

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

OTIS G. McCRAY

Petitioner for Reinstatement

[No. 88-R-13801]

Filed March 1, 1991

SUMMARY

Petitioner's third petition for reinstatement was denied by the hearing department of the former, volunteer State Bar Court, based on findings that petitioner omitted many significant items from his petition for reinstatement; gave false testimony regarding his arrangements with his creditors, and held himself out as an attorney at law after his disbarment. (C. Thorne Corse, Hearing Referee.)

Petitioner sought review, contending that the referee improperly excluded evidence of his good character, and that he had met the requirements for reinstatement. The review department held that petitions supporting petitioner's reinstatement were properly excluded as hearsay. While modifying the referee's findings in minor respects, the review department found that the referee had not erred in his overall conclusions and that petitioner had failed to demonstrate clearly and convincingly his present moral fitness and learning and ability in the law. The referee's denial of the petition for reinstatement was affirmed.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle, Teresa J. Schmid

For Petitioner: Otis G. McCray, in pro. per.

HEADNOTES

- [1] 146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings
2509 Reinstatement—Procedural Issues

In proceedings on petition for reinstatement, the review department, with the concurrence of the parties, could take judicial notice of State Bar Court decisions on earlier unsuccessful reinstatement petition.

- [2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
 The review department's review of hearing decisions is independent; it may make findings of fact or adopt conclusions at variance with those of the hearing department. Nevertheless, the review department accords great weight to the hearing department's findings resolving issues pertaining to testimony. (Trans. Rules Proc. of State Bar, rule 453(a).)
- [3] **161 Duty to Present Evidence**
2504 Reinstatement—Burden of Proof
 While the law does look with favor upon the regeneration of erring attorneys, the petitioner seeking reinstatement bears the burden to show by clear and convincing evidence that the petitioner meets the requirements, and that burden is a heavy one. The person seeking reinstatement after disbarment should be required to present stronger proof of present honesty and integrity than one seeking admission for the first time whose character has never been called into question. A disbarred attorney may be able to show by sustained exemplary conduct over an extended period of time that the attorney has reattained the standard of fitness to practice law.
- [4] **135 Procedure—Rules of Procedure**
194 Statutes Outside State Bar Act
2504 Reinstatement—Burden of Proof
 In a reinstatement proceeding, the petitioner bears the burden of establishing rehabilitation, present moral qualifications for readmission and present ability and learning in the general law. (Rule 952(d), Cal. Rules of Court; rule 667, Trans. Rules Proc. of State Bar.)
- [5] **141 Evidence—Relevance**
145 Evidence—Authentication
2590 Reinstatement—Miscellaneous
 Form petitions signed by lawyers and judicial officers in support of petitioner's reinstatement, which contained sketchy text and were undated, were properly excluded from evidence for lack of adequate foundation, as they fell far short of offering any probative value of the assessment of petitioner's character for meeting the rigorous burden of a reinstatement petition.
- [6] **142 Evidence—Hearsay**
2590 Reinstatement—Miscellaneous
 Form petitions in support of petitioner's reinstatement, and other letters and testimonials, were excludable from evidence as hearsay, absent stipulation of the State Bar examiner.
- [7] **2504 Reinstatement—Burden of Proof**
 Reinstatement proceedings are adversarial in nature, with the heavy burden resting on petitioner to prove rehabilitation, present moral fitness to practice and learning and ability in the general law.
- [8] **166 Independent Review of Record**
2590 Reinstatement—Miscellaneous
 Review department gave deference to hearing referee's findings and conclusions regarding reinstatement petitioner's showing of rehabilitation, since they rested largely on referee's superior position to evaluate testimony of witnesses. However, petitioner's two post-disbarment criminal convictions, and failure to establish that restitution had been made in disciplinary proceeding pending at time of disbarment, raised serious questions regarding rehabilitation.

- [9] **139 Procedure—Miscellaneous**
 2509 Reinstatement—Procedural Issues
In reinstatement cases, where the record on its face indicates a pending disciplinary matter dismissed without prejudice should the petitioner seek reinstatement, or indicates matters as serious as criminal convictions arising after disbarment or resignation, the parties should make clear on the record their respective positions on these factors, which could raise a serious question as to whether a person petitioning for reinstatement had been rehabilitated or was presently fit to practice law.
- [10] **2552 Reinstatement Not Granted—Fitness to Practice**
For an applicant for reinstatement, whose moral character was found wanting in earlier disbarment proceedings, the verified petition for reinstatement serves as the important, formal written presentation by which the petitioner placed 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. Where petition contained inaccuracy about marital status and omissions about financial obligations, lawsuits, and legal learning activities, and petitioner's explanations for these defects were not credited by hearing referee, petitioner's failure to bring before the State Bar Court a correct and complete petition for reinstatement fell below the standard of sustained exemplary conduct petitioner must meet for reinstatement.
- [11] **230.00 State Bar Act—Section 6125**
 2590 Reinstatement—Miscellaneous
Where reinstatement petitioner described himself as an attorney at law in public advertisement, but same document referred clearly to petitioner's disbarment, review department declined to find that petitioner had held himself out to the public as authorized to practice law. However, petitioner's use of term "attorney at law" when not an active member of State Bar was inappropriate, and its use in papers filed with State Bar Court in reinstatement proceeding did not aid petitioner in demonstrating sustained exemplary conduct.
- [12] **135 Procedure—Rules of Procedure**
 230.00 State Bar Act—Section 6125
 2502 Reinstatement—Waiting Period
 2590 Reinstatement—Miscellaneous
To be accurate, petitioner should have stated that the minimum waiting period to apply for reinstatement is five years (Trans. Rules Proc. of State Bar, rule 662), rather than stating that he had been disbarred for five years. Nonetheless, petitioner's statement as a whole clearly indicated that petitioner was not then licensed to practice law, so misstatement was not serious.
- [13] **148 Evidence—Witnesses**
 2552 Reinstatement Not Granted—Fitness to Practice
Where witnesses' abilities to observe petitioner's character in light of any changes since disbarment were limited, or witnesses were not fully aware of nature of offenses leading to disbarment, such character evidence failed to show a clear case for reinstatement, or to overcome effect of State Bar's negative evidence.

- [14] **148 Evidence—Witnesses**
 2590 Reinstatement—Miscellaneous
Favorable character evidence is neither conclusive or necessarily determinative on reinstatement.
- [15] **2553 Reinstatement Not Granted—Learning in Law**
Where reinstatement petitioner did not provide documentary evidence to support his claim that he had written legal memoranda, and also did not provide convincing testimonial evidence, petitioner did not show sufficient proof of learning and ability in the general law.
- [16] **2509 Reinstatement—Procedural Issues**
 2553 Reinstatement Not Granted—Learning in Law
Where reinstatement petitioner had shown rehabilitation, but had not presented sufficient proof of learning and ability in the general law, then if review department had concluded that petitioner was presently fit to practice, it would have conditioned its recommendation of reinstatement on passage of the bar examination to assure the public of petitioner's legal learning. However, review department's adverse determination on petitioner's fitness to practice made bar exam recommendation unnecessary.

ADDITIONAL ANALYSIS

[None.]

OPINION

STOVITZ, J.:

This is the third petition for reinstatement filed by Otis G. McCray (petitioner) following his disbarment by the Supreme Court in 1981. (*In re Petty and McCray* (1981) 29 Cal.3d 356.) After five days of hearing evidence, a referee of the former, volunteer State Bar Court concluded that although petitioner sustained his burden to show that he was rehabilitated, he failed to prove that he was presently morally fit or that he was learned in the general law. (Cal. Rules of Court, rule 952(d); Trans. Rules Proc. of State Bar, rule 667.) The referee's conclusions rest, in part, on his findings that petitioner omitted many significant items from his petition for reinstatement, that he gave false testimony as to arrangements he had made with creditors for payment of debts, and that he held himself out as an attorney at law after his disbarment.

Petitioner seeks our review and contends that the referee improperly excluded evidence of his good character. He cites to evidence he presented showing that he has met reinstatement requirements and urges us to recommend his reinstatement to the Supreme Court. The State Bar examiner (examiner) argues that the referee did not err, that the referee weighed the evidence correctly and made the appropriate findings and recommendation.

As we shall discuss further, we have reached the independent decision that the referee did not err in his overall conclusions and recommendations and that petitioner has failed to meet the high burden he had in this proceeding to show his entitlement to reinstatement.

I. BACKGROUND

Petitioner was admitted to practice law in California in January 1971. Seven years later, in 1978, he was convicted, on his plea of nolo contendere, of two counts of grand theft (Pen. Code, § 487, subd. 1) and one count of forgery (Pen. Code, § 470). That same year, he was placed on interim suspension by the Supreme Court because of his criminal conviction.

In 1981, the Supreme Court disbarred him. (*In re Petty and McCray, supra*, 29 Cal.3d 356.) In that case the Supreme Court found that McCray and his law partner, Petty, individually, knowingly and willfully employed and paid others to produce personal injury and property damage claims, staged false auto accidents, falsified medical reports and damage reports, presented false claims to insurers and forged names of individuals to releases to get proceeds in order to defraud the insurers. The conduct caused losses of \$15,000-\$17,000. The Supreme Court deemed McCray's claim of youth and inexperience and his lack of prior discipline to be insufficiently mitigating. (*Id.* at pp. 360-362.)

While the Supreme Court disbarred petitioner in 1981, it dismissed without prejudice to the State Bar should petitioner later seek reinstatement, a separate original disciplinary proceeding based on a stipulated disposition recommending petitioner's three-year stayed suspension, three-year probation and 60-day actual suspension. This recommendation arose from stipulated facts showing petitioner's failure to pay sums totalling about \$900 in two matters to medical providers who were holding liens in cases of petitioner's clients. Mitigating circumstances showed poor office management and petitioner's good faith in doing the best he could with no intentional misappropriation of funds. (See attachment to September 30, 1988 petition for reinstatement.)

Because petitioner was suspended interimly on December 6, 1978, which suspension was in effect continuously until he was disbarred, he could petition for reinstatement as early as December 6, 1983. (Rule 662, Rules Proc. of State Bar.)

On December 28, 1983, petitioner applied directly to the Supreme Court for "immediate reinstatement," urging that "many members of his family are in . . . peril" resulting from his not practicing law for the past five years. The Supreme Court denied this petition by minute order.

In 1985, petitioner filed with the State Bar Court his second petition for reinstatement. In May of 1986, the former, volunteer review department denied that petition and in October of 1986, the

Supreme Court denied review. (L.A. No. 31350.)¹
[1 - see fn. 1]

On September 30, 1988, petitioner filed the reinstatement petition we now review.

II. THE PRESENT RECORD

A. Omissions From the Petition for Reinstatement.

Petitioner omitted several items from his petition for reinstatement and made one incorrect statement therein. Petitioner stated his marital status as single although almost one year before he filed his 1988 petition he became married. His excuse for this was that he prepared several drafts of the petition earlier than the date he filed them, but he did not explain satisfactorily why he allowed this final version of the petition to be filed showing him single.

In the financial obligations section of his petition, petitioner listed only a debt of \$13,000 incurred in May 1988, to a "Brookland Financial." In his testimony, however, he admitted that as of the time of the petition he had four other obligations: Daniel's Jewelers for about \$400, the West Publishing Company for about \$3,500, the Mitsui Manufacturer's Bank for at least \$8,000 and one Kenneth Bell who held an unlawful detainer judgment against him for about \$1,300. (R.T. 6/14/89 pp. 7-12, 16-33.) At the hearing below, petitioner testified that he disclosed these obligations previously to the State Bar and he thought that his application for reinstatement was designed to bring forth current information or information later than what he had earlier given the State Bar. (R.T. 6/15/89 pp. 28-29.) As to the foregoing debts, petitioner's 1985 petition identified only the Bell obligation. However, it listed two others not mentioned by him in 1989: an obligation to the State

Bar Client Security Fund for \$850 incurred in "approximately 1980" and a debt due "H.F.C." of Bell, California in the amount of \$2,100 incurred in 1974 and reaffirmed in 1979. Petitioner could point to no language in the current petition that limited his answers to debts occurred since the filing of any previous petition.

In completing the section of the petition asking for information as to every civil case or bankruptcy proceeding to which petitioner had been a party, he left that area blank, although he was or had been involved as a party in at least 11 civil cases. While an addendum to his 1985 petition shows that these cases started prior to his disbarment, it appears some of them were pending after the effective date of his disbarment. Again, he could point to nothing in the text of the current petition which would allow him to limit his answer regarding lawsuits and in his attached 1985 petition, he stated that he could not recall any of the details of four of the suits to which he was a party.

Finally, although the petition form asked him to attach specific information regarding his learning and ability in the law, he furnished no specific information.

B. Petitioner's Testimony Regarding Arrangements to Pay Off Debts.

On December 19, 1988, the State Bar took petitioner's deposition in this reinstatement proceeding. During that deposition, petitioner testified that he had made arrangements to pay the outstanding obligations that he had with Daniel's Jewelers, West Publishing Company, and Mitsui Manufacturer's Bank. (R.T. 6/14/89 pp. 17-18.)² At trial, petitioner maintained that it was a true statement at the time of

1. [1] Petitioner's 1985 application is before us as an attachment to his 1988 petition. Neither petitioner nor the examiner introduced in evidence the State Bar Court file on the 1985 petition. At oral argument in this proceeding, the parties stated that they had no objection to our taking judicial notice of the hearing and review department decisions on the petition. Despite extended efforts, the State Bar Court clerk's office has been unable to locate the State Bar Court file in the 1985 proceeding and we, like the hearing referee, are thus unable to consider the State Bar Court rulings on the earlier petition.

2. In attempting to impeach petitioner's deposition testimony, the State Bar never quoted verbatim from the deposition, nor did it introduce the specific passage, although the referee at one point suggested that this should be done. Nevertheless, petitioner never disputed that he made that statement and at the trial he reaffirmed the truth of that statement. (R.T. 6/14/89 pp. 18-19.)

his deposition and was true today. However, the State Bar produced witnesses whose testimony, together with the vague statements of petitioner's later testimony, show that petitioner's "arrangements" were not that, but, at most, were his unilateral offers to pay followed by no payment to the bank and only two \$50 payments to West Publishing Company ("West").

Robert Leff, attorney for West, testified that he was hired in 1987 to collect the \$3,500 owed by petitioner to West. In 1987, Leff had one call from petitioner in which he told Leff he was in dire straits. Leff then had no contact with petitioner between June of 1987 and May of 1988, but had several in just the last month before the State Bar Court reinstatement hearing. In those calls, petitioner offered to pay the full amount, but he had not paid anything directly to Leff. The two \$50 payments were paid directly to West in St. Paul, Minnesota. Earlier, Leff had filed suit against petitioner on behalf of West; he was willing to work with petitioner but there had been no arrangement. (R.T. 6/14/89 pp. 43-60.)

Ms. Margaret Langer, a Vice President of Mitsui Manufacturer's Bank ("bank") testified that in 1976 or 1977 the bank obtained a judgment against petitioner for its debt of around \$10,000-\$11,000. She believed that the current value of that judgment (in 1980) was about \$13,000 and it was ultimately charged off to loan losses since petitioner made no payment on it. Langer recalled that petitioner telephoned her in the fall of 1988 to try to "retire" the debt to the bank. She did not have any current records available to her since this obligation was so old. By talking to her legal department she was able to reconstruct enough information about it. She invited petitioner to send to the bank information about his financial condition and what arrangements he wanted to make. She got no further information from petitioner at that time. (R.T. 6/14/89 pp. 71-80.) In his cross-examination of Langer, petitioner was obviously confused about the difference between paying off this obligation, which had been reduced to a

judgment, and trying to "renew" or create a new loan arrangement with the bank for future credit. In any event, the evidence is clear that petitioner had not made any sufficient "arrangement" with the bank as he had testified at deposition and adopted at hearing.

As mentioned *ante*, another obligation which petitioner had was to one Kenneth M. Bell, who had rented a residence to petitioner and who had obtained an unlawful detainer judgment against petitioner when he had failed to pay rent for two to three months continuously. (R.T. 6/14/89 pp. 116-118; exh. 1 (judgment for \$1,351).) While testifying at his reinstatement hearing about his obligations, petitioner testified that he continually stayed in touch with the jewelry store, West and the bank, but did lose touch with Bell. However, petitioner testified that he always indicated to Bell that he (petitioner) would take care of "the bill" once he was in a financial position to do so. He further testified that Bell's unlawful detainer action against petitioner was "filed at my instruction to Mr. Bell to help protect him." (R.T. 6/14/89 p. 19.)³ Bell testified that he has lived in the same address in Granada Hills for 19 to 20 years, he lived there while petitioner was a tenant of Bell's, and petitioner visited him there more than once when he was a tenant, either to talk or to pay the rent. (*Id.* at p. 122.) Bell testified that petitioner never denied that he owed the rent obligation, but that he never recalled discussing any arrangements to pay the debt and petitioner never talked about how Bell might be protected as far as back rent was concerned. (*Id.* at p. 129.) When petitioner asked Bell how the State Bar located him for these proceedings, Bell replied simply that it sent him a letter. (*Id.* at p. 132.) Petitioner sought to explain his statement that he couldn't locate Bell by stating that his records of Bell's address had been lost. (*Id.* at pp. 29-30.)

C. The Evidence Introduced to Show Petitioner's Holding Himself Out as an Attorney At Law.

The State Bar presented evidence to show that petitioner held himself out as an attorney at law after

3. Although petitioner's December 1988 deposition was not specifically read into the record nor introduced into evidence, it does appear that petitioner testified at his deposition that he

would have paid Bell's judgment but he could not locate Bell. (R.T. 6/14/89 p. 122.)

he was disbarred. Petitioner placed an ad, which ran about December 8, 1988, in the *Los Angeles Sentinel*, a weekly newspaper of general circulation oriented primarily toward the black community. (Exh. B.) This announcement was entitled "A PUBLIC APOLOGY". In that announcement, petitioner incorrectly stated that the Supreme Court of California had disbarred him "for a period of five years"; that "the five years are up" and he had filed for reinstatement. He expressed regret to his family, friends, clients and the legal profession for his involvement in the insurance fraud which led to his disbarment. He promised that after reinstatement he would again provide quality legal services to the poor. He stated that his deposition was being taken at the State Bar in Los Angeles on December 19, 1988, and invited persons interested in "financial involvements" (which he did not define) to write to him at "Otis G. McCray, Attorney at Law [address and telephone number given]." In addition, petitioner placed the title "Attorney at Law" immediately below his name on three of the legal documents he filed in this reinstatement proceeding: a Notice of Pre-Hearing Conference filed April 17, 1989; a Notice of Motion and Motion to Transfer Hearing to the City of Compton filed May 3, 1989; and a Stipulation Re: Petitioner's Testimony filed June 14, 1989.

Petitioner explained his use of the term attorney at law by stating that he did not mean to mislead anyone and particularly he could not mislead the State Bar since everyone at the State Bar knew of his true status.⁴

D. Other Evidence Bearing on Rehabilitation, Character and Fitness to Practice.

Petitioner did appear to show regret and remorse over the criminal convictions leading to disbarment. (See R.T. 6/15/89 p. 45; R.T. 6/20/89 p. 117.) He made full restitution for the losses he caused. However, one of his two main character witnesses, his own brother-in-law, testified that respondent told him that he was not involved in any of the wrongdo-

ing which led to his disbarment. (R.T. 6/13/89 p. 76.) Moreover, the record of this matter includes not only the Supreme Court opinion and underlying record concerning petitioner's disbarment, it includes another disciplinary proceeding which had gone completely through the State Bar Court with the recommendation of a three-year stayed suspension, 60-day actual suspension and until petitioner made specified restitution to the two doctors involved or the client security fund. The only mention of this by the referee was that he could not ascertain the precise legal basis of the culpability found by the State Bar. While the referee did make a good point, there can be little doubt that the State Bar Court had earlier found petitioner culpable of failing to handle properly and account for funds owed two doctors, and ultimately failing to pay them over. When the Supreme Court dismissed that proceeding before entering an order of discipline on the matter because petitioner had just been disbarred in the grand theft and forgery matter, it specifically reserved the State Bar's right to inquire into that matter should petitioner seek reinstatement. We find no examination of petitioner on that prior proceeding and we see no evidence of restitution to the two doctors involved in that matter or the client security fund.

In his 1988 reinstatement petition, petitioner did disclose two criminal convictions in 1983 and 1987, respectively. Petitioner's earlier conviction was for a 1983 arrest on a charge of violation of Labor Code section 212 (paying wages due by form of payment which is not negotiable). Petitioner gave no details of this conviction other than that the criminal court was in Van Nuys, California, and disposition was a \$50 fine. The second conviction he revealed was for Vehicle Code section 23152 and Penal Code section 12025 (driving while under the influence of alcohol or drugs and unlawful carrying of a concealed firearm without a license). Petitioner gave a few more details about this arrest: It occurred on January 26, 1987; he gave the case number and it resulted in a plea of guilty to "reckless" with a \$350 fine. We see nothing else in the record concerning these offenses,

4. The pleadings petitioner filed in this proceeding after this evidence was called to his attention, described his title as either "Petitioner In Pro Per", without reference to the phrase

"attorney at law"; or after the phrase "Attorney at Law" he placed within parentheses the word "Disbarred".

except for a brief statement in the 1985 petition as to the Labor Code conviction.⁵

Petitioner's main attempt to show his present moral fitness rested on his unsuccessful attempt to have introduced into evidence petitions which he caused to circulate around the criminal courts in Compton and which were signed by about 60 members of the bench and bar. The hearing referee declined to admit the petitions over objection from the State Bar that they lacked an adequate foundation for admission because they bore no dates when the individuals signed them and showed no recognition of any detail of the signatories' understanding of petitioner's moral character or rehabilitation. (R.T. 6/13/89 pp. 28-32, 35-36.)

When a few of the public defender attorneys who signed the petition were called to testify (mainly on petitioner's learning of the law) it was clear that most did not understand the reason petitioner was disbarred (most understood it had something to do with commingling—not insurance fraud, as petitioner's own public apology admitted) or had no knowledge of petitioner's omissions or false statements in this reinstatement proceeding. One witness, Deputy Public Defender Kenneth Green, testified that before the trial he asked the examiner if he had a choice as to being called as a witness or removing his name from the petition, and that he would prefer to remove his name from the petition. He felt he would need to know more about why petitioner was disbarred, but like all other witnesses, he did say that he would like to see petitioner reinstated. (R.T. 6/14/89 pp. 83-90.)

Petitioner's main witnesses as to his rehabilitation and moral character were his brother-in-law and a legal secretary who had worked for petitioner between 1975 and 1978. This secretary testified that petitioner's morals were good in that he always respected clients and that he was a decent and honest person. (R.T. 6/13/89 pp. 55-68.) She saw petitioner

several times a year socially since 1978 but her views relating to petitioner in a professional setting were limited to the period of her employment by petitioner, over 10 years ago. (*Id.* at pp. 58, 65.)

One impressive witness for petitioner was attorney Jess Willitte, president of the South-Central Los Angeles Bar Association. Willitte had known petitioner for about five years, was familiar with his current employment, had the chance to observe his conduct and testified that his character has been impeccable. (R.T. 6/15/89 pp. 66-80.)

E. Evidence Bearing on Petitioner's Learning in the Law.

This showing rested mainly on petitioner's own testimony which was generalized as to his activities in keeping up with the law. He testified that he attended seminars and bar associations, read the *Daily Journal* advance sheet cases in which he had an interest, discussed legal issues with attorneys and others on a regular basis in the Los Angeles County Public Defender's office where he worked as a law clerk, wrote briefs and memoranda and interviewed clients. However, he produced no briefs and memoranda he had drafted, claiming a privilege that the briefs or memoranda were not filed in any public action. (R.T. 6/15/89 pp. 70-71; 6/20/89 pp. 88-97.) Several of those who worked with petitioner in the public defender's office testified as to his discussion of legal issues and topics with them, and expressed in generally conclusory terms that petitioner either knew the law or was highly competent in it; but it was clear that this impression was limited to criminal law and little detail was provided about specific issues. (R.T. 6/20/89 pp. 22-52.)

F. The Referee's Findings and Conclusions.

After making findings concerning petitioner's disbarment, the referee found that petitioner had made full restitution of the losses caused to victims

5. In his 1985 petition (at p. 3), petitioner stated that this conviction resulted from a bank's failure to honor paychecks issued by him as secretary-treasurer of a business he was selling. According to petitioner, the business bank account

was closed, all funds were transferred before the checks could clear, the new owners were to make the checks good but did not and petitioner pled nolo contendere to the statute imparting criminal liability to anyone issuing such a check for wages.

in the matter which led to his disbarment, that there was no evidence of any misconduct in connection with petitioner's employment from 1978 until 1985, that after 1985 petitioner started work for the public defender's office as a law clerk and that the evidence showed that he was doing a very good job. From these findings, the referee concluded that petitioner showed that since the events for which he was disbarred, he had been adequately rehabilitated. (Decision ¶¶ 1-9, conclusion 1.)

The referee also concluded that petitioner failed to sustain his burden to show that he was morally fit to practice law. (Decision, conclusion 2.) He based his conclusion on findings that petitioner omitted material facts from his petition, including information regarding past petitions, the number of past disciplinary proceedings, his financial obligations, litigation to which he was a party and specific information concerning activities undertaken in respect to legal learning. He also found that petitioner described himself in his reinstatement application as single, although at the time of filing it he was married.

Also contributing to the referee's adverse conclusion on petitioner's moral fitness were his findings that, in documents filed in this proceeding, petitioner described himself as an attorney at law and also so described himself in a published apology in which he also misrepresented to the public the effect of his disbarment. The referee also found that petitioner gave "inaccurate testimony" as to financial arrangements he had made with creditors. (Decision, ¶ 16-19, conclusion of law 2.)

Finally, the referee concluded that petitioner failed to show required learning and ability in the general law. This conclusion rested on findings by the referee as to petitioner's limited reading of legal developments, lack of specific proof to support his testimony as to other activities he engaged in which were law related and the testimony of witnesses that their awareness of petitioner's knowledge of the law was limited to criminal law and certain related matters. (Decision ¶¶ 22-23.) The referee also found that petitioner showed an almost complete lack of familiarity with the rules of evidence and methods of proper case presentation. He gave examples of this in his decision. (Decision ¶ 24.) The referee recom-

mended that petitioner's application for reinstatement be denied.

Four days after the date by which petitioner was afforded the opportunity to file a closing brief, the referee received such a brief from petitioner. Although untimely, the referee considered the brief but found no reason to modify his decision. Treating petitioner's brief as a motion for reconsideration, the referee denied the motion.

III. DISCUSSION

[2] Our review of the hearing referee's decision and recommendation is independent. We may make findings of fact or adopt conclusions at variance with those of the referee. (Trans. Rules Proc. of State Bar, rule 453(a); *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916.) Nevertheless, we give great weight to the referee's findings resolving issues pertaining to testimony. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547; Trans. Rules Proc. of State Bar, rule 453(a).)

[3] While the law does look with favor upon the regeneration of erring attorneys (*Resner v. State Bar* (1967) 67 Cal.2d 799, 811), as we stated in *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, review den. Aug. 15, 1990 (S015226), the petitioner seeking reinstatement bears the burden to show by clear and convincing evidence that he meets the requirements and that burden is a heavy one. In *Giddens*, we quoted the Supreme Court's opinion in *Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403 that the person seeking reinstatement after disbarment should be required to present stronger proof of present honesty and integrity than one seeking admission for the first time whose character has never been called into question. Petitioner was disbarred for grand theft and forgery and in disbaring petitioner, the Supreme Court stated that he may be able to show "by sustained exemplary conduct over an extended period of time" that he has regained the standard of fitness to practice law. (*In re Petty and McCray, supra*, 29 Cal.3d at p. 362.) [4] Petitioner bears the burden of establishing these issues: rehabilitation, present moral qualifications for readmission and present ability and learning in the general law. (Rule 952(d), Cal. Rules of Court; rule 667, Trans. Rules Proc. of State Bar.)

[5] At the outset, we discuss petitioner's contentions that the hearing referee improperly excluded evidence. We find petitioner's contentions to be without merit. With respect to the circulated petitions containing signatures of lawyers and judicial officers in support of petitioner's reinstatement, the hearing referee correctly ruled that petitioner presented an inadequate foundation for their admission. These petitions were undated and, from the sketchiest nature of the text preceding the signatures, would fall far short of offering any probative value of the assessment of petitioner's character for meeting the rigorous burden of a reinstatement petition. [6] Even if petitioner had been able to overcome the hurdle of the lack of a sufficient foundation, these form-petition testimonials would have been excludable as hearsay, absent stipulation of the State Bar examiner. (Evid. Code, § 1200; *In re Ford* (1988) 44 Cal.3d 810, 818.) The same can be said of other letters and testimonials which the referee declined to admit into evidence. We agree with the observation of the examiner in his brief to us that in each case where the referee excluded evidence, the referee's careful consideration of the proffered evidence was apparent on the record. Petitioner was allowed wide latitude to argue his position to the referee, the referee gave petitioner the specific reason for his rulings on the evidence proffered and the hearings were even reopened at petitioner's request to allow him a further opportunity to present favorable evidence. Petitioner was afforded an eminently fair hearing presided over by a fair and impartial referee. [7] Petitioner's complaint that the State Bar had "erroneously construed reinstatement proceedings as being adversarial in nature" shows that petitioner has failed to understand that the governing rules and decisional law do, indeed, make these proceedings adversarial in nature, with the heavy burden resting on petitioner to prove rehabilitation, present moral fitness to practice and learning and ability in the general law. (See *ante*.) Finally, petitioner's claim that his July 1989 brief was not considered by the referee is completely

refuted by the referee's supplemental decision filed July 27, 1989.

[8] Giving deference to the referee's findings and conclusion of petitioner's showing of rehabilitation, since they rest largely on the referee's superior position to evaluate the testimony of witnesses (decision ¶¶ 1-9; conclusion I.A.), we adopt those findings and conclusion but not without some doubts. In that regard, we note that after his disbarment, petitioner suffered two different criminal convictions, one involving a violation of the Labor Code and another involving the unlawful carrying of a concealed firearm without a license. We also note that the record raises questions as to whether petitioner has made amends for losses which occurred in an original disciplinary proceeding pending at the time of his disbarment which was dismissed by the Supreme Court without prejudice to this reinstatement application. Finally, we note that testimony on petitioner's behalf was not always favorable to him concerning his involvement in the activities which led to his disbarment. Although we do have some serious questions concerning petitioner's evidence in rehabilitation, we do not find sufficient evidence to set aside the referee's findings and conclusion favorable to petitioner on this subject.⁶ [9 - see fn. 6]

Concerning the referee's findings on petitioner's fitness to practice, we adopt the referee's conclusion and most of his supporting findings. We shall analyze those findings individually and adopt the appropriate findings.

The hearing referee found (decision ¶ 13) that the petition for reinstatement was defective in many respects because petitioner omitted the date of his interim suspension, failed to attach his 1985 petition, omitted information as to the numbers of the disciplinary proceedings leading to his disbarment, incorrectly stated that he was single although he was married at the time of filing his petition, omitted most

6. [9] In future reinstatement cases where the record on its face indicates a pending disciplinary matter dismissed without prejudice should the petitioner seek reinstatement or indicates matters as serious as criminal convictions arising after disbarment or resignation of the type on which the Supreme Court would authorize the State Bar Court to hold hearings, we

would hope that the parties would make clear on the record their respective positions on these factors, which could raise a serious question as to whether a person petitioning for reinstatement has been rehabilitated or is presently fit to practice law.

of his financial obligations, omitted any litigation in which he had been involved and failed to detail his learning and ability in the law. Our review of the record has led us to conclude that it does not support several of the referee's determinations. We cannot agree with the referee that petitioner failed to attach all previous petitions that he filed. Our review of the record shows that petitioner attached to his 1988 petition both his 1983 and 1985 petitions and several supplements he filed to his 1985 petition. It is possible that the referee may have been confused in this regard since the 1985 petition and supplements do not bear the State Bar Court's case number for that earlier proceeding, 85-R-4 LA. However, from the State Bar Court file stamps on those 1985 documents, we are satisfied that petitioner did comply with the requirement in his 1988 petition to cite to any previous reinstatement petition filed. Moreover, we find that the 1985 petition includes sufficient information concerning petitioner's interim suspension and the number of disciplinary proceedings which led to his disbarment. (See also *Calaway v. State Bar* (1986) 41 Cal.3d 743, 748.) Thus, we delete subparagraphs (a), (b) and (c) from the referee's paragraph 13 as not supported by the record.

We do find, however, that in the four remaining areas identified by the referee, petitioner's incorrectly stated marital status, his lack of complete disclosure of his financial obligations and pending litigation and his lack of required information as to activities taken in support of learning and ability in the general law, that petitioner's 1988 application for reinstatement was materially incomplete; and, as to his marital status, incorrect. Without dispute, petitioner omitted from his reinstatement petition most of his financial obligations which were sizable. Although he did refer to other obligations in his 1985 attached petition, he did not update those in his 1988 petition; and, in any event, all of the disclosures did not form a complete list of his obligations. The same can be said about lawsuits to which he was a party. He disclosed none on his 1988 petition; and, although he disclosed a number on an addendum to his 1985 petition, he furnished only the court case number, date of filing and title for many of them, claiming that he did not remember the incidents which gave rise to the lawsuits.

[10] As we said in our earlier reinstatement opinion of *In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. at p. 34: "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." We need not decide whether petitioner's inaccuracy about his marital status or omissions about his financial obligations, lawsuits or legal learning activities were intentional or careless. The hearing referee who observed all of the witnesses, including petitioner, did not credit him for the various theories he gave for why his marital status was inaccurately stated or why his other information was omitted. We see no reason to disturb that resolution of evidence. We conclude that petitioner's failure to bring before the State Bar Court a correct and complete petition for reinstatement in the four areas we have noted falls below the standard of sustained exemplary conduct petitioner must meet for reinstatement. (See *In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 37-38.)

With respect to the referee's findings that petitioner described himself as an attorney at law in documents filed in these proceedings and in an apology published in a community newspaper, thereby suggesting in that apology that he was eligible to practice law (decision ¶¶16-17), we would modify the findings in two respects: in finding 16, we would find that petitioner referred to himself as an attorney at law in three, rather than "numerous" documents filed in this proceeding. [11] In finding 17, as to petitioner's public apology, we do not find that he suggested that he was entitled to practice law by his placement of the term "attorney at law" near his address, for in the same document, he referred

clearly to his disbarment. Given these facts, we decline to adopt that portion of the referee's conclusion 2 on page 11 of his decision that petitioner held himself out to the public as authorized to practice law. On the other hand, petitioner's use of the term "attorney at law" when not an active member of the State Bar in good standing was inappropriate (see Bus. & Prof. Code, §§ 6002, 6064) and its use in papers petitioner filed with the State Bar Court manifestly did not aid him in demonstrating to the court sustained exemplary conduct required to sustain his burden.

[12] Similarly, we do not assign the degree of seriousness shown by the referee to petitioner's reference in his public apology to his disbarment as being for a period of five years. (Decision, conclusion 2, page 11.) To be accurate, petitioner should have stated that the period of five years was the minimum waiting period to apply for reinstatement. (See Rules Proc. of State Bar, rule 662.) Nonetheless, the apology taken as a whole clearly indicated that he was not then licensed to practice law.

We adopt paragraphs 18 and 19 of the referee's decision and the referee's conclusions that those findings showed petitioner's inaccurate testimony as to arrangements he had made with creditors, including Bell. Here, the referee was in a particularly good position to judge conflicting testimony. The State Bar presented testimony of petitioner's creditors and our independent review of the record supports fully the referee's findings and conclusions that petitioner had not given accurate testimony as to arrangements he had made with creditors; nor did he offer any reasonable explanation why he was unable to discharge his longstanding debt to Bell.

[13] Finally, we adopt paragraphs 20-22 of the referee's decision relative to the shortcomings of petitioner's character witnesses. Of those findings, we conclude further that petitioner's character evidence failed either to show a clear case for reinstatement or to overcome the effect of the negative evidence presented by the State Bar. The witnesses' knowledge of petitioner's character for

the most part demonstrated either that their abilities to observe him in light of any changes since his disbarment were limited or that they were not fully aware of the nature of the offenses leading to his disbarment. Most testified that they might reconsider their favorable opinions or at least would want to know more when presented with the negative evidence introduced by the State Bar concerning the incompleteness of the petition for reinstatement or misrepresentations made by petitioner about financial obligation arrangements. [14] The Supreme Court has held that favorable character evidence is neither conclusive nor necessarily determinative on reinstatement. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1095; *Tardiff v. State Bar*, *supra*, 27 Cal.3d at p. 404.) While we have considered fully petitioner's character evidence, as did the hearing referee, we cannot consider it sufficient on this record to find petitioner fit to practice.

[15] We construe the referee's findings and conclusion that petitioner did not show sufficient proof of learning and ability in the general law to rest not only on the lack of convincing testimonial evidence, but also on the lack of documentary evidence to support his claim that he had written legal memoranda or had engaged in other activities to maintain knowledge of the law. We also find that conclusion grounded on the referee's finding that petitioner failed to demonstrate any but the most rudimentary knowledge of case presentation. Accordingly, we adopt paragraphs 22-24 of the referee's decision and conclusion 3 as our findings and conclusion that petitioner failed to demonstrate adequate evidence of present learning and ability in the general law. [16] If we had concluded that petitioner was presently fit to practice, we likely would have exercised the authority of rule 952(d), California Rules of Court, by conditioning the recommendation of his reinstatement on him passing the California State Bar Examination, thus assuring the public that he is sufficiently learned in the law. However, we need not make that examination recommendation in this case because of our decision adverse to petitioner on the question of fitness to practice.⁷

7. Also a requirement for reinstatement is passage of the Professional Responsibility Examination. (Rule 952(d), Cal. Rules of Court.) The record is silent as to whether petitioner

took or passed that examination, but we need not determine that fact in view of our decision.

IV. CONCLUSION AND DISPOSITION

It was petitioner's burden to present competent evidence showing clearly and convincingly his rehabilitation, present moral fitness and learning and ability in the law. As we have discussed, his showing of rehabilitation was barely sufficient, and his evidence concerning his fitness to practice and learning and ability in the law were each inadequate to sustain his burden. We adopt the findings and conclusions of the hearing referee as we have modified them as set forth above. We also adopt the referee's conclusions. Petitioner's application for reinstatement is denied.

We concur:

PEARLMAN, P.J.
NORIAN, J.