

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD DISTEFANO

Petitioner for Reinstatement

No. 90-R-10598

Filed September 12, 1991

SUMMARY

An attorney petitioned for reinstatement after having been disbarred in 1975 based on his conviction for filing false federal tax refund claims. In 1979, after his disbarment, petitioner had been convicted in state court of grand theft and forgery based on his embezzlement of \$32,000 from his employer. The hearing judge found petitioner had shown clear and convincing evidence of rehabilitation and present good moral character, and recommended reinstatement. (Hon. Ellen R. Peck, Hearing Judge.)

The State Bar sought review, contending that petitioner's failure to make full restitution to his former employer precluded a showing of rehabilitation. The review department held that the California Supreme Court requires proof of passage of a professional responsibility examination as a precondition to reinstatement under the California Rules of Court, and therefore remanded the matter to the hearing judge for further proceedings and findings as to whether petitioner had passed such an examination. In addition, the review department ordered further proceedings on petitioner's showing of rehabilitation and present good moral character, holding that petitioner's obligation to make restitution did not depend on the existence of any legal obligation to do so, but that convincing evidence of petitioner's recognition of his culpability, contrition and rehabilitation could warrant reinstatement even absent restitution.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Beatrice R. Lawson

HEADNOTES

- [1] **725.11 Mitigation—Disability/Illness—Found**
760.11 Mitigation—Personal/Financial Problems—Found

In disciplinary matters, greater mitigating weight is given to financial pressures if the pressures are extreme and result from circumstances beyond the control of the attorney, such as undiagnosed psychiatric problems.

- [2] **2504 Reinstatement—Burden of Proof**
Reinstatement is not necessarily precluded where the reinstatement petition omits information which is insignificant and the petitioner has no intent to mislead or to conceal derogatory information. However, reinstatement may be denied when omissions from the petition are significant or misleading.
- [3 a, b] **194 Statutes Outside State Bar Act**
 2504 Reinstatement—Burden of Proof
The California Rule of Court regarding reinstatement requires petitioners for reinstatement to pass a professional responsibility examination, and to establish their learning and ability in the law, rehabilitation and present moral qualifications. Applicants who fail to show sufficient learning in the law may be required to pass the examination required of initial applicants for admission.
- [4 a, b] **2504 Reinstatement—Burden of Proof**
The heavy burden of proving rehabilitation is with the petitioner seeking reinstatement. One who has been previously disbarred must present stronger proof of present honesty and integrity than one seeking initial admission whose character has never been questioned. The proof submitted must overcome the prior adverse judgment of the petitioner's character, and must be considered in light of the moral shortcomings which led to the disbarment. The burden is on petitioners seeking reinstatement to show by a sustained course of good conduct that they have attained a standard of character which entitles them to be members of the bar.
- [5 a, b] **135 Procedure—Rules of Procedure**
 2504 Reinstatement—Burden of Proof
 2509 Reinstatement—Procedural Issues
Passage of a professional responsibility examination is one of the basic requirements for reinstatement. Although a State Bar rule permits the State Bar Court to grant a petitioner up to two years after the reinstatement hearing to pass the examination, the Supreme Court requires proof of passage to precede reinstatement. Thus, the State Bar rule is interpreted to require passage of the examination as a condition precedent to a State Bar Court recommendation of reinstatement to the Supreme Court. (Trans. Rules Proc. of State Bar, rule 667.)
- [6] **2590 Reinstatement—Miscellaneous**
The Supreme Court has not ruled out the possibility of a conditional reinstatement, but the condition must not be inconsistent with the basic purpose underlying reinstatement.
- [7] **130 Procedure—Procedure on Review**
 165 Adequacy of Hearing Decision
 2509 Reinstatement—Procedural Issues
 2559 Reinstatement Not Granted—Other Basi
Where there was no evidence in the record that a reinstatement petitioner had taken and passed a professional responsibility examination, and neither the parties nor the hearing judge focused on the issue when evaluating petitioner's request for reinstatement, the matter was remanded to give the petitioner an opportunity to take and pass the examination if he had not already done so, and for findings on the issue.
- [8] **2504 Reinstatement—Burden of Proof**
To demonstrate rehabilitation, a reinstatement petitioner needs to show a recognition of his or her wrongdoing, and evidence of rehabilitation is viewed in light of the moral shortcomings that led to the disbarment.

- [9 a, b] **591 Aggravation—Indifference—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
2504 Reinstatement—Burden of Proof
 An attorney's obligation to make restitution is not limited to legally enforceable claims. An attorney may have a moral obligation to make restitution as part of the duties of an attorney, in order to confront the harm caused by the theft. Nonetheless, payment of restitution is neither mandatory nor determinative of rehabilitation. The attorney's attitude toward payment to the victim is considered as well as the ability to pay.
- [10] **591 Aggravation—Indifference—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
2504 Reinstatement—Burden of Proof
 An attorney's moral duty to make restitution is not limited to clients, and extends to an employer to whom the attorney owed a fiduciary duty.
- [11 a, b] **2504 Reinstatement—Burden of Proof**
2551 Reinstatement Not Granted—Rehabilitation
 Where there has been an absence of complete restitution and no evidence of an inability to pay, a petitioner for reinstatement may present evidence of other affirmative acts which demonstrate the petitioner's recognition of fault, contrition and curing of the source of the initial problem and the resulting harm. Such other evidence must be "quite convincing" to establish the present rehabilitation of the petitioner. The fact that petitioner's victim had recommended petitioner's imprisonment, rather than probation and restitution, did not justify petitioner's failure to make restitution.
- [12 a, b] **2504 Reinstatement—Burden of Proof**
 Testimonials from attorneys and employers are given considerable weight in reinstatement proceedings but are not alone conclusive. A broad spectrum of witnesses who have observed the petitioner's daily conduct and mode of living is particularly insightful. Information on business ventures and pro bono or charitable work also reflects on petitioner's moral character and rehabilitation.

ADDITIONAL ANALYSIS

[None.]

OPINION

FACTS

PEARLMAN, P.J.:

The State Bar of California seeks review of the decision of a hearing judge of the State Bar Court recommending that the petition of Richard Distefano (petitioner) seeking reinstatement to the practice of law in the State of California be granted. Petitioner was disbarred by the Supreme Court of California in 1975 based on his conviction for filing false claims with the Internal Revenue Service, contrary to 18 United States Code section 287, an offense involving moral turpitude. (*In re Distefano* (1975) 13 Cal.3d 476.) After his disbarment, petitioner embezzled \$32,000 from his employer and was convicted in 1976 in state court for grand theft and forgery. Since his release from incarceration in 1979, he has been employed as a law clerk and also owns and operates a business which writes medical reports for forensic purposes. He made full restitution of \$4,194.18, as ordered pursuant to his federal sentence, but made only a partial repayment of \$3,000 prior to his state conviction to his former employer, who is now deceased. The hearing judge, on weighing all the facts and circumstances including the issue of restitution, found that petitioner's showing of rehabilitation and present good moral character was clear and convincing, and recommended that the reinstatement petition be granted.

The State Bar contends on review that petitioner's failure to make or offer full restitution after his release from prison precludes a showing of rehabilitation. In response, petitioner rests on the findings and conclusions in the hearing decision, but indicated at oral argument a willingness to accept conditions to his reinstatement.

Upon our independent review of the record, we remand this matter to the hearing judge for further proceedings and findings as to whether petitioner has passed a professional responsibility examination, as required by former rule 954(d), California Rules of Court (now renumbered as rule 951(f), effective December 1, 1990), and rule 667, Transitional Rules of Procedure of the State Bar, and for further proceedings on the issue of petitioner's showing of rehabilitation and present moral qualifications.

Petitioner was initially admitted to the practice of law in 1967 and was disbarred by the Supreme Court in March 1975, based on his conviction in federal court in 1972 on three counts of violating 18 United States Code section 287, for submitting false income tax returns claiming refunds. Petitioner, over a two-year period, submitted thirteen federal income tax returns using the names and social security numbers of living taxpayers, falsifying the remainder of the returns, preparing fictitious W-2 forms and signing the forms. The false refund claims totalled over \$16,000. Petitioner was sentenced to two five-year probation terms, to be served concurrently, on conditions including restitution of \$4,194.18 and psychiatric treatment.

After his disbarment, petitioner was employed as an office manager for a dental corporation owned by Dr. Richard Stermer and during the course of his employment embezzled \$32,000. Petitioner repaid over \$3,000 to Dr. Stermer prior to Dr. Stermer reporting the thefts to the police. Dr. Stermer also retained \$900 he owed petitioner in salary and other compensation. Dr. Stermer then demanded that petitioner repay him in full immediately by borrowing the money from petitioner's aging parents. Petitioner refused to do so and offered to make regular payments over time instead. That alternative was apparently rejected by Dr. Stermer and petitioner was arrested.

Petitioner pled guilty to one count of grand theft (Pen. Code, § 487) and one count of forgery (Pen. Code, § 470). The record indicates that Dr. Stermer told state probation officials that he thought petitioner should serve time in prison and appeared in court at petitioner's sentencing. The state probation department rejected petitioner's plea that he be given a non-custodial sentence so that he could work and repay Dr. Stermer in full. The state probation department recommended that petitioner be committed to state prison for the term prescribed by law and, on September 24, 1976, the judge sentenced petitioner to state prison. In a subsequent proceeding in November 1976, to recall petitioner from prison and place him on probation, petitioner again offered to repay the full amount taken from Dr. Stermer if

released from prison. The recommendation from state correctional officials was for petitioner to be placed on probation, rather than returned to prison. The sentencing judge rejected the recommendation and petitioner remained in state prison until May 1978. Petitioner served 18 months in state prison, with one year of parole thereafter.

As a result of his state conviction, on July 11, 1977, petitioner's federal probation was revoked and he was sentenced to three terms of imprisonment for one year and one day, to be served concurrently with each other and consecutive to his state term of imprisonment. Petitioner moved to reduce his federal sentence, pleading that the additional prison time subsequent to his time in state prison would preclude him from making any restitution to Dr. Stermer during the period of his state parole. The motion was denied. Petitioner served one year and one day in federal custody (a combination of prison and half-way house confinement) subsequent to his state incarceration. Petitioner has paid the restitution ordered as part of his federal sentence, but was not ordered to repay any monies in connection with his state conviction.

The hearing judge (and the Supreme Court in the disbarment case) found that during each criminal episode petitioner was involved with a male lover who demanded money and other material support from petitioner in order to sustain their relationship. The hearing judge found that petitioner was unable to face ending the relationship with each man and could not resist the increasing demands for funds or financially continue to sustain his material support of each man on his salary. He therefore resorted to criminal means to pay the debts incurred. The money taken in each case was either given to or spent on petitioner's lover.

Petitioner was ordered as part of his federal sentence to submit to psychiatric treatment (exh. 2) and did receive counseling while on federal parole and in state prison. At the reinstatement hearing, Dr. Bruce Steinberg, a board certified psychiatrist, testified concerning his psychiatric evaluation of petitioner. [1] In discipline proceedings, financial pressures are given greater weight in mitigation "if they are extreme and

result from circumstances . . . that are beyond the attorney's control." (*In re Naney* (1990) 51 Cal.3d 186, 196.) Very recently, in *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1038, the Supreme Court gave great weight to the fact that "undiagnosed psychiatric difficulties apparently did give rise to his spending extravagances, which in turn prompted the need for funds at the time of his misfeasance."

Based on a review of petitioner's prior psychiatric records and treatment, and two interviews with petitioner, Dr. Steinberg concluded that petitioner does not currently suffer from any behavior disorders, psychoses or personality disorders and is not in need of psychological treatment. Petitioner did exhibit some traits of a dependent/avoidant personality as well as some generalized non-specific impulse control disorders, which were manifest in his criminal conduct. In the opinion of Dr. Steinberg, these traits are in remission and, further, petitioner has demonstrated remorse for and insight into his prior conduct and taken measures in his personal life to lessen his vulnerability to similarly destructive relationships. Dr. Steinberg demurred at offering any guarantees concerning future behavior, but stated that in his opinion further criminal behavior by petitioner was unlikely. Petitioner also offered the testimony of Conrad Hartell, a retired businessman and close friend of petitioner for almost 20 years who was familiar with petitioner's disbarment and subsequent incarceration. Hartell presented his observations of petitioner's emotional development and acceptance of his homosexuality.

Petitioner's learning and ability in the law have not been challenged by the State Bar. Since his release from incarceration, petitioner has been employed as a law clerk in the firm of Alschuler, Alschuler, Alschuler, and Alschuler, and is the sole shareholder and principal employee in Forensic Consultants, Inc., a service which drafts medical reports for physicians for submission to federal and state agencies and for use in court proceedings. The four partners in the Alschuler firm and the firm's bookkeeper, Mrs. Walter Alschuler, testified in support of the reinstatement petition. Petitioner lives with and is the sole relative caring for his elderly parents, but he does not provide them with financial support.

There are two additional facts not mentioned in the hearing department decision which should be noted. During the State Bar's cross-examination, petitioner revealed that he had not disclosed two items on his reinstatement application: (1) a minor criminal conviction for trespass, involving the solicitation of an under-cover police officer which took place in 1975, in between his two more serious offenses, and (2) on his list of employers, he did not list his employment by the Stermer Dental Corporation between January 1, 1975, and June 2, 1976, the date his thefts were discovered by Dr. Stermer. His explanation at the hearing was that his omission of the items was an oversight. His employment by Dr. Stermer was before the court in connection with his criminal conviction for grand theft and forgery. The decision in favor of reinstatement impliedly accepted the explanation that the omissions were the result of oversight. On remand, the court can clarify its ruling in this regard.¹ [2 - see fn. 1]

REQUIREMENTS FOR REINSTATEMENT

[3a] Former rule 954(d), California Rules of Court (now renumbered as rule 951(f), effective December 1, 1990) requires applicants for reinstatement to pass a professional responsibility examination, to establish their rehabilitation and present moral qualification, and to establish present ability and learning in the law.² [3b - see fn. 2] [4a] Petitioner bears the burden of proving rehabilitation on a petition for reinstatement after disbarment and that burden is a heavy one. (*Calaway v. State Bar*, *supra*, 41 Cal.3d at p. 745.) As the Supreme Court often recites in reinstatement opinions, "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. In other words, in an application for rein-

statement, 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.]" (*Roth v. State Bar* (1953) 40 Cal.2d 307, 313.)

[4b] In its opinion disbaring petitioner, the Supreme Court similarly stated that "the burden properly must rest on him to prove by a sustained course of good conduct that he has attained a standard of character which entitles him to be a member of the Bar." (*In re Distefano*, *supra*, 13 Cal.3d at p. 481.)

We note that there was extensive discussion at the hearing level of petitioner's showing of rehabilitation, present moral character, and ability and learning in the law. There was no evidence in the record that petitioner has taken and passed a professional responsibility examination.

[5a] Passage of a professional responsibility examination is one of the basic requirements under the court rules for reinstatement. If the petitioner has not passed the professional responsibility examination by the conclusion of the hearings, the court, "in its discretion, may permit the petitioner a period of up to two years thereafter within which to pass the examination." (Rule 667, Trans. Rules Proc. of State Bar.) The Supreme Court has interpreted rule 951(f) to require proof of passage of the professional responsibility examination to precede reinstatement. Thus, in a recent case, it remanded a matter to our hearing department after a hearing judge had recommended conditional reinstatement of a formerly disbarred attorney provided, among other condi-

1. While the examiner raised these matters at the hearing below, there were no follow-up arguments made by the parties. [2] An omission may not be fatal to a reinstatement petition where the information omitted is insignificant and there is no intent to mislead the State Bar or conceal derogatory information. (*Calaway v. State Bar* (1986) 41 Cal.3d 743, 748.) However, where the omissions are significant or misleading, reinstatement may be denied. (*In the Matter of*

Giddens (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, review den. Aug. 15, 1990 [S015226].)

2. [3b] Applicants who fail to show sufficient present learning in the law may be required by the State Bar to pass the admission examination required of initial applicants for admission. (Former rule 954(d), Cal. Rules of Court [now rule 951(f)].)

tions, that the attorney take and pass the professional responsibility examination given by the National Conference of Bar Examiners within one year after the Supreme Court's reinstatement. (*In re Thomson*, order filed July 11, 1991 (S020731).) The Supreme Court's remand order required further proceedings and findings that Thomson "has passed the professional responsibility examination." (*Ibid.*)³ [6 - see fn. 3] [5b] Thus, rule 667 must be interpreted to require successful passage of the PRE as a condition precedent to a State Bar Court recommendation of reinstatement.

[7] In light of the fact that in the instant matter, neither the parties nor the hearing judge focused on the professional responsibility examination requirement in evaluating petitioner's request for reinstatement, we deem it appropriate in light of *In re Thomson* to remand the matter to the hearing department to give petitioner an opportunity to take and pass the professional responsibility examination if he has not already done so, and for additional proceedings and findings on this issue.

In reopening the record for evidence of passage of the professional responsibility examination, it will also be appropriate for the parties to present additional evidence, if any, on petitioner's showing of rehabilitation or lack thereof. [8] To demonstrate rehabilitation, a petitioner needs to show a recognition of his or her wrongdoing, and evidence of rehabilitation is viewed in light of the moral shortcomings that led to the disbarment. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) For guidance on remand, we address the issue of restitution since the examiner has taken the position that absent restitution petitioner should not be readmitted and petitioner has taken the position that restitution is no longer necessary.

It is undisputed that petitioner did not have the wherewithal to make complete restitution prior to going to jail and made such payments then as he was able. It is also undisputed that petitioner did not seek to complete restitution after his release, although he

did acquire sufficient funds to do so, because he believed he had already paid his debt to society. It appears that petitioner now is under no legal obligation—criminal or civil—to repay the victim of his crime.

[9a] Restitution is not, however, limited to legally enforceable claims. As the Supreme Court stated in disbaring petitioner, "the responsibilities of a lawyer differ from those of a layman; 'correspondingly, our duty to the public and to the lawyers of this state in this respect differs from that of the trial judge in administering criminal law.' [Citation.]" (*In re Distefano, supra*, 13 Cal.3d at p. 481.) An attorney may therefore be required to make restitution as a moral obligation even when there is no legal obligation to do so. (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008.) Restitution forces an attorney to confront the harm caused by theft. (*Id.* at p. 1009.) [10] While the victim was not a client, the victim was petitioner's employer to whom petitioner owed a fiduciary duty. The Supreme Court does not predicate a moral duty to make restitution on the victim being a client. [9b] Nonetheless, restitution is neither mandatory, nor in and of itself determinative of rehabilitation. (*Hippard v. State Bar, supra*, 49 Cal.3d at p. 1093.) Applicants for reinstatement are to be judged not solely on the ability to make restitution, but by their attitude toward payment to the victim. (*Resner v. State Bar* (1967) 67 Cal.2d 799, 810; *In re Gaffney* (1946) 28 Cal.2d 761, 764-765.)

[11a] Petitioner's attitude toward restitution is of concern. He contends that the victim wanted petitioner to spend the maximum time in jail and opposed any probation which would have allowed petitioner an opportunity to complete repayment. He thus claims that the victim got what he wanted. Petitioner cannot justify his failure to make restitution because the victim recommended petitioner's imprisonment rather than recommending probation. Petitioner embezzled his employer's funds and his rehabilitation can only be demonstrated by his own conduct. Since petitioner has not made complete restitution, we address the sufficiency of other evidence of petitioner's rehabilitation.

3. [6] While the Supreme Court has not ruled out the possibility of a conditional reinstatement (*Hippard v. State Bar* (1989) 49

Cal.3d 1084, 1098), the condition must not be inconsistent with the basic purpose underlying reinstatement. (*Ibid.*)

[11b] As the Court noted in *Hippard v. State Bar*, where there has been an absence of restitution and no evidence of an inability to pay, there may still be other affirmative actions by petitioner which demonstrate the same recognition of fault, contrition and curing of the source of the initial problem and the resulting harm to the public and the bar. Under these circumstances, such evidence must be "quite convincing" to establish the present rehabilitation of the attorney. (*Hippard v. State Bar, supra*, 49 Cal.3d at p. 1095.) [12a] The favorable testimony of attorneys and employers of those seeking reinstatement is entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) However, testimonials alone are not conclusive. (*Ibid.*)

[12b] We are concerned in independently reviewing the present record regarding the lack of breadth of rehabilitative evidence presented by petitioner. In reinstatement cases, "the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living of an attorney who has suffered disbarment" is particularly insightful. (*In re Andreani* (1939) 14 Cal.2d 736, 749-750.) Information concerning business ventures has been considered in past cases in evaluating rehabilitation. (See, e.g., *Calaway v. State Bar, supra*, 41 Cal.3d at p. 746; *Resner v. State Bar, supra*, 67 Cal.2d at pp. 808-809.) A greater spectrum of witnesses would provide a better basis for evaluating petitioner's qualifications for reinstatement, particularly if there is no evidence on rehearing of efforts at this juncture to complete restitution to Dr. Stermer's heirs or otherwise to demonstrate recognition of the need to take affirmative steps to make amends for his crime. While we do not expect petitioner to engage in *pro bono* or charitable works or contribute thereto solely to satisfy his showing of rehabilitation (see *Porter v. State Bar* (1990) 52 Cal.3d 518, 529, fn. 7), evidence of any such activities or the absence thereof does reflect on petitioner's moral character and rehabilitation.

CONCLUSION

For the reasons stated above, we remand this matter to the hearing department for further proceedings and findings (1) that petitioner has passed a professional responsibility examination (rule 951(f), California Rules of Court); and (2) on the issue of petitioner's showing of rehabilitation and present moral qualifications.

We concur:

GOLDHAMMER, J.*
NORIAN, J.

* By appointment of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.