STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KEVIN P. KIRWAN

Petitioner for Reinstatement

No. 91-R-02993

Filed February 10, 1994

SUMMARY

Petitioner sought reinstatement after resigning from the State Bar with charges pending following his conviction for aiding and abetting mail fraud. His misconduct had ceased over 10 years prior to his reinstatement hearing, and he produced evidence of his good conduct since that date. The hearing judge concluded that petitioner had failed to show rehabilitation based on three factors: his having ceased to perform community service after a certain date; his participation in a hot tub business with a paroled ex-convict, and his failure to establish his recovery from alcoholism by showing sustained participation in a treatment program or offering expert testimony to confirm his abstinence. After receiving the hearing judge's decision, petitioner moved to reopen the record to allow him to present previously unavailable evidence regarding the hot tub business, as well as new evidence regarding his recovery from alcoholism in the form of a report from a psychiatrist whom respondent had consulted after the reinstatement hearing. The hearing judge denied the motion to reopen. (Hon. Carlos E. Velarde, Hearing Judge.)

On review, the review department concluded that the hearing judge had erred in finding lack of moral rehabilitation based on petitioner's failure to continue his community service and his participation in the hot tub business. Accordingly, it found no need to address petitioner's offer of additional evidence on these issues. However, as to petitioner's recovery from alcoholism, the review department concluded that the psychiatrist's report which petitioner had sought to introduce by his motion to reopen raised questions about the adequacy of his recovery program. Accordingly, the review department remanded for a hearing focusing on the issues raised by the psychiatrist's report. (Pearlman, P.J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Teresa M. Garcia, Allen L. Blumenthal

For Petitioner: R. Zaiden Corrado

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.

HEADNOTES

[1] **595.90 Aggravation—Indifference—Declined to Find**
695 Aggravation—Other—Declined to Find
2504 Reinstatement—Burden of Proof
Community service activities may bear on the showing of rehabilitation in a reinstatement proceeding, but discontinuance of such activity, without more, is not necessarily an adverse factor.

[2] **2504 Reinstatement—Burden of Proof**
Where petitioner for reinstatement had operated a hot tub salon with a paroled ex-convict, with the approval of both his own probation officer and the ex-convict's parole officer, and where petitioner took careful steps to avoid any problems and there was no evidence of law violations or immoral activity, potential risk of such problems did not undercut petitioner's showing of rehabilitation in view of other favorable evidence.

[3] **2504 Reinstatement—Burden of Proof**
Where petitioner for reinstatement had a record of eight years of difficult and responsible employment with no impropriety and no unfavorable evidence, accompanied by favorable character evidence and evidence of remorse and acceptance of responsibility for misconduct leading to resignation, such record was adequate to show sustained exemplary conduct and demonstrate moral reform.

[4] **725.36 Mitigation—Disability/Illness—Found but Discounted**
2504 Reinstatement—Burden of Proof
2551 Reinstatement Not Granted—Rehabilitation
Where petitioner for reinstatement admitted his alcoholism, but his showing of recovery rested entirely on his own efforts at abstinence as supplemented by favorable character testimony, and he failed to present any medical or other expert opinion attesting to his recovery and prognosis, or any evidence that he had undergone recent treatment or participated in any recovery program, hearing judge's conclusion that such showing was insufficient to establish rehabilitation was entitled to considerable weight.

[5 a-c] **125 Procedure—Post-Trial Motions**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous
2509 Reinstatement—Procedural Issues
2551 Reinstatement Not Granted—Rehabilitation
In reinstatement proceeding, where petitioner moved to augment record on review with medical evidence regarding recovery from alcoholism which hearing judge had declined to consider on motion for reconsideration, and review department concluded that petitioner made favorable showing on all other aspects of rehabilitation, review department considered petitioner's evidence in accordance with case law holding that extrinsic evidence will not be ignored where it is the only means of proving rehabilitation from serious physical or emotional problems. Where such evidence added support to conclusion that petitioner had not demonstrated that recovery program was adequate, and State Bar expressed concern that evidence had been offered without opportunity for cross-examination, review department remanded for further hearing and expert testimony regarding petitioner's recovery.

[6] **2551 Reinstatement Not Granted—Rehabilitation**
2590 Reinstatement—Miscellaneous

Where reinstatement petitioner showed moral rehabilitation but did not make adequate showing of recovery from alcoholism, review department declined to recommend reinstatement conditional on continued adherence to a treatment program. Possibility of conditional reinstatement has not been foreclosed, but it would not be appropriate when it involves as central an issue of concern as recovery from alcoholism and depression.

ADDITIONAL ANALYSIS

[None.]

OPINION

STOVITZ, J.:

Petitioner Kevin P. Kirwan seeks our review of a decision of a State Bar Court hearing judge denying his petition for reinstatement after he resigned from membership in the State Bar following his conviction for aiding and abetting mail fraud. His conviction was later set aside pursuant to a writ of error *coram nobis*. Petitioner's misconduct ceased in 1982 and all witnesses attested to his good conduct since that time. The hearing judge acknowledged petitioner's remorse over his misconduct but nonetheless concluded that petitioner had failed to show that he was morally rehabilitated. The judge emphasized several factors leading to his conclusion, including that petitioner's showing of recovery from alcoholism involved no sustained participation in any external treatment program and that petitioner presented no expert evidence to support his testimony of abstinence since 1985 from alcohol consumption. Petitioner urges us to reverse the hearing judge's adverse findings since he claims that the record shows that he has been rehabilitated and is once again fit to practice law. The State Bar, represented by the Office of Chief Trial Counsel (OCTC), supports the hearing judge's findings and conclusions adverse to petitioner.

We have reviewed this record independently and have concluded that petitioner made a satisfactory showing of his moral regeneration. Both parties stipulated below that petitioner had the requisite learning and ability in the general law and that is not an issue on review. However, we have considered a psychiatrist's report which petitioner presented to us in the first instance and have concluded that it tends to support the hearing judge's conclusion that petitioner has not clearly and convincingly shown that the steps he took on his own have been satisfactory "to overcome a history of alcohol abuse that has persisted since adolescence." We recognize the important steps petitioner has taken to achieve moral reform. We also recognize that a hearing specifically focusing on the issues raised by petitioner's evaluating psychiatrist, regarding his continued recovery from both alcoholism and depression, would permit a better record to be made. Accordingly, we shall remand this matter to the hearing judge for further proceedings on the issue of petitioner's recovery from alcoholism and depression as set forth, *post*, in this opinion.

I. STATEMENT OF THE CASE.

A. Petitioner's criminal behavior leading to his resignation.

The following facts are not disputed and the facts immediately surrounding petitioner's misconduct, recited *post*, were stipulated to below by petitioner and OCTC. Petitioner was admitted to practice law in California in 1964. In 1968 petitioner formed a law partnership with Charles Kamanski, a former law clerk to Chief Justice Roger Traynor and former managing partner of a Los Angeles tax law firm. Kamanski and petitioner decided to set up a tax shelter program for their clients by buying and developing Arizona fruit orchards. This project required both partners to spend a great deal of time in Arizona tending to the project. In 1976 a freak hail and sleet storm ruined both the $5 million crop and petitioner and his partner. As a result, in the words of the hearing judge, petitioner felt "beaten, emotionally suicidal, out of control and unable to think through matters."

Peter Werrlein, a member of the city council of the City of Bell, California, was one of petitioner's clients who lost about $600,000 in the Arizona orchard project. Because of his loss, Werrlein acted as if petitioner and Kamanski were indebted to him. Some other business people wanted to own a card casino in Bell, where such businesses were legal, and bribed Werrlein and Bell City Manager John Pitts. Werrlein and Pitts set out to get city council approval of the casino. Petitioner and others were to obtain the real estate and license for the casino.

Knowing that Werrlein and Pitts could not legally hold an interest in the casino, petitioner agreed to hold or "front" a 51 percent interest for them. In return, petitioner would have been relieved of the $600,000 debt he owed Werrlein and petitioner would have become casino manager at a salary of $150,000 a year, after taxes. Acting on his plan to "front" the others' interest in the Bell casino, petitioner commit-

ted perjury when applying to the City of Bell for the license to operate by failing to disclose that he held the interests of persons (Werrlein and Pitts) who were forbidden by law from holding an interest in the casino. Petitioner also committed perjury in 1982 by declaring falsely in a superior court lawsuit that Pitts did not own and never had owned an interest in the casino.

In 1982, petitioner again committed perjury on his federal income tax return by reporting a sale of his own interest in the casino. However the actual transaction with one Dadanian was not a sale at all. Dadanian paid petitioner $20,000 for the sale of petitioner's interest but petitioner gave the money back to Dadanian so no sale really occurred. When the FBI started looking into matters at the Bell casino, petitioner first lied to FBI agents that he was not "fronting" others' interests. Anticipating prosecution, petitioner and others devised two "cover" stories and agreed to testify falsely if tried. However, as will be noted, *post*, petitioner stopped all dishonest conduct at that point and cooperated completely with the government.

In mid-1984, petitioner and others were indicted on various federal criminal charges. The essence of the multi-faceted indictment was that the defendants, including petitioner, conspired to defeat the right of the citizens of Bell to have city officials perform their duties honestly in matters affecting the Bell casino. In September 1984 petitioner was convicted by negotiated plea of a crime of moral turpitude, aiding and abetting mail fraud. (18 U.S.C. §§ 2, 1341.) Without any promise as to sentencing, petitioner made himself available for extensive interviews with the FBI, which determined that he was then telling the truth. As a result, the government altered a great deal of its prosecution strategy against the other defendants. Petitioner also testified against several of the other defendants and all were convicted. Petitioner was sentenced to three years probation on condition that he spend six months in a half-way house at night. The parties to this proceeding stipulated to petitioner's successful completion of probation and his early discharge from it in January 1988.

Effective in May 1985, petitioner was suspended interimly and in April 1988, the Supreme Court accepted his resignation with charges pending. In 1990 the convicting court granted petitioner *coram nobis* relief on the authority of *McNally* v. *United States* (1987) 483 U.S. 350, holding that a conviction under the mail fraud statute as it read at the time of petitioner's crime cannot apply to conduct intended to deprive persons of intangible rights such as the right to have public officials act honestly. Despite having his conviction set aside, petitioner has conceded the misconduct he committed which we have summarized *ante*.

B. Evidence regarding rehabilitation and fitness to practice.

1. Employment and character evidence.

Petitioner's dealings with the Bell casino lasted about four years (1980-1984). He was at the casino on an almost daily basis and was involved in the details of its operation. Millions of dollars flowed through the casino annually. Petitioner prided himself not only on avoiding any personal misuse of casino funds but on setting up controls to resist repeated demands from casino principals who wanted to "skim" the casino revenues.

The hearing judge made findings as to some but not all aspects of petitioner's employment. After his conviction, in July 1985, petitioner became a salesperson for a Santa Monica Audi dealership. He did not consider himself a good salesperson but he considered his business skills to be very good and in January 1986 was named dealership general manager. This job ended in 1987 when a critical national report on the car plummeted sales and the dealership owner was forced to eliminate petitioner's job.

Petitioner's next job was with Sierra Energy Company, between September 1987 and August 1988. This firm was a fledgling business which had developed an efficient refrigeration process and had entered into a contract with Ralph's Grocery Company in Los Angeles to develop the system for the grocery chain. However, a dispute arose between Sierra and Ralph's and Ralph's declined to pay Sierra. Petitioner was unable to resolve the dispute and Sierra filed for bankruptcy.

Beginning in September 1988 petitioner worked with A & Y Contractors, a minority contracting firm which had a multi-million-dollar contract for a major postal construction project in Los Angeles. The firm was undercapitalized and had become so obligated to others in order to get enough bonding required for the post office job that its future as a viable minority-owned business was in doubt. Petitioner threw himself into the daily operations of this business, which had a payroll of $160,000 per month, to achieve a successful result.

Petitioner's most recent job has been for his counsel in this proceeding, R. Zaiden Corrado, starting in 1989. He has assisted Corrado in many ways including acting as a law clerk or paralegal, drafting documents and briefs on complex issues for Corrado and devising training procedures for staff and new attorneys.

As to all of petitioner's jobs since his conviction, there has been no evidence presented of any impropriety on petitioner's part and witnesses or references have been offered to verify petitioner's good conduct. The only aspect of petitioner's employment history which caused concern for the hearing judge was petitioner's dealings with an ex-convict, Perez, between about 1986 and 1989 in overseeing him in the running of a hot tub salon, called Hot Tub Fever.

Petitioner met Perez in the federal half-way house and was most impressed with his valor in Vietnam and how his inability to get a job on returning to the United States had led Perez to become involved in drug trafficking out of desperation. Petitioner thought that if he could set up Perez in a legal business, it would give Perez civilian work experience to rehabilitate himself. With the permission of petitioner's probation officer and Perez's parole officer, petitioner operated the salon, supervising Perez. This was a business of 14 hot tubs, each in a private booth with a shower, television and video cassette player where people or couples could enjoy a hot tub in a private setting. OCTC took the position below that the salon was a place for frequent, immoral sexual activity. However, no evidence was introduced to support that claim or to show that any illegal conduct took place at the salon while petitioner worked there. The evidence does show that the salon was adjacent to a private school and it was under constant surveillance by local police. Petitioner refused to allow the salon to be used for prostitution or other improper activity. Some of the salon's patrons were senior citizens using the salon alone for hydrotherapy. In 1989, in order to expand, the adjacent school made an offer to buy the salon property. That ended petitioner's venture with the salon.

Although petitioner did not present many character witnesses, he did present three attorney witnesses: his former partner, Kamanski; attorney Weisman, who represented him in the 1980's in some of the casino matters; and an attorney-investor in the Arizona orchards, Daniels. Petitioner's wife also testified and her testimony showed that because of her own professional background as an investment counselor for a nationwide brokerage firm, she had the ability to compare petitioner's character to that of the many other professionals with whom she dealt. Some of the attorney witnesses did not know all details of the facts behind petitioner's mail fraud conviction. On the other hand, their testimony was valuable because it covered a knowledge of petitioner which was both close and spanned a considerable period of time which extended right up to the time of the hearing below.

2. Community service.

The hearing judge found that starting in 1968, petitioner had been a director of Big Brothers of Greater Los Angeles and continued until his status as a convicted felon impaired his ability to raise funds for the organization. He therefore left the Big Brothers board in 1989.

3. Remorse and recognition of wrongdoing.

The hearing judge's findings point to petitioner's shame, embarrassment and remorse over his misconduct. The judge concluded that petitioner understood the immorality of his criminal acts, accepted responsibility for them and that petitioner and his family had suffered a great deal on account of petitioner's criminal conviction and resignation.

4. Recovery from alcoholism.

By his own admission, petitioner has suffered from alcoholism for many years.[1] Some other members of his family have suffered from the disease as well. Since college, petitioner had always been a heavy drinker and it increased while dealing with the Arizona orchard problems and the Bell casino. Also, in the casino, alcohol was everywhere. When petitioner entered the half-way house in July 1985, disgusted that his defenses against unethical conduct had been impaired in part by alcohol, he decided to effect a complete turnaround of his life. There is no evidence in this record that petitioner has consumed any alcoholic beverage since July 1985, and the evidence showed that petitioner resisted successfully temptations to resume drinking. All of petitioner's efforts at abstention were based on his own efforts and he felt that he did not need any therapy or outside program to refrain from drinking. Petitioner had participated only briefly in Alcoholics Anonymous in 1985 and attended a few meetings since that time. He testified that, as a recovering alcoholic, he had the urge to drink every day but expressed confidence in his ability to control that urge.

II. DISCUSSION.

A. Introduction.

As we observed in *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429, the petitioner seeking reinstatement must establish present ability and learning in the general law, rehabilitation and present moral fitness. (See also Trans. Rules Proc. of State Bar, rule 667.) In addition, petitioner must pass the professional responsibility examination before we can recommend his reinstatement to the Supreme Court. (*Id.*; rule 951(f), Cal. Rules of Court; *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 673-674.) There is no evidence that petitioner has passed the professional responsibility examination. On the other hand, OCTC has stipulated that petitioner made an adequate showing of his learning and ability in the general law and we adopt the favorable conclusion of the judge on that issue.[2]

The Supreme Court has held and the hearing judge correctly observed that one seeking reinstatement "bears a heavy burden of proving rehabilitation" and "must show by the most clear and convincing evidence" that rehabilitative efforts "have been successful." (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1091-1092.) Put another way, the petitioner for reinstatement must show "'sustained exemplary conduct over an extended period of time.'" (*In the Matter of Miller, supra*, 2 Cal. State Bar Ct. Rptr. at p. 429, quoting *In re Giddens* (1981) 30 Cal.3d 110, 116.) With these principles in mind, we evaluate petitioner's rehabilitative showing with our familiar proviso that we independently review the record. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.)

B. Rehabilitation and Moral Fitness.

We start by examining petitioner's rehabilitative showing in light of the criminal acts which led to his resignation. (See *In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 558, citing *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403; see also *In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 314, fn. 2.) We agree with the hearing judge's conclusions that petitioner's misconduct was reprehensible. It not only furthered governmental corruption but manifested his own perjury and dishonesty as well. However, since the law favors "'the regeneration of erring attorneys'" (*Tardiff* v. *State Bar, supra*, 27 Cal.3d at p. 404, quoting *Resner* v. *State Bar* (1967) 67 Cal.2d 799,

1. Petitioner testified in great detail about how he or any other alcoholic would have to drink a certain amount to reach the level acceptable to the body where there would no longer be an impulse or craving to drink more and how that level was extended over time. He seemed very aware in his testimony below as to the etiology of alcoholism and the chemical process of the body in reacting to alcohol consumption.

2. Even in the absence of such a stipulation, the record would support such a conclusion, given the diversity and complexity of the legal drafting petitioner has done over several years for his employer.

811), we must determine whether his evidence of rehabilitation met his high burden.

In concluding that petitioner did not show the requisite sustained exemplary conduct, the hearing judge emphasized three areas. First, he found petitioner's conduct in operating the hot tub salon with Perez to show poor judgment, at the very least, since it could adversely affect petitioner's reinstatement if illegal activity had occurred "in a business venture in which the appearance of impropriety was likely." (Decision, p. 19.) The hearing judge was even more concerned that petitioner had not shown sufficient proof that his alcoholism was controlled, since petitioner's showing rested solely on his own efforts to overcome that ailment. Finally, the hearing judge concluded that the lack of any community service activities since 1989 reflected on petitioner's rehabilitation.

We disagree with the hearing judge that either petitioner's conduct of the hot tub salon or his lack of recent community service activities militates against his rehabilitation. **[1]** Community service activities may bear on one's showing of rehabilitation (see *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 317; *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 675), but we see nothing in this record which demonstrates that petitioner's discontinuance of such activity in 1989 is an adverse factor, especially since he continued to perform such service for four years after his crimes.

[2] We also disagree with the conclusions drawn by the hearing judge as to petitioner's operation of the hot tub salon. As the hearing judge recognized, petitioner's conduct of this business with Perez had the approval of both petitioner's probation officer and Perez's parole officer. There was nothing illegal or immoral about the manner in which petitioner acted and it appears he took careful steps to avoid any problems. We cannot speculate as to the effect on petitioner's burden if evidence of law violations or immoral activity had been produced. However, the potential of such risk did not undercut his showing in view of all of the favorable evidence.

[3] This record shows that for over eight years, petitioner has undertaken a wide variety of difficult and responsible employment challenges with no evidence of any impropriety and with only favorable evidence presented below about him. Under comparable showings, we have found such a record to be sustained exemplary conduct warranting our recommendation of reinstatement. (See *In the Matter of Rudman*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 556.) This is hardly the case of a petitioner who has remained a recluse and has merely rested on a record of lack of significant law violations since disbarment or resignation. As the hearing judge noted, petitioner's showing was also accompanied by favorable character evidence and evidence of remorse about and acceptance of responsibility for his immoral acts concerning the Bell casino. Thus, on this record, we find that petitioner has demonstrated his moral reform from the acts which led him to resign from Bar membership.[3]

We turn to the one remaining issue in assessing this petitioner's rehabilitation, the evidence of his recovery from alcoholism. Unlike the petitioner in *In the Matter of Rudman*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 558, who was free of a chemical dependency problem, and whose involvement in an isolated drunk driving incident was found not to militate against reinstatement, petitioner's alcoholism was long standing and it accompanied his criminal conduct. Thus, the case before us is somewhat more comparable to the factual situation in the disbarment case of *In re Billings* (1990) 50 Cal.3d 358, 363-364, 367-368, where the Court held that the showing of recovery from alcoholism, even though supported by alcohol treatment program participation, was not meaningful enough to warrant reduction of discipline.

[4] While we commend petitioner's candor in accepting his disease openly, at the hearing below,

3. Because of our conclusion, we have not deemed it necessary to consider the evidence petitioner proffered to us in augmentation of the record concerning his operation of the hot tub salon or his community service, or to determine the validity of the hearing judge's denial of petitioner's post-trial application to present previously unavailable corroborating evidence.

petitioner's showing of recovery rested entirely on his own efforts at abstinence as supplemented by the favorable testimony of a few character witnesses. What was missing, however, was any medical or other expert opinion attesting to his recovery and prognosis, or any evidence that petitioner had undergone any recent professional treatment or participated in any external or supporting recovery program. (See *In re Billings*, *supra*, 50 Cal.3d at pp. 367-368; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1119.) In these circumstances, the hearing judge's conclusion that petitioner's showing of recovery was insufficient for rehabilitation was entitled to considerable weight.

[5a] On review, petitioner requests that we augment the record to include a report, the curriculum vitae and a declaration under penalty of perjury of a psychiatrist, Dr. William Vicary, who had examined petitioner in March 1993, two months after the hearing judge filed his decision. Petitioner had offered these same documents to the hearing judge in asking for reconsideration of the judge's decision but the hearing judge declined petitioner's requests. OCTC objects to our consideration of Dr. Vicary's opinion on several grounds including that it is hearsay and unaccompanied by the opportunity to cross-examine the doctor. Because we have concluded that petitioner made a favorable showing as to all other aspects of his rehabilitation, we felt it necessary to examine the doctor's report in evaluating the parties' opposing positions as to whether we should consider it. In that regard, we follow the Supreme Court's guidance in disciplinary cases that, while it is very reluctant to rely on extrinsic evidence, it will not ignore it where it is the only means of proving rehabilitation from serious physical or emotional problems. (See *In re Billings*, *supra*, 50 Cal.3d at pp. 366-367; *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 905; but see, e.g., *Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 682-683.)

[5b] After examining Dr. Vicary's report, we believe that it lends added support to the hearing judge's conclusion that petitioner has not yet demonstrated by clear and convincing evidence that his self-administered program is a sufficient recovery from his disease. The doctor examined petitioner twice in March 1993 for a total of six hours. He read a number of pertinent documents including the hearing judge's decision and the results of medical and psychological tests. Dr. Vicary's report noted no evidence of psychosis but petitioner did present evidence of a chronic depression from which he continued to suffer. The doctor also concluded that petitioner's tests were consistent with one who has been sober for a long time and that his traits and intelligence were all favorable prognostic signs. The doctor prescribed a small dose of psychiatric medicine to eliminate petitioner's depressive symptoms and noted that he will also take a drug, Antabuse, to prevent him from drinking alcohol. In his overall opinion, Dr. Vicary stated that with the "treatment interventions" of outpatient psychiatric care, antidepressant and Antabuse medication and attendance at Alcoholics Anonymous, petitioner's mental condition should be "unremarkable and he should have continued sobriety."

[5c] We read Dr. Vicary's opinion as calling for more structure and treatment than petitioner's self-administered abstinence and also that petitioner needs to recover from depression as well as alcoholism. This does not mean that we devalue petitioner's own efforts for they have resulted in considerable progress toward his eligibility for reinstatement. On the other hand, we also note the concern expressed by OCTC that it had no opportunity to cross-examine the doctor. Petitioner has offered to produce Dr. Vicary's testimony and we believe that this matter should be remanded to the hearing judge to permit expert testimony to be received on the issue of petitioner's recovery from alcoholism and depression or other relevant medical or psychiatric condition. Expert testimony or documentary evidence on this issue may be presented by either party and the hearing judge shall then make findings and conclusions that petitioner has or has not recovered suffi-

ciently from alcoholism and depression so that he may be reinstated.[4] **[6 - see fn. 4]**

III. DISPOSITION.

For the foregoing reasons, we remand this matter to the hearing judge for further proceedings not inconsistent with this opinion. If the hearing judge makes findings favorable on the issue of petitioner's recovery, and petitioner has not yet presented proof of passage of the professional responsibility examination, the judge may make a recommendation pursuant to rule 667, Transitional Rules of Procedure of the State Bar.

I concur:

GEE, J.*

PEARLMAN, P.J., concurring:

Because of the deference due to the hearing judge's resolution of issues of credibility, such as the state of mind of a petitioner seeking reinstatement, I disagree with the majority's finding that the current record is sufficient for us to reach a different conclusion than the hearing judge as to whether petitioner has proved his rehabilitation. However, I agree with the majority that the motion to augment raises additional issues concerning the sufficiency of the steps taken by petitioner with respect to his recovery from alcoholism. I also would have granted the motion to augment with respect to other evidence offered therein by petitioner.

As this review department noted in *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, "Rehabilitation is a state of mind which may be difficult to establish." (*Id.* at p. 436, citing, inter alia, *Resner* v. *State Bar* (1967) 67 Cal.2d 799, 811; *In re Andreani* (1939) 14 Cal.2d 736, 749.) We are required to give great weight to the hearing judge's resolution of issues of fact pertaining to testimony. (Trans. Rules Proc. of State Bar, rule 453.)

In this case, as noted by the majority, petitioner not only sought review of the decision below denying his petition for reinstatement, but also sought to augment the record to present additional evidence which had been rejected in post-trial proceedings below. I believe it is incumbent upon us to examine issues of excluded evidence with care in light of the deference we must give to credibility determinations of the hearing judge with respect to evidence in the record.

One of the central concerns of the hearing judge in denying the petition for reinstatement was the judgment shown by petitioner in becoming involved in a financially unsuccessful hot tub business with two federal parolees. Petitioner explained that he had done so to assist them in reestablishing themselves in society because there were few employment opportunities for ex-felons or business persons willing to take the risk of being associated with ex-felons. Petitioner also asserts that he was surprised by the negative impact his actions had on the hearing judge since there was no evidence of any impropriety in the conduct of that business, but that he was impaired in seeking to corroborate his testimony because his federal probation officer who had approved the arrangement was unavailable to testify without prior approval of the federal court.

In a post-trial application to present additional evidence, petitioner provided to the court a copy of a recently obtained letter from the federal judge approving the probation officer's participation in petitioner's efforts to obtain reinstatement. Petitioner also provided the judge below with a letter from the federal probation officer stating that there

4. We have considered, but rejected, recommending a reinstatement conditional on petitioner's continued adherence to a prescribed treatment program. **[6]** Although the Supreme Court has not foreclosed the possibility of a conditional reinstatement (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at pp. 1097-1098), we do not deem a conditional reinstatement appropriate when it involves as central an issue of concern as petitioner's recovery from alcoholism and depression. (Cf. *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 674, fn. 3 [passage of the professional responsibility examination not deemed appropriate for a conditional reinstatement].)

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

was no indication of any illegitimate or illegal activity at the hot tub salon; that petitioner had expressly been given permission to employ two federal probationers there; that the probation officer had carefully monitored petitioner's association with the individuals; that petitioner impressed the probation officer as an individual who genuinely wanted to help; and that petitioner was always cooperative and compliant, and on all occasions was found to be sober and hardworking when the probation officer made regular unannounced visits to the hot tub salon. The probation officer's letter also stated that petitioner was granted early termination of his federal probation because of his good conduct. This offer of evidence, if accepted as true, might well have assuaged the hearing judge's concerns about petitioner's involvement in the hot tub business and helped to corroborate petitioner's continued sobriety. In light of petitioner's other evidence, favorable testimony of the probation officer might well have tipped the balance in favor of finding petitioner to be fully rehabilitated.

Petitioner acknowledges that we cannot credit the unsworn statements in the probation officer's letter offered to augment the record before us in view of the Office of the Chief Trial Counsel's right to cross-examination on behalf of the State Bar. However, it would appear that under the circumstances, petitioner's application to present additional evidence to the hearing judge on this issue should have been granted.

For the reasons stated above, I concur with the majority opinion in remanding the case for further proceedings.