STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WALDO A. BROWN

Petitioner for Reinstatement

No. 90-R-17664

Filed February 24, 1993

SUMMARY

Between 1974 and 1977, petitioner engaged in two illegal schemes, which resulted in convictions for conspiring to obstruct justice and falsifying documents and public records. He resigned in 1985 after a hearing panel recommended his disbarment. On his second attempt to obtain reinstatement, the hearing judge denied his petition on the ground that he had failed to prove rehabilitation and present moral qualifications for readmission. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Petitioner requested review. His evidence was not contradicted, nor was testimonial credibility an issue. Considering his 15 years of good behavior since 1977, extensive pro bono work, recognition of the seriousness of his misconduct, remorse, and fundamental change of values, as well as the testimony by his 7 character witnesses and the 19 reference letters on his behalf, the review department concluded that his undisputed showing of rehabilitation and present moral qualifications equalled or exceeded the showings by others whom the California Supreme Court had reinstated. The review department recommended his reinstatement upon his paying the necessary fees and taking the required oath.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Lily Barry

HEADNOTES

[1] **135 Procedure—Rules of Procedure**
2590 Reinstatement—Miscellaneous
The fact that a person resigned with disciplinary charges pending instead of suffering disbarment does not affect the necessity for a reinstatement proceeding. (Trans. Rules Proc. of State Bar, rule 662.)

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

[2] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
2509 Reinstatement—Procedural Issues
Where reinstatement petitioner's employer offered favorable character testimony at trial, and petitioner requested augmentation of the record to add the employer's declaration executed over 14 months later updating and reiterating such testimony, the review department considered the record incomplete without the declaration and granted petitioner's unopposed request to augment the record with the declaration. (Prov. Rules of Practice, rule 1304.)

[3] **146 Evidence—Judicial Notice**
191 Effect/Relationship of Other Proceedings
2509 Reinstatement—Procedural Issues
Where decisions by the former State Bar Court concerning a petitioner's prior reinstatement petition helped illuminate the petitioner's subsequent progress toward rehabilitation, the review department took judicial notice of such decisions pursuant to Evidence Code section 452(d).

[4] **135 Procedure—Rules of Procedure**
2504 Reinstatement—Burden of Proof
A petitioner for reinstatement must pass the Professional Responsibility Examination, show present ability and learning in the general law, and show rehabilitation and present moral qualifications for readmission. (Trans. Rules Proc. of State Bar, rule 667.)

[5 a, b] **2504 Reinstatement—Burden of Proof**
A petitioner for reinstatement bears a heavy burden of proof, and must show rehabilitation by the most clear and convincing evidence and provide overwhelming proof of reform. However, no absolute guarantee that the petitioner will never engage in misconduct again is possible, nor must a petitioner show perfection. The law favors the regeneration of erring attorneys and should not place unnecessary burdens on them in proving rehabilitation.

[6 a, b] **162.90 Quantum of Proof—Miscellaneous**
166 Independent Review of Record
2504 Reinstatement—Burden of Proof
The hearing judge's determinations of testimonial credibility must receive great weight because the hearing judge observed the witnesses' demeanor. However, the review department, examining the record independently, must reweigh the evidence and pass upon its sufficiency. Where testimonial credibility was not an issue and the determination to be made was whether the quality and quantity of a party's evidence met the applicable burden of proof, the issue was a question of law.

[7] **2504 Reinstatement—Burden of Proof**
A petitioner for reinstatement must provide stronger proof of present honesty and integrity than an applicant who is seeking admission for the first time and has never had his or her character questioned. Such proof must overcome the prior adverse judgment which resulted in the petitioner's disbarment or resignation with discipline charges pending. The evidence must be considered in light of the petitioner's prior moral shortcomings.

[8] **2504 Reinstatement—Burden of Proof**
2590 Reinstatement—Miscellaneous
Egregious misconduct does not preclude reinstatement. The law favors rehabilitation. Reformation is open to all attorneys who have erred.

[9] **135 Procedure—Rules of Procedure**
2502 Reinstatement—Waiting Period
2503 Reinstatement—Showing to Shorten Waiting Period

A petition for reinstatement may be filed five years after the effective date of interim suspension, disbarment, or resignation. For good cause, reinstatement may be sought three years after disbarment. (Trans. Rules Proc. of State Bar, rule 602.)

[10] **159 Evidence—Miscellaneous**
2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted

The passage of an appreciable period of time is an appropriate consideration in determining whether a petitioner for reinstatement has made sufficient progress towards rehabilitation. Where the evidence is uncontroverted and shows exemplary conduct for eight to ten years with no suggestion of wrongdoing, a petitioner would seem to have established rehabilitation.

[11 a, b] **159 Evidence—Miscellaneous**
2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted

Evidence of pro bono or charitable work reflects on an erring attorney's rehabilitation and present moral qualifications. Where a petitioner for reinstatement had volunteered one full day every week for several years at a legal services program, such extensive pro bono work was a significant factor in favor of the petitioner's reinstatement.

[12 a, b] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted

Although the law demands neither fraudulent penitence nor artificial contrition, a petitioner for reinstatement must understand his or her professional responsibilities and must show a proper attitude toward his or her misconduct. Where a petitioner acknowledged the seriousness of his wrongdoing, expressed remorse, and described a fundamental change in values likely to prevent future misconduct, such testimony, which hearing judge found credible, was a significant factor in favor of his reinstatement.

[13 a-c] **159 Evidence—Miscellaneous**
2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted

Although testimony by character witnesses and letters of reference are not conclusive, favorable character evidence deserves heavy weight in determining whether a petitioner for reinstatement has proved rehabilitation and present moral qualifications. Favorable character testimony and reference letters from employers and attorneys are entitled to special weight. Petitioner's current employer's testimony expressing a high opinion of petitioner's character, demeanor and behavior, and confirming petitioner's sensitivity and concern for proper ethical behavior, merited significant weight.

[14 a, b] **148 Evidence—Witnesses**
199 General Issues—Miscellaneous
2590 Reinstatement—Miscellaneous

Judges should not testify voluntarily as character witnesses. Judges should respond to requests from the State Bar, but absent such a request, should not write a letter of reference for an attorney facing discipline or a petitioner seeking reinstatement.

[15] **148 Evidence—Witnesses**
2510 Reinstatement Granted
Testimony by psychologist who had tested reinstatement petitioner and interviewed him 10 times, and who opined that risk of petitioner's recidivism was very low, was entitled to significant weight.

[16 a, b] **148 Evidence—Witnesses**
2590 Reinstatement—Miscellaneous
Favorable character testimony in reinstatement proceeding should not have been devalued based on lack of frequent current contact with petitioner by witnesses who knew him at time of original misconduct, or based on failure to call family members to testify, where misconduct was unrelated to home or family.

[17] **141 Evidence—Relevance**
2504 Reinstatement—Burden of Proof
2590 Reinstatement—Miscellaneous
Where evidence about the manner in which a reinstatement petitioner has handled positions of trust is available, such evidence is of probative value. But evidence that the petitioner has occupied positions of trust is not a requirement of reinstatement, and favorable testimony about the petitioner's trustworthiness should not be discounted because the witnesses have failed to observe how the petitioner would handle a fiduciary relationship.

[18 a-c] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted
The standard for rehabilitation and present moral qualifications in a reinstatement proceeding is objective, and whether the petitioner has met the heavy burden of proof depends on a comparison of the facts of the current proceeding with the facts in other reported proceedings. Where petitioner's showing of rehabilitation and present moral qualifications was at least comparable to the showings by others who had obtained reinstatement, and reported cases denying reinstatement were distinguishable, review department recommended reinstatement.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P. J.:

We review the decision by a hearing judge of the State Bar Court to deny reinstatement to petitioner, Waldo A. Brown, in his second attempt at reinstatement following his resignation with disciplinary charges pending in 1985. The evidence which was introduced on petitioner's behalf below was uncontradicted and found credible by the hearing judge. The main issue before us is whether as a matter of law petitioner has presented sufficient evidence to meet his heavy burden of proving rehabilitation and present moral qualifications in light of the criminal acts he committed 15 years ago. We conclude that his undisputed showing is equal to or greater than that of others who have been reinstated by the Supreme Court and we recommend that he be reinstated.

I. FACTS AND PROCEEDINGS BEFORE THE STATE BAR COURT

After gaining admission to the California bar in 1959, petitioner worked in a district attorney's office. He formed a partnership in 1963 and practiced law by himself from 1966 onwards. His private practice focused on criminal defense.

In November 1974, the deputy clerk of a municipal court suggested an illegal scheme to petitioner for the handling of cases in which his clients were charged with driving under the influence of alcohol ("DUI"). Petitioner used this scheme in approximately 54 cases. Without the knowledge of the judge or the prosecuting attorney, the DUI charge against each client was dismissed upon the client's guilty plea to a lesser charge of reckless driving. Because of weak evidence, petitioner would have expected the prosecuting attorney to offer such a plea bargain in most of the cases. The clerk did not seek or receive compensation for her part in the scheme, nor did petitioner ask more than his usual fee from the affected clients. The scheme ended when a new judge changed the court's operating procedures in January 1975.

In May 1976, petitioner began another scheme, which resulted in the illegal manipulation of approximately 85 DUI cases. Exploiting the trust and lax practices of another judge, petitioner had the DUI convictions of many persons ruled unconstitutional without the knowledge of a prosecuting attorney,[1] although a number of these convictions were sound. The rulings prevented the convictions from being used to enhance punishment in other DUI cases against the same defendants. Petitioner did not ask for any additional payment from the defendants, many of whom were no longer represented by him and had no new DUI cases against them. Petitioner's second scheme ended when the judge retired in September 1977.

Petitioner's misconduct led in May 1980 to his conviction of conspiracy to obstruct justice and in May 1982 to his conviction of falsifying documents and falsifying public records. As a result of his first conviction, he was incarcerated for nine months in 1983, was in a work furlough program for the next three months, and spent one year on parole. As a result of his second conviction, he received a five-year probation, which ended in 1987.

In February 1981, the California Supreme Court placed petitioner on interim suspension because of his initial criminal conviction. He remained on interim suspension while a disciplinary proceeding ensued. In October 1984, a State Bar hearing panel recommended petitioner's disbarment. Petitioner later tendered his resignation, which the California Su-

1. The hearing judge found that the judge in the second scheme was not aware of petitioner's misconduct at the time of the scheme. Petitioner argues that the judge joined petitioner in declaring closed cases unconstitutional without the presence of a deputy district attorney. There is evidentiary support in the record for petitioner's argument with regard to some closed cases, but the evidence is not clear about all the approximately 85 closed cases. Whether or not the second judge was also involved in petitioner's scheme makes no difference in terms of the issues involved in this reinstatement proceeding.

preme Court accepted in November 1985 and which became effective the following month.[2] **[1 - see fn. 2]**

Since July 1986, petitioner has worked as a paralegal in two law offices. Since July 1987, he has volunteered his services for one full day every week to a legal services program. In 1989, the program awarded him a certificate recognizing his outstanding and valuable service.

In 1987,[3] petitioner submitted his first reinstatement petition. In June 1988, a State Bar Court referee recommended reinstatement. In September 1988, the former volunteer review department of the State Bar Court denied reinstatement on the ground that petitioner had failed to prove his rehabilitation. Petitioner did not seek review of this denial by the California Supreme Court.

In December 1990, petitioner filed his current reinstatement petition. A two-day hearing occurred in July 1991. In a July 1992 decision, the hearing judge found that petitioner had passed the Professional Responsibility Examination and concluded that petitioner had proved present learning and ability in the general law, but not rehabilitation and the present moral qualifications for readmission. In August 1992, petitioner requested review.

In October 1992, petitioner requested augmentation of the record with a declaration from petitioner's employer. The declaration updates and reiterates the employer's favorable testimony at the July 1991 hearing, which testimony was found to be credible. The examiner filed no opposition to petitioner's request and asserted at oral argument that she did not oppose petitioner's proposed augmentation of the record.

II. DISCUSSION

A. Augmentation of the Record

[2] As a preliminary matter, we consider petitioner's unopposed request to augment the record with a declaration updating the favorable testimony offered by petitioner's employer during the 1991. The original record must be incomplete or incorrect in order for us to grant such a request. (Provisional Rules of Practice of State Bar Court, rule 1304.) Because the character evidence offered by an employer weighs heavily in determining rehabilitation and present moral qualifications (*Feinstein* v. *State Bar* (1952) 39 Cal.2d 541, 547; *In re Andreani* (1939) 14 Cal.2d 736, 749-750; *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 675; see also *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 36) and because more than 14 months elapsed from the date of the employer's strong character testimony to the date of the declaration reiterating a favorable opinion of petitioner's character, we consider the record incomplete without the declaration and grant the request.

[3] Pursuant to Evidence Code section 452, subdivision (d), which permits judicial notice to be taken of the record of any court of this state, we informed counsel for both parties at oral argument of our intent to take judicial notice of a copy of the former referee's 1988 decision recommending petitioner's reinstatement and a copy of the former volunteer review department's 1988 decision denying reinstatement. Since neither party objected we admitted both of these decisions into evidence.[4] They reflect the former State Bar Court's reasoning about petitioner's showing of rehabilitation approximately five years ago and help illuminate petitioner's progress toward rehabilitation since then.

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2. **[1]** That petitioner resigned with disciplinary charges pending after a disbarment recommendation, instead of actually suffering disbarment, does not affect the necessity for a reinstatement proceeding. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1092, fn. 4; see also *Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 745; *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 398; Trans. Rules Proc. of State Bar, rule 662.)

3. The parties stipulated, and the hearing judge found, that petitioner submitted his first petition for reinstatement in May 1987. The first petition shows no submission date, but bears a filing date of June 16, 1987.

4. We added these decisions to exhibit W, which already contains the reporter's transcript and petitioner's reference letters for petitioner's former reinstatement proceeding.

B. Requirements for Reinstatement

[4] Reinstatement requires (1) the passage of the Professional Responsibility Examination, (2) a showing of present ability and learning in the general law, and (3) a showing of rehabilitation and present moral qualifications for readmission. (Trans. Rules Proc. of State Bar, rule 667.) The examiner does not argue that petitioner has failed to satisfy the first two requirements, nor does the record support such an argument. Thus, the only remaining question is whether petitioner made an adequate showing of rehabilitation and present moral qualifications.

C. Petitioner's Burden of Proof

[5a] An erring attorney who seeks reinstatement bears a heavy burden of proof. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1091; *Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 745; *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 222; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.) Such a petitioner "must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful." (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1092.) "[O]verwhelming proof of reform" is necessary. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547, and cases cited therein.)

[5b] Yet "'no absolute guarantee that petitioner will never engage in misconduct again'" is possible. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404, quoting *Resner* v. *State Bar* (1967) 67 Cal.2d 799, 811.) Nor must petitioner show perfection. (*In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 37.) Reformation is a state of mind which "may be difficult to establish affirmatively" and "may not be disclosed by any certain or unmistakable outward sign." (*In re Andreani*, *supra*, 14 Cal.2d at p. 749.) The law favors "'the regeneration of erring attorneys and should not place unnecessary burdens upon them'" in proving rehabilitation. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404, quoting *Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 811; see also *In re Gaffney* (1946) 28 Cal.2d 761, 764; *In re Andreani*, *supra*, 14 Cal.2d at p. 749; *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373, 382.)

D. Independent Review of the Record

The task of the review department is to independently review the record. In doing so, we may adopt findings and conclusions different from those of the hearing judge who heard and saw the witnesses and observed their demeanor. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 807; see also Trans. Rules Proc. of State Bar, rule 453(a); *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *In the Matter of McCray*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 382; *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.)

[6a] Citing *Resner* v. *State Bar*, *supra*, 67 Cal.2d 799, the examiner argues that the hearing judge was in a superior position to evaluate the weight of the evidence "because of the opportunity to weigh the evidence first hand." *Resner*, however, stands for the familiar proposition that the hearing judge's determinations of testimonial credibility must receive great weight because the hearing judge heard and saw the witnesses and observed their demeanor. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 807; see also Trans. Rules Proc. of State Bar, rule 453(a); *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *In the Matter of McCray*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 382; *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.) Our review requires us not only to examine the record independently, but also to reweigh the evidence and pass upon its sufficiency. (*In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.)

[6b] Testimonial credibility is not an issue in this proceeding. The hearing judge believed both petitioner and his witnesses and we adopt all of her findings of material fact. Our task here is to determine whether the quality and quantity of petitioner's evidence meet his heavy burden of proof. This is, as the examiner acknowledged at oral argument, a question of law based on the undisputed record below.

E. Petitioner's Prior Misconduct

The hearing judge stressed petitioner's misconduct between November 1974 and January 1975 and between May 1976 and September 1977. She correctly observed that his schemes were sophisticated, occurred over a sustained period of time, took place in the absence of any notable duress or compulsion, were not voluntarily terminated by him, and involved his abuse of a position of trust. As she observed, he had sufficient maturity and experience at the time of his misconduct to realize "that his actions were terribly wrong."

[7] Contrary to petitioner's suggestion, reinstatement proceedings differ from admission proceedings. Unlike an applicant for admission, an erring attorney must provide stronger proof of present honesty and integrity than one who seeks admission for the first time and has never had his or her character questioned. Such proof must overcome the prior adverse judgment which resulted in petitioner's disbarment or resignation with discipline charges pending. Petitioner's evidence must be considered in light of petitioner's prior moral shortcomings. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403; *Roth* v. *State Bar* (1953) 40 Cal.2d 307, 313; *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30; see also *Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1092; *Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 746.)

[8] The egregiousness of petitioner's misconduct, however, does not preclude his reinstatement. The law favors rehabilitation. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 811; *In re Andreani*, *supra*, 14 Cal.2d at p. 749; *In the Matter of McCray*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 382.) Reformation is open to all attorneys who have erred. (*In re Andreani*, *supra*, 14 Cal.2d at p. 749.) "'It is not the policy of the law, and is not considered to be in the interest of justice, that an attorney who has been disbarred for misconduct shall never under any circumstances be readmitted to practice.'" (*Ibid.*, quoting *In re Nisbet* (1926) 77 Cal.App. 260, 261.) Thus, for example, in *In re Aquino* (1989) 49 Cal.3d 1122, the Supreme Court disbarred Aquino who had been convicted on multiple counts of violating federal immigration and naturalization laws by engaging in a fraudulent scheme involving sham marriages. Between October 1980 and June 1981, he repeatedly counseled clients to perjure themselves. Nonetheless, the high court noted that, by the time of his disbarment, Aquino had already made substantial progress toward rehabilitation. (*Id.* at pp. 1131-1132; see *id.* at pp. 1134-1135 (conc. opn. of Kaufman, J.).) Pursuant to Evidence Code section 452, subdivision (d), we take judicial notice of the fact that, following a hearing department decision recommending reinstatement from which the State Bar did not seek review, Aquino was ordered to be reinstated upon paying the necessary fees and taking the required oath by California Supreme Court order filed August 6, 1991. (*In the Matter of Aquino*, order filed Aug. 6, 1991 (S022071).) We must likewise determine whether petitioner's evidence dispels the cloud of his prior misconduct.

F. Passage of a Very Long Time Since Petitioner's Misconduct

[9] The rules governing reinstatement proceedings allow a petition for reinstatement to be filed five years following the effective date of interim suspension, disbarment or resignation. Depending on the showing made, this five-year period may be sufficient to demonstrate rehabilitation. For good cause, reinstatement can be sought three years following disbarment. (Rule 602, Trans. Rules Proc. of State Bar.) In arguing that he has proved rehabilitation, petitioner stresses that he has not practiced law for 12 years, that his misconduct occurred 15 to 18 years ago, and that he has engaged in no misconduct since then. In discussing her adverse conclusion regarding petitioner's rehabilitation, the hearing judge failed to mention the very long time since his misconduct; nor does the examiner address this issue.

[10] "The passage of an appreciable period of time" constitutes "an appropriate consideration" in determining whether a petitioner has made sufficient progress towards rehabilitation. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1095.) In a reinstatement proceeding, an erring attorney must "'show by sustained exemplary conduct over an extended period of time that [he has] reattained the standard of fitness to practice law.'" (*In re Giddens* (1981) 30 Cal.3d 110,

116, quoting *In re Petty* (1981) 29 Cal.3d 356, 362; see also *In the Matter of Wright, supra*, 1 Cal. State Bar Ct. Rptr. at p. 223.) "Where the evidence is uncontroverted . . . and shows exemplary conduct extending over a period of from eight to ten years without even a suggestion of wrongdoing, it would seem that rehabilitation had been established." (*Werner* v. *State Bar* (1954) 42 Cal.2d 187, 198 (conc. opn. of Carter, J.).)

G. Petitioner's Pro Bono Work

[11a] In discussing her conclusion that petitioner had failed to prove rehabilitation and present moral qualifications, the hearing judge also did not mention that as of the 1991 hearing in the current proceeding, petitioner had donated one full day of his time every week for four years to doing pro bono work for a legal services program. Citing *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933, 941, the examiner described petitioner's pro bono work as an activity which was not extraordinary and which merely constituted what is expected of a member of society. *Seide* provides no basis for such a characterization.

[11b] Case law establishes that petitioner's extensive pro bono work is another significant factor in favor of his reinstatement. Evidence of pro bono or charitable work reflects on an erring attorney's rehabilitation and present moral qualifications. (*In the Matter of Distefano, supra*, 1 Cal. State Bar Ct. Rptr. at p. 675.) In granting reinstatement, the California Supreme Court has observed that one petitioner donated his services to civic and public projects for a considerable portion of six years (*In re Andreani, supra*, 14 Cal.2d at p. 748); that a second petitioner took an active part in community affairs, donated time to the Red Cross, and was active in his church for a number of years (*Werner* v. *State Bar, supra*, 42 Cal.2d at p. 190); and that a third petitioner attended church regularly and participated in community affairs for five years. (*Allen* v. *State Bar* (1962) 58 Cal.2d 912, 914.)

H. Petitioner's Testimony About His Misconduct, Remorse, and Change of Values

[12a] Rehabilitation is a state of mind. (*Resner* v. *State Bar, supra*, 67 Cal.2d at p. 811; *In re Andreani, supra*, 14 Cal.2d at p. 749.) Although the law demands neither fraudulent penitence nor artificial contrition (*Calaway* v. *State Bar, supra*, 41 Cal.3d at p. 747), a petitioner for reinstatement must understand his or her professional responsibilities (*Feinstein* v. *State Bar, supra*, 39 Cal.2d at p. 548; see also *Roth* v. *State Bar, supra*, 40 Cal.2d at p. 314) and must show a proper attitude toward his or her misconduct. (*Feinstein* v. *State Bar, supra*, 39 Cal.2d at p. 547; *Wettlin* v. *State Bar* (1944) 24 Cal.2d 862, 870.) In granting reinstatement, the California Supreme Court has observed that a petitioner took his punishment in proper spirit, evidenced an appreciation of the gravity of his misconduct, and manifested a steady determination to rehabilitate himself. (*In re Gaffney, supra*, 28 Cal.2d at p. 763.)

[12b] In his testimony during the current proceeding, petitioner acknowledged unequivocally the seriousness of his wrongdoing, expressed remorse, and described a fundamental change which he had experienced in his values and which he believed would prevent future misconduct if he were reinstated. The hearing judge determined that his testimony was credible, and the examiner does not challenge this credibility determination. In addressing the factors which he believes show his rehabilitation and present moral qualifications, petitioner stresses his testimony about his misconduct, remorse, and change of values. Pursuant to case law, such testimony is a significant factor in favor of his reinstatement.

I. Testimony by Character Witnesses and Letters of Reference

[13a] Testimony by character witnesses and letters of reference are not conclusive. (*Tardiff* v. *State Bar, supra*, 27 Cal.3d at p. 404; *Roth* v. *State Bar, supra*, 40 Cal.2d at p. 315; *Feinstein* v. *State Bar, supra*, 39 Cal.2d at p. 547; *In the Matter of Distefano, supra*, 1 Cal. State Bar Ct. Rptr. at p. 675; *In the Matter of McCray, supra*, 1 Cal. State Bar Ct. Rptr. at p. 385; *In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. at p. 37.) Nevertheless, in determining whether an erring attorney has proved rehabilitation and present moral qualifications, the California Supreme Court has heavily weighed "the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to

their observation of the daily conduct and mode of living" of such an attorney. (*In re Andreani*, *supra*, 14 Cal.2d at pp. 749-750; see also *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404; *Resner* v. *State Bar*, *supra*, 67 Cal.2d at pp. 805-806; *Roth* v. *State Bar*, *supra*, 40 Cal.2d at p. 315; *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 675.) The Court has stated that favorable character testimony and reference letters from employers and attorneys are especially entitled to considerable weight. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; see also *Preston* v. *State Bar* (1946) 28 Cal.2d 643, 651.)

In this proceeding, petitioner presented favorable testimony by seven character witnesses: three judges,[5] **[14a - see fn. 5]** three attorneys, and a psychologist. They testified that petitioner has demonstrated good character, honesty, and integrity and that they did not believe he would do wrong in the future. In addition, petitioner submitted nineteen reference letters urging his reinstatement: ten from attorneys, five from judges,[6] **[14b - see fn. 6]** two from legal secretaries, one from a court administrator, and one from a law office manager. Among the letter writers were a number of persons who had been in good positions to observe petitioner's daily conduct. These writers included an attorney who had been the law partner of petitioner's employer from December 1989 onwards, an attorney who had been the executive director of the legal services program since petitioner began doing pro bono work for the program, a staff attorney who had supervised petitioner's pro bono work at the program for two years, a staff attorney who had observed petitioner's work at the program since 1989, a staff attorney who had worked with petitioner on cases handled by the program for two years, a legal secretary who had worked at the program during the entire time of petitioner's pro bono service to the program, and the office manager for petitioner's current employer during the entire time of his work for the employer.

The hearing judge carefully and accurately summarized the testimony of the seven witnesses who appeared on petitioner's behalf. She accepted their testimony as credible and described it as laudatory and considerable. Yet in discussing her conclusions of law, she asserted that their testimony failed to dispel the unfavorable conclusions established by petitioner's misconduct 15 to 18 years earlier. According to the hearing judge, none of the witnesses had a close or personal relationship with petitioner after his separation from the State Bar, and most had spent little time with the petitioner during the year or two before their testimony. She discounted the testimony of witnesses who had known petitioner when he was secretly committing misconduct on the grounds that their favorable perceptions of petitioner at that time were incorrect. She expressed concern that none of petitioner's family members or close personal friends testified on his behalf. Also, she stated that petitioner's evidence lacks a tested quality because his moral character has yet to be proven in a situation in which he would again be tempted to engage in misconduct and would be likely to succeed in so doing.

The examiner presented no witnesses to rebut the extremely favorable testimony by petitioner's character witnesses, but discounts the value of this testimony, reiterating the views of the hearing judge.

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5. **[14a]** The record does not reveal whether the judges who testified in this proceeding did so under subpoena or voluntarily. Judges should not testify voluntarily as character witnesses. (Cal. Code Jud. Conduct, canon 2B; *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 28, fn. 1; *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 290, fn. 4; *In re Rivas* (1989) 49 Cal.3d 794, 798, fn. 6.)

6. **[14b]** The record does not reflect whether the letters of reference were requested by the hearing judge. Judges' input can be of vital importance when they are possessed of substantial personal knowledge of the petitioner. However, the California Judicial Conduct Handbook treats character references in bar disciplinary proceedings in a similar manner as letters of reference in criminal sentencing proceedings, stating that: "Absent a request, a judge should not write a letter of reference for a lawyer accused of misconduct and facing bar discipline. A judge should, however, respond to any request from the State Bar." (Rothman, California Judicial Conduct Handbook (Cal. Judges Assn. 1990) § 210.340; see also *id.*, § 210.330 [letters of reference in criminal proceedings].) Letters of reference offered in a reinstatement proceeding would appear to fall in the same category as letters of reference offered in the disciplinary proceeding which preceded the reinstatement hearing. (See generally *In re Rivas*, *supra*, 49 Cal.3d at pp. 801-802.)

The hearing judge also carefully and accurately summarized the reference letters, but apparently discounted them as well. Although she did not mention the reference letters in discussing her adverse conclusion regarding petitioner's rehabilitation and present moral qualifications, she found as facts that none of the letter writers had "a close or personal relationship" with petitioner, that none reported "frequent current contacts" with petitioner, and that petitioner had not recently acted in a fiduciary capacity on behalf of any of them. The examiner presented no evidence to rebut these favorable reference letters. She also fails to discuss them.

[13b] Petitioner points out that his current employer, for whom he has worked as a paralegal since July 1987, expressed a high opinion of his character, demeanor, and behavior and has been in an excellent position to observe him because he has spent most of his waking hours since 1987 in his employer's office. The employing attorney testified at the July 1991 hearing that petitioner was honest, had disclosed his misconduct before being hired, and expressed remorse and the belief that his punishment had been just. In addition, the employer testified that petitioner had demonstrated his sensitivity to, and concern over, proper ethical behavior. In the October 1992 declaration, the employer updated and repeated his favorable testimony. The examiner conceded at oral argument that the employer's testimony and declaration merit significant weight.

[15] We also give significant weight to the testimony by the psychologist, who tested petitioner and who interviewed him 10 times in 1991, the last time with his wife of 40 years. The psychologist testified that petitioner did not try to defend or excuse his misconduct and expressed remorse. According to the psychologist, petitioner's misconduct was "an ego trip," not "a get-rich-quick scheme." Also, the psychologist testified that the risk of petitioner's recidivism was very low because of his shift in basic values, his pride, and the likelihood of his retirement in the near future. Neither the hearing judge nor the examiner sought to discredit the psychologist's testimony.

[16a] Petitioner argues against devaluing the testimony of the attorneys and judges who knew him when he was secretly engaged in misconduct and who had a high opinion of him at that time. As petitioner points out, these witnesses came forward despite their previous extreme disappointment in petitioner and with full knowledge of the extent of his wrongdoing. These witnesses have a strong interest in maintaining the honest administration of justice. Having once been deceived by petitioner, it is very unlikely that they would have testified on his behalf unless they were convinced that he was rehabilitated and would not repeat his misconduct. Yet, based on their observations of petitioner's behavior and their conversations with petitioner, these attorneys and judges urged petitioner's reinstatement. Their testimony thus deserves significant weight in conjunction with that of his employer and the psychologist. Not every character witness need testify to close, continuous contact. It is the cumulative effect of a cross-section of witnesses with varying relationships to the petitioner that paints a picture of his present character.

[16b] Petitioner also argues against devaluing the favorable character testimony on his behalf on the ground that he did not call family members to testify. As petitioner points out, his misconduct did not occur at home or within his family and the testimony of a presumably biased family member could only have been cumulative. Petitioner's wife attended the 1991 hearing, and the psychologist's testimony about petitioner's remorse and change in values was partially based on an interview including petitioner's wife. Thus, we do not discount the favorable character testimony on petitioner's behalf on the ground that he failed to call a family member to testify.

[17] Nor do we discount such testimony on the grounds that it lacks what the hearing judge called "a tested quality." Where evidence about the manner in which a petitioner has handled positions of trust is available, such evidence is of probative value. Yet "evidence that the petitioner has occupied positions of trust is not a requirement of reinstatement." (*Werner* v. *State Bar*, *supra*, 42 Cal.2d at p. 194.) Where a petitioner has not acted in a fiduciary capacity since his or her disbarment or resignation with disciplinary charges pending, the testimony of character witnesses about his or her trustworthiness should not be

discounted on the ground that they have failed to observe how the petitioner would handle a fiduciary relationship. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404.)

[13c] We also find that the letters bolster the favorable testimony by petitioner's character witnesses. As discussed with regards to petitioner's testimonial evidence, it was not necessary for all of the letter writers to have close or personal relationships with petitioner or for petitioner to have acted recently in a fiduciary capacity on behalf of any of them. Although no letter writers explicitly reported frequent current contacts with petitioner, at least seven had been in good positions to observe petitioner's behavior for extended periods of time since 1987.

J. Comparison of Petitioner's Showing of Rehabilitation and Present Moral Qualifications with the Showings of Rehabilitation and Present Moral Qualifications in Other Reported Reinstatement Proceedings

[18a] The standard for rehabilitation and present moral qualifications in a reinstatement proceeding is objective. Whether petitioner has met his heavy burden depends on a comparison of the facts of the current proceeding with the facts in other reported California reinstatement proceedings. Petitioner's showing of rehabilitation is at least comparable to the showings of rehabilitation and present moral qualifications by others who have gained reinstatement over the years. (See, e.g., *Calaway* v. *State Bar*, *supra*, 41 Cal.3d 743; *Resner* v. *State Bar*, *supra*, 67 Cal.2d 799; *Allen* v. *State Bar*, *supra*, 58 Cal.2d 912; *Werner* v. *State Bar*, *supra*, 42 Cal.2d 187; *Jonesi* v. *State Bar* (1946) 29 Cal.2d 181; *In re Gaffney*, *supra*, 28 Cal.2d 761; *Preston* v. *State Bar*, *supra*, 28 Cal.2d 643; and *In re Andreani*, *supra*, 14 Cal.2d 736.)

Research has revealed no reported reinstatement proceeding in which the California Supreme Court failed to find rehabilitation and present moral qualifications on a showing as strong as petitioner's. Nor at oral argument could the examiner cite any such proceeding.

[18b] Further, the current proceeding is distinguishable from reported reinstatement proceedings in which the California Supreme Court failed to find rehabilitation and present moral qualifications. For example, in *Hippard* v. *State Bar*, *supra*, 49 Cal.3d 1084, 1098, Hippard showed neither a meaningful attempt to make restitution in whole or in part nor an inability to do so. In *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d 395, 405, Tardiff continued his misdeeds long after his disbarment; that he finally stopped engaging in such misconduct did not demonstrate rehabilitation. In *Roth* v. *State Bar*, *supra*, 40 Cal.2d 307, 314-315, Roth's own testimony indicated in several ways a more than careless attitude toward the rules of professional conduct; most of his character witnesses were mere casual acquaintances; one character witness knew nothing about his present moral character; he misinformed one character witness about the reasons for his disbarment and informed none of the character witnesses of previous conduct for which he had been investigated or disciplined; and several character witnesses indicated that such knowledge might have altered their opinion of him.

In *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d 541, 548, Feinstein's repeated assertions that he had done no wrong despite a criminal conviction and other disciplinary proceedings against him, as well as his failure to make any attempt to determine whether his activities had resulted in losses to others or to reimburse his victims, indicated a continuing failure to comprehend his professional responsibilities. The current proceeding presents no adverse evidence of the sort which led to denials of reinstatement petitions in *Hippard*, *Tardiff*, *Roth*, and *Feinstein*.

The current proceeding is also distinguishable from prior reinstatement proceedings in which we have failed to find rehabilitation and present moral qualifications. For example, in *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. 219, 227-228, we denied reinstatement because Wright made no effort to pay certain creditors, displayed a lack of concern to keep his creditors informed of his whereabouts, demonstrated indifference towards them, produced character evidence limited to an affidavit from an attorney employer, failed to inform the employer of his disbarment, and omitted from his reinstatement application a relatively recent lawsuit against the employer. In *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. 25, 32-33, 37-38, we denied reinstatement because Giddens displayed an

inexcusable carelessness in his application for reinstatement by failing to disclose two lawsuits to which he was a party. No lack of evidence or adverse evidence of the sort which troubled us in *Wright* and *Giddens* affects the current proceeding.

III. CONCLUSION AND RECOMMENDATION

[18c] Upon our independent review of the record, we conclude that petitioner has met the requirements for reinstatement. We thus recommend to the California Supreme Court that he be reinstated as a member of the State Bar upon his paying the necessary fees and taking the required oath.

We concur:

NORIAN, J.
STOVITZ, J.