement, that they have taken and passed the [Attorney Exam] within three years prior to the filing of the application for readmission or reinstatement."<sup>1</sup>

### A. Petition for Reinstatement

Unger sat for the Attorney Exam administered in February 2013. He received notification, dated May 17, 2013, that he had passed the exam. On May 16, 2016, Unger filed

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<sup>1</sup> Similarly, rule 5.441(B)(3)(a) of the Rules of Procedure of the State Bar (Rule 5.441) states that petitioners for reinstatement who resigned with charges pending "must establish that they have taken and passed the [Attorney Exam] within three years prior to the filing of the petition for reinstatement."

his petition and attached the passage notification as his evidence of compliance with Rule 9.10(f) and Rule 5.441.

On June 27, 2016, OCTC filed a motion to dismiss on the grounds that Unger “failed to have taken and passed” the Attorney Exam “within three years prior to the filing of the petition for reinstatement.” OCTC argued that Unger had to have filed his petition no later than February 25, 2016, to be timely, three years after he *took* the Attorney Exam. In his opposition, Unger argued that the three-year limitation cannot accrue until the petitioner *passes* the exam.

#### **B. Dismissal Order**

In ruling on OCTC’s motion, the hearing judge stated that the “limitation on the time period during which the petitioner is required to take the examination is important to ensuring that the results of the examination, when favorable, are indicative of that individual’s present ability and learning in the general law.” (Underlining in original.) The judge reasoned that Unger’s proposed interpretation would place “no time limitation on when the petitioner is required to take the examination but, instead, merely require the reinstatement petition to be filed within three years after the individual has been notified of the examination results.” He concluded that Unger “failed to present proof that he successfully took the examination within three years prior to the filing of his petition, and the evidence presented by him showed that the examination he passed was outside the three-year window.”

#### **C. Arguments on Review**

In his opening brief on review, Unger advances three arguments. First, he contends that the language of the rule supports multiple readings, so we should consider it in the context of its purpose—to ensure that the petitioner has shown competence—and that purpose is served by proof of passage of the exam, not proof of taking it. Second, Unger compares the rules governing reinstatement with the rule governing admission, which he asserts “specifically” sets

forth the applicable time limitation for using California Bar Examination<sup>2</sup> results as “[n]o later than five years from the last day of administration of the California Bar Examination the applicant passes.” (Rules of State Bar, rule 4.17(A).) He argues that “[h]ad the State Bar wanted to assert the last day of the [Attorney Exam] as the applicable accrual date, they could have and should have done so.” Third, Unger urges that strong public policy favors trying cases on the merits.

OCTC counters that if the “intention was to measure the three[-]year time period from notification of passage, the rule would have stated *within three years after notice of passage of the attorney exam.*” (Italics in original.) Further, it contends that the word “passed” in Rule 9.10(f) only clarifies that a petitioner must be successful in taking the Attorney Exam to apply for reinstatement; the word itself has no impact on the time limitation. Additionally, OCTC argues that the date the petitioner is notified of passage is of little relevance in assessing his or her present ability and learning in the general law. OCTC did not address Unger’s observation regarding the rule on admission or his policy argument favoring consideration of his disciplinary case on the merits.

#### **D. Analysis**

Neither the Supreme Court nor the State Bar Court has addressed in a published decision the event that triggers the start of the three-year limitation at issue here. We observe that a few days after the judge filed his order dismissing Unger’s petition in this matter, a hearing judge in a different reinstatement matter, *Ellerman*, concluded, “As petitioners cannot file for reinstatement until they pass the examination, [OCTC’s] proposed interpretation of rule 5.441(B)(3)(a) effectively and surreptitiously reduces the window of time to petition for reinstatement from three years to approximately thirty-three months. Such an interpretation is contrary to the clear

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<sup>2</sup> Petitioners for reinstatement are required to take the Attorney Exam rather than the California Bar Examination, which individuals seeking admission must pass.

reading of the rule, and, as pointed out by Petitioner, serves no purpose other than creating a trap for unwary petitioners. Moreover, there is a strong public policy favoring the resolution of matters on their merits.” (*Ellerman, supra*, order filed Aug. 3, 2016.)<sup>3</sup>

Looking at the plain language of Rule 9.10(f) and Rule 5.441, we read “have taken and passed the [Attorney Exam]” as a single prefiling requirement<sup>4</sup> that must be fully satisfied before a petitioner can file a petition for reinstatement. Taking the Attorney Exam does not satisfy the requirement; the petitioner fulfills the prefiling requirement only when he or she passes the exam. We conclude that the most reasonable reading of the rule is that passage of the exam triggers the start of the three-year limitation. Thus, a petitioner must file a petition for reinstatement within three years after the date he or she passed the Attorney Exam, which is the date of the written notification mailed by the Committee of Bar Examiners to the petitioner. In this case, the date of passage was May 17, 2013, and we find that Unger timely filed his petition within three years of that date on May 16, 2016.

We disagree with the hearing judge’s reasoning that this reading of the rule would result in “no time limitation on when the petitioner is required to take the examination.” Our general understanding is that the Committee of Bar Examiners notifies test takers of examination results in writing within three to four months after the administration of the Attorney Exam. Should a hearing judge confront a factual situation where a petitioner’s notification is dated more than four months after the administration of the Attorney Exam, the judge retains the discretion to

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<sup>3</sup> We take judicial notice of the fact that in *Ellerman*, OCTC has filed a petition for interlocutory review challenging the hearing judge’s order, which is pending before this court. (Rules Proc. of State Bar, rules 5.156(B), 5.157(D); Evid. Code, § 452, subd. (d).)

<sup>4</sup> A petitioner is also required to have submitted fingerprints to the California Department of Justice, to have paid all discipline costs and reimbursed any payments made by the Client Security Fund, and to include a \$1,600 filing fee. (Rules Proc. of State Bar, rule 5.441(B)(1), (2) & (C).)

determine, based on the particular facts of the case, whether the petitioner has failed to timely file for reinstatement.

### **III. ORDER**

For the reasons set forth above, we reverse the hearing judge's dismissal of Unger's petition for reinstatement to the practice of law, and remand this matter to the Hearing Department to allow for further proceedings under rule 5.440 et seq. of the Rules of Procedure of the State Bar.