STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

# ELROY R. GIDDENS

Petitioner for Reinstatement

[No. 89-R-10039]

Filed March 27, 1990; as modified, March 29, 1990

## SUMMARY

Petitioner was disbarred in 1981 following a criminal conviction for conspiracy to distribute amphetamines. His first petition for reinstatement was denied in 1986. In this proceeding, he again sought reinstatement as a member of the State Bar.

A referee of the former, volunteer State Bar Court concluded after a hearing that petitioner met the reinstatement requirements and recommended that petitioner be reinstated. (James L. Kellner, Hearing Referee.)

The review department reviewed this matter at the State Bar examiner's request. Upon the review department's independent review, it concluded that although petitioner had the requisite learning and ability in the general law and had passed the required professional responsibility examination, petitioner had omitted material information from his application for reinstatement. One of the items petitioner omitted was a lawsuit to which he had been a party, and which did not appear to reflect favorably on him. Despite petitioner's very strong favorable character testimony, the review department concluded that petitioner had not met his burden to demonstrate his reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time."

## COUNSEL FOR PARTIES

For Office of Trials: Stephen J. Strauss, Loren J. McQueen

For Petitioner: David A. Clare, Kenneth Kocourek

## HEADNOTES

[1] **161 Duty to Present Evidence**
**2504 Reinstatement—Burden of Proof**
The Supreme Court has consistently held that petitioners seeking reinstatement have the burden to show by clear and convincing evidence that they meet readmission requirements, and that burden is a heavy one.

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **161 Duty to Present Evidence**
**2504 Reinstatement—Burden of Proof**
Persons seeking reinstatement after disbarment should be required to present stronger proof of their present honesty and integrity than persons seeking admission for the first time whose character has never been called into question.

[3] **2504 Reinstatement—Burden of Proof**
In an application for reinstatement, although treated by the Supreme Court as a proceeding for admission, the proof presented must be sufficient to overcome the Court's former adverse judgment of applicant's character. In determining whether a reinstatement petitioner has met this burden, the evidence of present character must be considered in light of the moral shortcomings which resulted in the imposition of discipline.

[4] **135 Procedure—Rules of Procedure**
**166 Independent Review of Record**
As to matters of testimonial credibility, the review department properly gives great weight to the hearing referee who saw and heard the witnesses and who resolved those issues. The review department should ordinarily be reluctant to deviate from the factual findings of the referee resolving testimonial matters. (Rule 453(a), Trans. Rules Proc. of State Bar.)

[5] **135 Procedure—Rules of Procedure**
**166 Independent Review of Record**
Under rule 453, Trans. Rules Proc. of State Bar, review by the review department is not an appeal from the hearing panel decision. The hearing panel's findings serve as a recommendation to the review department, which may make findings or draw conclusions at variance with those of the hearing referee.

[6] **166 Independent Review of Record**
The independent review conducted by the review department requires that it independently examine the record, and reweigh the evidence and pass upon its sufficiency.

[7] **130 Procedure—Procedure on Review**
**136 Procedure—Rules of Practice**
Examiner's brief violated rule 1306 of the Provisional Rules of Practice of the State Bar Court by failing to include topical index and authorities table, but review department declined to strike it due to recent adoption of rule and lack of asserted prejudice to opposing party. Review department noted that rule 1312 of the Provisional Rules of Practice of the State Bar Court provides for clerk's office to return, unfiled, papers not conforming to rules, absent application to and order from Presiding Judge.

[8] **165 Adequacy of Hearing Decision**
**166 Independent Review of Record**
**2509 Reinstatement—Procedural Issues**
Review department's review of reinstatement matter was made more difficult by hearing referee's failure to make findings on many of the specific issues in dispute, but review department's independent review of the record permitted it to make the necessary findings.

[9] **165 Adequacy of Hearing Decision**
**166 Independent Review of Record**
**2504 Reinstatement—Burden of Proof**
**2551 Reinstatement Not Granted—Rehabilitation**
**2552 Reinstatement Not Granted—Fitness to Practice**

Upon its independent review of the record, the review department found that circumstances of reinstatement petitioner's omission of two law suits from reinstatement petition demonstrated that petitioner had not met his heavy burden of showing clearly and convincingly his rehabilitation and present moral fitness. While review department was reluctant to differ with referee who weighed the credibility of witnesses, including petitioner, and who concluded that petitioner met reinstatement standards, it was review department's duty to independently examine record, reweigh evidence and pass on its sufficiency. Doing so, review department concluded that hearing referee had not given sufficient care to analyzing petitioner's evidence about his non-disclosure of two lawsuits as it bore on the qualities needed for reinstatement.

[10] **221.00 State Bar Act—Section 6106**
**2552 Reinstatement Not Granted—Fitness to Practice**

In disciplinary cases, the Supreme Court has considered an attorney's acts of gross neglect in representing clients' interests to involve moral turpitude. Reinstatement petitioner's lack of care as to his own duties regarding disclosure of litigation on reinstatement petition, while not requiring strong label of moral turpitude, fell short of highest standard of fitness which petitioner must demonstrate for reinstatement.

[11] **2504 Reinstatement—Burden of Proof**

The petition for reinstatement is not merely a paperwork exercise to hurdle on the way to readmission; verified petition serves as important, formal written presentation by which petitioner seeks decision on reinstatement. A court evaluating a petition for reinstatement should be able to rely on it as candid and complete in the same manner as a court would rely on an attorney's affidavit or declaration made under penalty of perjury.

[12] **2504 Reinstatement—Burden of Proof**
**2559 Reinstatement Not Granted—Other Basis**

Where reinstatement petitioner failed to disclose litigation completely in two successive petitions, his failure to do so was not excused by theory of mistake; rather, his offer of that theory cast further doubt that he had achieved insight into standard of sustained exemplary conduct he had to meet for reinstatement.

[13] **2559 Reinstatement Not Granted—Other Basis**

Omission of employment information from reinstatement petition, standing alone, would not warrant denial of reinstatement, but when coupled with omission of lawsuits, also showed that petitioner had failed to sustain his burden.

[14 a, b] **193 Constitutional Issues**
**2551 Reinstatement Not Granted—Rehabilitation**

As with any aspirant to membership in State Bar, reinstatement petitioner is entitled to access to courts to decide good faith claims, but where petitioner who worked for confusingly intertwined entities sued customer of one entity for punitive damages for complaining against one entity instead of another, and failed to show justification for suit, petitioner failed to sustain burden of showing exemplary conduct required to qualify for reinstatement.

[15] **148 Evidence—Witnesses**
**2504 Reinstatement—Burden of Proof**
**2552 Reinstatement Not Granted—Fitness to Practice**

In reinstatement proceeding, impressive testimonials of witnesses were neither conclusive nor necessarily determinative; witnesses could not be given conclusive weight in light of petitioner's failure to file complete and sufficient application for reinstatement.

[16 a, b] **2504 Reinstatement—Burden of Proof**

The Supreme Court has not specified the exact amount of legal learning required for reinstatement. Petitioner's inability to answer one specific legal question at hearing did not significantly undermine the strength of the showing he had made regarding current legal learning.

[17] **2504 Reinstatement—Burden of Proof**
**2551 Reinstatement Not Granted—Rehabilitation**

Where, in ordering reinstatement petitioner's earlier disbarment, Supreme Court had set as the standard for his reinstatement that he show reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time," this standard did not require perfection nor total freedom from true mistake. However, where petitioner did not justify omission of lawsuits from reinstatement petition by ascribing them simply to mistake; could not justify materially incomplete petition in respect of his employment; and had taken inconsistent position in lawsuit, petitioner's showing fell short of sustained exemplary conduct.

## ADDITIONAL ANALYSIS

[None.]

## OPINION

STOVITZ, J.:

Petitioner, Elroy Giddens, was disbarred in 1981. His earlier petition for reinstatement was denied in 1986 and he has again sought reinstatement as a member of the State Bar. (Bus. & Prof. Code, § 6082.) In this proceeding, he must establish: rehabilitation and present moral qualifications for readmission, present ability and learning in the general law and passage of the Professional Responsibility Examination. (Cal. Rules of Court, rule 952(d); Rules of Proc. of State Bar, rule 667.) In the words of the Supreme Court opinion disbarring him, petitioner must demonstrate his reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time." (*In re Giddens* (1981) 30 Cal.3d 110, 116.)

After taking testimony and receiving documentary evidence at a two-day hearing, a referee of the State Bar Court concluded that petitioner met the reinstatement requirements and recommended that he be reinstated. We review this matter on the State Bar examiner's request. (Rules Proc. of State Bar, rule 450(a).)

As we will detail, upon our independent review, we have concluded that although petitioner has the requisite learning and ability in the general law and has passed the required Professional Responsibility Examination, he omitted material information from his application for reinstatement. One of the items he omitted, a lawsuit to which he was then a party, did not appear to reflect favorably on him. Despite his very strong, favorable character testimony, we have concluded, and will explain below, that petitioner has not met his burden to demonstrate his reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time." (See *ante*.)

Before proceeding to our detailed review of the central issues in this case, we find it helpful to set forth the background of this matter and the principles governing our review.

### 1. BACKGROUND

#### A. Background of Petitioner's Disbarment

Petitioner, now 49, was originally admitted to practice law in California in 1972. Effective December, 11, 1978, he was placed on interim suspension from practice by the Supreme Court after his federal conviction of a crime of moral turpitude: conspiracy to distribute controlled substances (amphetamines). (21 U.S.C. § 841(a)(1); see Bus. & Prof. Code, §§ 6101-6102; Cal. Rules of Court, rule 951.)

Effective November 30, 1981, petitioner was disbarred. (*In re Giddens*, *supra*, 30 Cal.3d 110.)

In its opinion, the Supreme Court pointed to several factors which supported the disbarment recommendation of the State Bar: the lack of petitioner's explanation for his criminal conduct, that his conduct "extended over several months and involved several transactions," that he took no steps to end the continuing scheme or report it until after indictment and that he could not satisfactorily explain why he did not withdraw from the conspiracy at an earlier time. (*In re Giddens*, *supra*, 30 Cal.3d at pp. 115-116.) The Court noted that petitioner did not suffer from financial hardship, drug or alcohol dependency or emotional distress at the time of his crime. (*Id.* at p. 115.) The Court also observed that during his involvement in the drug conspiracy, petitioner "furnished between 30 and 40 percent of the money used to buy multi-100,000 lots of amphetamines . . . and realized therefrom a profit of $5,000 to $7,000 [over four to five months]." (*Id.* at p. 113.)

In disbarring petitioner, the Court noted character testimony in his favor but concluded that petitioner had not shown sufficient evidence of rehabilitation. Such a showing, held the Court, would involve his demonstrating in a reinstatement proceeding his reattainment of the standard of fitness to practice law by "*sustained exemplary conduct over an extended period of time*." (*Id.* at p. 116, emphasis added.)

Since his disbarment, petitioner worked for an engineering company between 1981-1982 and since

1982, he has worked in a non-legal capacity, managing roofing or paving companies. During the past few years, he has also worked as a law clerk to several attorneys, including working as a volunteer law clerk since about the beginning of 1988 for the Legal Aid Society of Orange County.

B. Prior Petition for Reinstatement

In 1985, petitioner filed his first application for reinstatement. Although it was denied and is not the subject of review here, it is part of the present record. After trial in that matter, a State Bar Court hearing panel recommended by vote of two to one that petitioner be reinstated. In 1986, upon its review, the former review department adopted revised findings and unanimously denied the petition. On March 4, 1987, the Supreme Court denied review (L.A. 32292 [minute order]).

The former review department's denial of petitioner's previous application rested on findings showing that petitioner's testimony was either false or not credible concerning his business activities and lawsuits to which he had been a party and which suits he had omitted from his then pending application for reinstatement. The department also characterized petitioner's evidence of rehabilitation as "weak to nonexistent" and it concluded that since disbarment, petitioner had continued to associate with known criminals and engaged in conduct inconsistent with rehabilitation.

2. PRINCIPLES OF REVIEW OF REINSTATEMENT MATTERS

**[1]** Our Supreme Court has consistently held that the petitioner seeking reinstatement has the burden to show by clear and convincing evidence that he meets readmission requirements and that burden is a heavy one. (E.g., *Hippard* v. *State Bar* (1989) 49 Cal.3d 1089, 1091-1092; *Tardiff* v. *State Bar* (1981) 27 Cal.3d 395, 403; *Feinstein* v. *State Bar* (1952) 39 Cal.2d 541, 546.) **[2]** The Court reviewed the standard in *Tardiff, supra*, explaining: "As we have repeatedly said: '"The person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. **[3]** In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character." [Citations.] In determining whether that burden has been met, the evidence of present character must be considered in the light of the moral shortcomings which resulted in the imposition of discipline.' [Citation.]" (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403).

Moreover, the Supreme Court has held that this petitioner must show that he has reattained the standard of fitness to practice law required for reinstatement, by showing "sustained exemplary conduct over an extended period of time." (See *ante*.)

**[4]** In conducting this intermediate review, as to matters of testimonial credibility, we properly give great weight to the hearing referee who saw and heard the witnesses and who resolved those issues. (*Feinstein* v. *State Bar* (1952) 39 Cal.3d 541, 547; Trans. Rules Proc. of State Bar, rule 453(a).) We should ordinarily be reluctant to deviate from the factual findings of the referee resolving testimonial matters. **[5]** Nevertheless, under rule 453, our review is not an appeal from the hearing panel decision. Those findings serve as recommendations to us and we may make findings or draw conclusions at variance with those of the hearing referee. (Rules Proc. of State Bar, rule 453(a); *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) **[6]** Our independent review requires that we:

1) independently examine the record; and
2) reweigh the evidence and pass upon its sufficiency.

(E.g., *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 843.)

Although there is no dispute that petitioner passed the Professional Responsibility Examination, and we so find (Petitioner's exh. C), the examiner[1] contends in this review that petitioner has not estab-

1. At oral argument, the State Bar examiner who tried this case, Stephen J. Strauss, was unavailable and another examiner, Loren McQueen, appeared in his place.

lished rehabilitation, his present moral qualifications or ability and learning in the law. We will review the evidence received below and the examiner's contentions[2] **[7 - see fn. 2]** in light of the above legal standards for review in these matters. **[8]** Our review is made more difficult because the hearing referee did not make findings on many of the specific issues in dispute. Nevertheless, our independent review of the record permits us to make the necessary findings.

### 3. PETITIONER'S SHOWING RE REHABILITATION AND MORAL FITNESS

#### A. Petitioner's Failure to Disclose Two Lawsuits to Which He Was a Party

It is undisputed that petitioner omitted from his petition for reinstatement two pending lawsuits to which he was a party, even though he was aware that the petition called for him to disclose those suits. (2 R.T. p. 171.)

To evaluate properly petitioner's conduct as it bears on his rehabilitation, we must set out the lawsuits to which petitioner had been a party as of the time he filed his reinstatement petition.

Petitioner filed his current application for reinstatement on January 18, 1989. Therein, he listed his involvement in five lawsuits:

> *Chillar* v. *Giddens*, a small claims action filed against him in 1988 for breach of a construction contract in which petitioner prevailed;
>
> *O'Sullivan* v. *Ability Builders*, a municipal court action filed against him and his contracting business in 1986 for breach of contract which included a charge of fraud. The matter was still pending at the time of hearing;
>
> *Giddens* v. *Farmers Insurance*, a superior court action he filed in 1987 for breach of insurance contract which he dismissed after settling with the insurance company;
>
> *Ability Builders* v. *Bunning*, a pending municipal court action he filed in 1987 in a dispute arising from a construction contract; and
>
> *Normandy Park Apartments* v. *Pavco Paving & Coating, Inc.*, a superior court action filed against him and his contracting business in 1987 with which he had not been served and the status of which he was unaware.

At the end of the above list, petitioner stated in his petition that he researched the records of all courts in Orange County to discover any lawsuits filed and not served. Petitioner stated that he "did not discover any lawsuits that are not included in this petition or disclosed in the hearing of the prior petition." (Exh. B, attachment 11.)

In March 1989, about two months after petitioner filed his current reinstatement application, a State Bar investigator told petitioner's counsel that it appeared that petitioner had omitted several lawsuits from his petition. Petitioner's counsel discussed this with petitioner and then counsel wrote to the State Bar examiner with details of the omitted lawsuits and the explanation petitioner has consistently offered thereafter: that petitioner researched the index of lawsuits of a court nearby to business he was conducting, copied cases involving him as a party, placed those copies in a legal file but copies of two omitted suits were misfiled so they were not included in his petition. (Exh. 1.)

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2. **[7]** By request in his brief on review, petitioner asks that we strike and not consider the State Bar examiner's brief because it exceeded 10 pages and did not contain the topical index and authorities table required by rule 1306, Provisional Rules of Practice of the State Bar Court. We decline to do so, noting that the examiner's brief was submitted very early in the history of this review department and that the predecessor bodies which had been in existence for over 20 years had no such rules. Petitioner has asserted no prejudice arising from the defects noted. We assume that in the future, all counsel will comply with applicable briefing and motion requirements and we note that rule 1312 of the Rules of Practice provides for our clerk's office to return, unfiled, papers which do not conform to the rules, absent application to the Presiding Judge and her appropriate order.

The lawsuits petitioner omitted from his petition are:

*Marangi* v. *Giddens*, a small claims suit brought by Connie Marangi, a school teacher, in January 1987, after she employed petitioner's roofing company to repair a leaking roof and the roof still leaked after four additional repairs. Petitioner did not appear in defense of the action and Marangi was awarded judgment against him for about $1,400. Petitioner sought to set aside the judgment and when that was unsuccessful, he paid it promptly (exh. 1); and

*Ability Builders and Giddens* v. *Marangi*, a superior court suit petitioner and his construction company brought against Marangi in October 1987 for fraud, slander and interference with contract (exh. 5). In the first cause of action, petitioner referred to the small claims action Marangi filed against him, claimed that she testified in the small claims action that petitioner completed an inferior roofing job on her property, that her testimony was false because another company (Pacific Paving and Coating ("Pacific")) did the work, not Ability Builders ("Ability") and "in furtherance of this fraudulent scheme," she contacted Ability's bonding company and attempted to collect the small claims judgment.

The second cause of action of petitioner's suit against Marangi rested on his claim that she "slandered" petitioner by filing a complaint with the Contractors State License Board, claiming that Ability, instead of Pacific did roof work on her property. In this second cause, petitioner also alleged that she further slandered him by stating under penalty of perjury to Ability's bonding company that "shoddy work" had been completed on roof when another company (Pacific) had done the work (exh. 5).

In his suit against Marangi, petitioner asked for unstated compensatory damages and for punitive damages of $100,000. (Exh. 5; 2 R.T. pp. 177-181.) His suit against Marangi was filed by attorney Norma Scott who testified that petitioner was doing part-time work for her as a law clerk. (1 R.T. pp. 130, 137.) Petitioner testified that he had given Marangi an open extension of time to answer and the suit is unresolved. (2 R.T. p. 180.)

When asked at the reinstatement hearing below whether he had completely forgotten about his suit against Marangi, petitioner testified that, at the time he prepared his reinstatement petition, it had slipped his mind. (2 R.T. p. 205.) According to petitioner, he had no intent not to disclose the suit: "It was a mistake." (2 R.T. p. 176.)

The hearing referee did not make any express findings on the extent to which petitioner's omission of the two *Marangi* suits bore on his burden of establishing rehabilitation and present moral fitness. Yet it seems clear from his ultimate findings in petitioner's favor as well as the referee's statement on the record[3] that he concluded that petitioner's omission of these suits did not reflect adversely on the showing petitioner needed for reinstatement.

Before us, the State Bar examiner urges that petitioner's omission of the lawsuits was intentional; or, at the very least raises serious questions about petitioner's worthiness of the public's trust and confidence.

**[9]** On our independent review of the record, we find that the circumstances of petitioner's omission of the *Marangi* suits demonstrates that petitioner has not met his heavy burden in this proceeding of showing clearly and convincingly his rehabilitation and present moral fitness.

While we are reluctant to differ with the referee who weighed the credibility of witnesses, including petitioner, and who concluded that petitioner met the reinstatement standards, as we said earlier in this opinion, it is our duty to independently examine the record, reweigh the evidence and pass on its sufficiency. Doing so, we have concluded that the hearing referee did not give sufficient care to analyzing petitioner's evidence about his non-disclosure of the *Marangi* suits as it bears on the qualities needed for reinstatement.

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3. During the hearing, the referee interjected at one point and stated, "I'm convinced that it's oversight that [petitioner] didn't include some of these lawsuits, unless there's evidence to the contrary." (2 R.T. p. 177.)

We have no reason to doubt petitioner's explanation that his misfiling of copies of the *Marangi* litigation papers resulted in his not having them in front of him when he prepared his petition. However, in the circumstances of this particular case, we find petitioner's complete omission of the suits from his petition inexcusable.

Marangi's small claims suit against petitioner does not appear, by itself, to reflect adversely on the qualities needed for reinstatement. Petitioner did not defend this suit and claimed to have no knowledge of its prosecution, but he did learn of it after judgment, for he made an appearance and sought without success to set aside the judgment. After that point, he determined that Marangi had communicated with Ability's bonding company. In response, he filed a superior court action against her seeking $100,000 in punitive damages for remarks she assertedly made against petitioner's roofing work to Ability's bonding company—a still-pending action commenced just 15 months before filing his petition for reinstatement. In these circumstances, including that the number of suits to which petitioner had been a party was not great, we find incredible that petitioner would have no recollection of either of the two *Marangi* actions when filing his reinstatement petition or that the process of completing that petition and listing the other suits, would not have refreshed his recollection as to the *Marangi* suits.

Petitioner's mistake theory is also implausible as an excuse for his omission for another reason: it rested on his having acquired copies of lawsuits from courts in which they were filed and filing (or misfiling) those copies in his personal files. But it is clearly implausible that petitioner, a law clerk and eager aspirant for reinstatement as a member of the State Bar, would not have had his *own* file copy of the Marangi superior court suit which he initiated and which was still pending. For that suit, he would not have been dependent on acquiring a copy from court records.[4]

In 1986, petitioner learned that his earlier petition for reinstatement was denied, in part, because he had failed to disclose lawsuits to which he had been a party. Yet by his own testimony, he depended for information to file this 1988 reinstatement petition on the process of visiting courts, checking court indexes and making copies of suits naming him. He testified that he had no independent recollection or any other record-keeping method to identify a pending suit for punitive damages in which he and his company were plaintiffs. In these circumstances, we find petitioner's lack of care tantamount to gross neglect.

**[10]** In disciplinary cases, the Supreme Court has considered an attorney's acts of gross neglect in representing clients' interests to involve moral turpitude. (E.g., *Ridley* v. *State Bar* (1972) 6 Cal.3d 551, 560.) While we need not place that strong label on petitioner's lack of care here as to his own duties, we do find that it falls short of the highest standards of fitness petitioner must demonstrate for reinstatement.

In *Calaway v. State Bar* (1986) 41 Cal.3d 743, the Supreme Court, by divided vote, reinstated an applicant who had omitted a third party claim from his petition. The Supreme Court majority noted that the applicant disclosed the underlying action but did not disclose ancillary proceedings brought in the matter (apparently under the same court case number). As the Supreme Court majority noted, Calaway's failure to provide details of the ancillary action rested on his not unreasonable assumption that the State Bar would review the entire court case file if it deemed the matter significant. Here, unlike in *Calaway*, petitioner disclosed no portion of any of the *Marangi* litigation, leaving it to chance whether the bar's investigation process would uncover the two suits. When it did, petitioner was content to rest on his explanations that his omission was just a mistake and he continues to assert his entitlement to reinstatement based on his incomplete petition.

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4. Another reason we are less reluctant to reverse the hearing referee's determination in favor of petitioner as to his omission of the Marangi suits is that the referee's decision may rest on an erroneous view of the evidence. The referee recited that petitioner "made a list of his lawsuits" but misfiled the particular ones discussed. (Hearing referee's decision, p. 8, lines 9-10.) We find no evidence that petitioner kept any list of suits to which he was a party; only that he made copies of the suits themselves as he came across them in court indices and filed the copies in personal files.

**[11]** The petition for reinstatement is not merely a paperwork exercise to hurdle on the way to readmission. For an applicant such as this petitioner, whose moral character was found wanting earlier in disbarment proceedings, the *verified* petition for reinstatement serves as the important, formal written presentation by which the petitioner now places himself before the State Bar, the legal profession, the judiciary and the public for decision whether he or she should again be allowed to discharge the high responsibilities required of an attorney at law in this state. A court evaluating a petition for reinstatement should be able to rely on it as candid and complete in the same manner as a court would rely on an attorney's affidavit or declaration made under penalty of perjury.

**[12]** In two consecutive applications for reinstatement, petitioner has been unable to disclose completely, as required, litigation to which he was a party. Particularly in his current application, petitioner should have known the importance of disclosing *all* actions to which he was a party. We cannot deem his failure to do so to be excused by his theory of mistake. Rather, his offer of that theory to excuse his omission, casts further doubt that he has achieved an insight into the standard of sustained exemplary conduct he must meet for reinstatement.

B. Petitioner's Failure to Disclose Other Information About His Employment

The State Bar examiner also contends that petitioner's omission from his petition for reinstatement of his status as Ability Builders President and his employment with Pacific Pavings and Coatings ("Pacific") casts doubt on his rehabilitation. **[13]** We conclude that these omissions, standing alone, would not warrant denial of reinstatement; but, when coupled with petitioner's omission of the *Marangi* lawsuits, we find that his omission of his employment with Pacific also shows that petitioner has failed to sustain his burden.

In seeking reinstatement, petitioner was required to disclose his employment history by listing "every position" held since disbarment. (Exh. B, p. 6.) Except as noted *post*, the only position he listed was with Ability from January 1985 to "present" as general manager. At the evidentiary hearing, petitioner testified on direct examination that he was part-owner of Ability (he held a 40 percent interest), its office manager, job estimator and caretaker of the "economics" of the company. On cross-examination for the first time, just before being shown records from the Contractors State License Board, petitioner testified that he was Ability's president between May 1986 and February 1989. (2 R.T. pp. 167-168, 211-212.) Petitioner would not answer the question whether his non-disclosure of his presidency of Ability was significant but he offered that he had disclosed his presidency at the hearing on his earlier petition and was not trying to hide anything.[5]

While it would have been completely open of petitioner to have revealed his presidency of Ability on his petition for reinstatement, in the context of Ability's extremely small, almost family corporate structure, we do not find his lack of disclosure of his presidency of Ability on the petition shows lack of rehabilitation. He did not mislead anyone and he did disclose that he was general manager. In the earlier proceeding which he also revealed on his present petition, he disclosed his 40 percent ownership interest in Ability.

We reach a different result as to petitioner's omission of his employment with Pacific. Indeed, evidence taken in this proceeding regarding petitioner's position with Pacific casts further doubt on the good faith of petitioner either in this proceeding or in his lawsuit for punitive damages against Marangi. Petitioner noted that the former company name of Ability was Pavco Paving and Coating, Inc. ("Pavco") and he referred to his prior petition for reinstatement for other employment (exh. B). As pertinent here, his prior petition listed his work with an engineering company between December 1980 and November 1981 and his employment as general manager of Pavco from January 1982 to the time he completed his earlier petition. (Exh. B., attachment.) Neither his present or former petitions for reinstatement referred to petitioner's work with Pacific.

5. Petitioner did not disclose this fact in his earlier *application* for reinstatement. The transcript of the earlier hearing is not part of the record before us. The prior review department's decision denying reinstatement refers to petitioner's 40 percent ownership in Ability.

At the hearing on petitioner's current petition, the referee received evidence that petitioner had signed contracts for and correspondence regarding roof work on three jobs in 1985 on behalf of *Pacific*, including the work done for Marangi. (Exhs. 2, 5, 6 and 7.) Petitioner also used a business card with both the Pacific name and petitioner's. (Exh. 10.) Postcards were also sent to persons in the Huntington Beach area using both the Pacific name and the Ability name. (Exhs. 10 and 11.) Letterheads and contracts used by petitioner for Pacific gave the same address and telephone number later used by petitioner for Ability. (Exhs. 2, 5, 6 and 7.)

At the hearing, petitioner testified that the basis of his suit against Marangi was that she falsely stated to Ability Builders' bonding company that *Ability* was responsible for the roof work when petitioner signed her contract on behalf of *Pacific*, not Ability. (2 R.T. pp. 179, 225.) Nonetheless, petitioner denied he was an employee of Pacific, testifying that Pavco ran Pacific. Petitioner testified that they were "two different entities, doing different types of work." (2 R.T. p. 220; see also 2 R.T. p. 178.) He conceded however, that he "estimated and sold jobs for" Pacific. (2 R.T. p. 221.)

Petitioner's testimony showed how Marangi could have assumed that Ability was responsible for making good on the warranty of roof work done by Pacific: "Well, [Marangi] told me why Ability Builders was named as defendant—because Ability Builders used the *same type of advertising*—that is, mailing a post card to property owners in different areas. And, when she got a post card from Ability Builders that was *similar to Pacific* Paving and Coatings, then she sued Ability Builders, also. And, I think, when I talked to her on the phone, I told her I was involved with Ability Builders. This is two years later, so I—but, we were still servicing the Pacific Paving and Coatings warranty calls, and retaining the Pacific phone number for that purpose." (2 R.T. p. 179, emphasis added; see also 2 R.T. p. 232.) "Because I sign 90 per cent of the contracts that Ability Builders and Pacific and PAVCO entered into, and when people sue, they don't seem to pay attention to who they've got the contract with. They sue every name they find." (2 R.T. p. 182 [petitioner's testimony in answer to questions as to why he was sued by O'Sullivan].)

Thus, the record shows that petitioner himself treated his work on behalf of Pacific as so intertwined with his responsibilities at Ability and its predecessor Pavco that he made no separate mention of Pacific on his application for reinstatement while the suit against Marangi for punitive damages for treating the entities as the same business was still pending.

**[14a]** As is any aspirant to membership in the State Bar, petitioner is fully entitled to access to the courts to decide claims brought in good faith. But in the circumstances of this record, it is hard to avoid the conclusion that petitioner either made a material omission in his petition for reinstatement or he brought a very questionable suit[6] against his customer which he has taken no steps to resolve.

The confusing was in which petitioner held out the intertwined entities to the public; his numerous hats at each entity undisclosed in his petition; his apparent failure to give careful consideration to the theories of his case against Marangi before filing suit for punitive damages coupled with his failure to keep records of or remember that such action was even pending all reflect poorly on petitioner. **[14b]** Having introduced evidence which showed the great similarities among petitioner's successive contract-

6. In the superior court action petitioner alleged that Marangi made a false claim against Ability's bond when she sought to collect on the small claims judgment against Ability which resulted from Ability's default. It would seem that the issue of Ability's responsibility to Marangi should have been raised earlier in defense of the underlying small claims action. As previously discussed, petitioner also included an allegation in part that Marangi slandered petitioner by "filing a complaint with the State Contractor's License Board." (Exh. 2: civil complaint, p. 7.) However, petitioner testified that her complaint to the licensing agency was "probably privileged." (2 R.T. p. 181.) Indeed, for many years, complaints directed to licensing or disciplinary agencies in California have enjoyed *absolute privilege* from defamation action. (See *Lebbos* v. *State Bar* (1985) 165 Cal.App.3d 656, 667 [complaints to the State Bar]; *Long* v. *Pinto* (1981) 126 Cal.App.3d 946, 948 [report to Board of Medical Quality Assurance]; *King* v. *Borges* (1972) 28 Cal.App.3d 27, 31-32 [complaint to Real Estate Commissioner]; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 512, pp. 601-602.)

ing businesses, it was his burden to demonstrate how they were different from one another and how any difference among them justified his bringing the particular punitive damage against his customer Marangi which he omitted from his reinstatement application. He failed to sustain his burden in this regard and fell short of showing exemplary conduct, particularly as a would-be practitioner of business or corporate law which petitioner hoped to practice should he be reinstated. (See *post*.) These factors all demonstrate his failure to sustain the burden of showing exemplary conduct in order to qualify for reinstatement.

C. Other Contentions Raised by the State Bar Examiner

The State Bar examiner contends that the *O'Sullivan* action (see *ante*) casts doubt on petitioner's showing of rehabilitation. Once again, the hearing referee failed to make specific findings on this issue but inferentially considered it insufficient to weaken what he concluded was petitioner's affirmative showing. With regard to the *O'Sullivan* action, while a suit charging fraud can have a very serious bearing on an applicant's eligibility for reinstatement, we find expressly that pendency of the *O'Sullivan* suit does not show lack of rehabilitation. The only information we have concerning it in the record, other than petitioner's testimony about it,[7] is the civil complaint itself. That bare complaint does not disclose any facts showing lack of rehabilitation or fitness. Neither O'Sullivan's testimony nor any other evidence was elicited to support the point the State Bar examiner makes.

Similarly, with regard to the State Bar examiner's claim that differing evidence was presented by attorney Young on whether petitioner was or was not paid for legal research, we do not find the subject to bear significantly on petitioner's eligibility for reinstatement.

D. Character Evidence

At the evidentiary hearing, petitioner testified that he wanted to be reinstated because he really enjoyed and loved the law. He did not see the law as a way to make a "fast buck" since he earned a good living with his contracting business, Ability Builders. If he was reinstated, he planned to "do a little general practice," probably with another attorney, concentrating in business, corporations, personal injury and maybe some criminal law. He also planned to continue to be involved with Ability. In the event he was not reinstated, petitioner testified he would stay somewhat involved with some of the attorneys for whom he worked, including those at Legal Aid who are his friends, although he noted that it was quite a time problem for him to be involved in business and remain current in the law. (2 R.T. pp. 190-192, 194.)

At the evidentiary hearing, petitioner presented an impressive group of witnesses. These included four lawyers for whom petitioner had acted as a law clerk over various periods of time. They also included four business people who had known petitioner for from three to ten years and an investigator for the State Bar who had known petitioner for five years and who had previously served for 31 years as a Los Angeles police officer, mostly in homicide investigation. Each of these witnesses knew the circumstances of petitioner's disbarment and each was positive and unequivocal in testifying to petitioner's industry, honesty and integrity.

In his decision, the hearing referee summarized the testimony of petitioner's witnesses at length and we need not repeat that testimonial summary. (See decision, pp. 2-7.) It is clear from reviewing the reporter's transcript of testimony and examining the referee's decision, that the referee who saw and heard all witnesses, including petitioner, was impressed by petitioner's favorable wit-

7. Petitioner testified that his company repaired the roof in question in the *O'Sullivan* suit. He gave the previous owner a letter that he saw no other leaks at the time. A few months later, the owner sold the building to O'Sullivan and five months after that O'Sullivan complained that the roof leaked. Petitioner inspected the roof again and found that someone else had done some other work on the roof in the interim and had placed nails in the roof without properly sealing them. Petitioner refused to repair this separate work he had not done since the warranty he had given was limited to the area in which his company had performed the work. O'Sullivan threatened to and did sue. (2 R.T. p. 183.)

nesses. **[15]** However, our Supreme Court has held that impressive testimonials of witnesses are neither conclusive nor necessarily determinative. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1094; *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404.) While we are likewise impressed by petitioner's witnesses, we cannot give them conclusive weight in view of petitioner's failure to bring forth a complete and sufficient application for reinstatement.

4. PETITIONER'S SHOWING RE LEARNING AND ABILITY IN THE GENERAL LAW

We turn last to petitioner's showing as to his learning and ability in the general law.

While not making detailed findings on the subject, the hearing referee concluded that petitioner succeeded in staying current with California law and demonstrated a current knowledge of law. (Decision, p. 9.) The evidence on which the referee's conclusions rest is clear and convincing. It includes not just petitioner's testimony as to his work for several attorneys over the past few years and his reading of a number of legal publications, but also the strong, positive testimony of four members of the State Bar who hired or supervised petitioner in his performance of legal research or law clerk duties.[8]

The foregoing evidence was convincing to the hearing referee and involved the weighing of testimonial credibility. In our independent review of the record, we find that petitioner has established the learning and ability in the law required for reinstatement. We also find no reason to deviate from the identical conclusion of the hearing referee.

**[16a]** The Supreme Court has not specified the exact amount of legal learning required for reinstatement. (*Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 756 (dis. opn. of Bird, C.J.).) Petitioner's activities involving the law in recent years have been of the same type deemed satisfactory in other cases when reinstatement was otherwise merited. (E.g., *Resner* v. *State Bar* (1967) 67 Cal.2d 799, 804; *Allen* v. *State Bar* (1962) 58 Cal.2d 912, 914.)

The State Bar contests petitioner's showing by focusing largely on his lack of an answer to one question the State Bar examiner put to him at the evidentiary hearing. Petitioner was asked to state how the Civil Discovery Act changed in 1987, in response to testimony petitioner gave that he read and remained current with a Continuing Education of the Bar publication, "Civil Discovery Practice in California." (2 R.T. pp. 263-264.) **[16b]** We do not believe that petitioner's lack of an answer to this question significantly undermines the strength of the showing he has made.

5. CONCLUSION AND DISPOSITION

Petitioner has taken important steps toward rehabilitation since disbarment. In view of the strength of his character evidence and the hearing referee's favorable recommendation, we have most diligently considered the record before reaching our decision. It is unfortunate that petitioner's own acts in submitting a materially incomplete application will again result in denial of his second application for reinstatement. **[17]** As we noted early in our opinion, in ordering petitioner's disbarment, the Supreme Court set as the standard for his reinstatement that he show reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time." This standard does not require perfection from an applicant nor total freedom from true mistake. However, in this case petitioner did not justify the omission of lawsuits he undeniably made in his petition by ascribing them simply to mistake.

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**8.** Representative of the testimony of members of the State Bar in support of petitioner's learning in the law was that of Ellen Pierce, petitioner's supervising attorney at the Legal Aid Society of Orange County for the past one-and-a-half years prior to the reinstatement hearing. Petitioner had been volunteering at the Legal Aid Society as a law clerk for that time.

As Pierce testified when asked if she had an opinion as to petitioner's current learning in the law: "Well, I think what I just told you is typical. He's up to the day, and back to the books. Now, one day we were arguing about law, and I just knew I was right. I stepped out to go do something, and then I thought, 'I'll go back and look, and pull out the code.' It was off the shelf, and [petitioner] had it—checking me, and I'm checking him, to see who's got it right. And we're doing that all the time. He wants to keep current, he is current—he must read the Daily Journal for breakfast." (1 R.T. p. 24 (underlining in original).)

Nor could he justify his materially incomplete petition in respect of his employment, and the inconsistent position taken in his lawsuit against Marangi. In sum, the showing he made in this proceeding falls short of the sustained exemplary conduct petitioner was obligated to show for reinstatement to the legal profession.

As petitioner is undoubtedly aware, he may reapply for reinstatement two years after this petition is denied. (Rules Proc. of State Bar, rule 662.) When he is able to place before the State Bar a complete, forthright petition for reinstatement, show in other respects his rehabilitation and fitness according to the standards of our Supreme Court and again show that he has maintained his learning and ability in the law, he will be entitled to the State Bar Court's recommendation of his reinstatement—a decision which we would not hesitate to make upon his proper showing.

Petitioner's application for reinstatement is denied.

We concur:

PEARLMAN, P.J.
NORIAN, J.