

Filed December 8, 2015

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	Case No. 13-R-14734
)	
ROBERT LEWIS GORDON,)	OPINION
)	
Petitioner for Reinstatement.)	
_____)	

Petitioner Robert Lewis Gordon is seeking reinstatement to practice law. His prior discipline involved a suspension and ultimately his disbarment, but none of his misconduct was based on a finding of moral turpitude. In light of this disciplinary history, we are here asked to determine whether the amount of evidence that Gordon presented in the proceedings below met his burden of establishing rehabilitation and present moral fitness by clear and convincing evidence.¹

The customary standard in reinstatement cases considers the attorney’s showing of rehabilitation “in light of the moral shortcomings that previously resulted in discipline.” (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092.) As a consequence, the amount of evidence of rehabilitation required for reinstatement varies according to the seriousness of the misconduct at issue. (*In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 552-553.)

As we discuss *post*, Gordon’s suspension and disbarment were related: each involved duties that he was required to undertake but which he failed to perform timely. In his 2004

¹ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

suspension case, Gordon agreed, inter alia, that he would make restitution for unearned fees totaling \$2,950 in quarterly payments to three clients or to the State Bar's Client Security Fund (CSF). However, he waited to make this restitution, as well as an additional \$9,320 in restitution required when CSF paid claims to other clients of Gordon, until only weeks before he filed his 2013 petition for reinstatement. In his disbarment case, he failed to comply with the provisions of rule 9.20, California Rules of Court, as he had agreed that he would in his suspension matter.²

After a three-day trial, the hearing judge determined that Gordon presented sufficient evidence of good character and community service to establish his rehabilitation and recommended reinstatement, notwithstanding a finding that Gordon had admittedly prioritized the payment of certain personal and family-related expenses over the restitution to his clients and CSF, which reflected adversely on his rehabilitation.

Seeking review, the State Bar's Office of the Chief Trial Counsel (OCTC) argues that Gordon failed to establish his rehabilitation. Gordon seeks to uphold the hearing judge's decision, urging that his restitution, albeit delayed, was consistent with his financial ability and with decisional law.

On our independent review of the record (Cal. Rules of Court, rule 9.12), we find that, despite Gordon's showing of good character, community service, and several years of post-disbarment employment, the hearing judge's finding that Gordon prioritized certain personal obligations over his duty of restitution ordered by the Supreme Court warrants a negative finding of rehabilitation such that Gordon's petition for reinstatement should be denied.

² All references to rules 9.10 through 9.20 refer to provisions of the California Rules of Court. At the time that Gordon was ordered to comply with rule 9.20, it was numbered rule 955. Subsequently, these rules were renumbered. For clarity, we refer to the rule under its current numbering.

I. GORDON WAS SUSPENDED IN 2004, DISBARRED IN 2005, AND SOUGHT REINSTATEMENT IN 2013

Gordon was admitted to practice law in California in 1986, and practiced without complaint for about 16 years. For the first seven years, Gordon had a general practice, but became increasingly focused on representing debtors in bankruptcy proceedings. His use of television marketing and a practice of waiving up-front payment of legal fees caused his practice to surge. But, by 2002, Gordon realized that his high-volume practice and deferred legal fees threatened the survival of his practice. Several client matters eluded his calendaring system, and, by 2002, he was facing client complaints to the State Bar that resulted in formal disciplinary charges against him.

A. 2004 Suspension

In April 2004, Gordon cooperated with OCTC and entered into a comprehensive stipulated disposition of the charges against him, which involved four bankruptcy client matters, two personal injury matters, and a State Bar investigation for failing to timely pay the filing fees in seven other bankruptcy matters. Gordon admitted in five of these matters that he failed to perform legal services competently (Rules Prof. Conduct, rule 3-110(A)).³ In four matters, he admitted that he failed to refund unearned fees to clients (rule 3-700(D)(2)). In five of the matters, he agreed he failed to communicate to clients significant developments in their cases (Bus. & Prof. Code, § 6068, subd. (m)).⁴ In one matter, he admitted that he withdrew improperly from employment (rule 3-700(A)(2)). In the State Bar investigation matter, in which he agreed that he had failed to timely remit to the court clerk the bankruptcy filing fees for his clients,

³ All further references to rules are to the California Rules of Professional Conduct unless otherwise noted.

⁴ All further references to sections are to the Business and Professions Code unless otherwise noted.

Gordon filed motions to vacate the dismissals of the bankruptcy petitions, and each of the seven client cases proceeded.

In the stipulated disposition, no moral turpitude was found. In aggravation, Gordon agreed that his misconduct significantly harmed the public or the administration of justice. In mitigation, Gordon had no prior record over many years of practice, cooperated with OCTC, and demonstrated remorse.

Effective September 3, 2004, the Supreme Court ordered the discipline agreed to in the stipulation and suspended Gordon from practice for three years, stayed, on conditions of probation, which included six months of actual suspension, and payment of restitution of \$2,950 in unearned fees and interest to three clients, or to CSF, in specific quarterly minimum payments starting in September 2004. Gordon and OCTC agreed in 2004 that he would pay at least \$735 in quarterly payments. This would have completed his restitution to the three clients, including interest, in four to five quarters. However, Gordon made *none* of this restitution for nearly a decade, until July 2013, just weeks before seeking reinstatement. Gordon also was ordered to comply with the provisions of rule 9.20 to notify clients and courts of his suspension and to file an affidavit of his compliance with that rule.

B. 2005 Disbarment

Although Gordon had no clients to notify of his suspension at the time he was required to comply with rule 9.20, he failed to file the required affidavit attesting to his compliance with the rule. Instead, he remained at home most days in a somewhat depressed state, and did not confide in his family about his suspension. Moreover, after he was suspended, Gordon did not keep his address current on State Bar records. Therefore, when OCTC filed new disciplinary charges in December 2004, charging willful failure to comply with rule 9.20, Gordon was unaware of these new charges and defaulted. After his default was entered, Gordon learned of the charges, filed

his rule 9.20 affidavit more than eight months after it was due, and sought unsuccessfully to be relieved from default. Nevertheless, as disbarment is the customary discipline for willful failure to comply with rule 9.20, even by failing to file the affidavit of compliance, absent mitigating circumstances (see, e.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131), the Supreme Court ordered Gordon's disbarment, effective October 15, 2005. No moral turpitude was found in the disbarment proceeding.

C. 2013 Petition for Reinstatement

After disbarment, Gordon continued for a time in his depressive and embarrassed state. He amassed hundreds of thousands of dollars of financial losses, his home was foreclosed, and he had to move to a much smaller residence. This caused a sharp constriction in the family's lifestyle, which further added to Gordon's humiliation. After he consulted with discipline defense counsel and learned of the possibility of reinstatement, he confided in his family, who encouraged him to seek reinstatement. Gordon reciprocated by committing himself to support his family by creating and working hard at a business of providing support services to other bankruptcy law firms. Gordon also committed to making first-rate high school and college opportunities available to his children. Additionally, he addressed delinquent state and federal tax obligations and necessary medical care, particularly for his spouse.⁵

In December 2004, CSF reimbursed a total of \$2,950 to the three clients whose unearned fees Gordon had been ordered to repay in his stipulated discipline. Between June 2005 and December 3, 2009, after Gordon's disbarment, CSF received claims from and paid another nine clients a total of \$9,320.⁶ Together with interest and processing fees, and \$7,374 in disciplinary costs from the 2004 suspension and 2005 disbarment proceedings, the total amount Gordon owed

⁵ Gordon's post-disbarment activities will be discussed in more detail *post*.

⁶ Per section 6140.5, subdivision (a), CSF is a discretionary fund. Its purpose is to relieve or mitigate losses caused by the dishonest conduct of members of the State Bar. No evidence was presented at trial as to the basis of the payments made to Gordon's former clients.

the State Bar by 2013 was \$28,096. On August 8, 2008, a State Bar assistant general counsel had written Gordon that changes to the Business and Professions Code allowed the State Bar to collect CSF reimbursements and disciplinary costs assessments through civil litigation. This letter gave Gordon an opportunity to pay the \$2,950 in restitution arising out of his 2004 suspension plus \$1,510 in interest and processing costs before a Superior Court judgment was sought. Although payment was due by October 7, 2008, the State Bar informed Gordon that he could petition the State Bar Court for a payment plan or other relief. As noted, Gordon did not pay any of the restitution owed nor did he seek relief.

II. REQUIREMENTS FOR REINSTATEMENT

Under rules 5.441 and 5.445 of the Rules of Procedure of the State Bar of California, Gordon must do the following before he may be reinstated to the practice of law: (1) pass a professional responsibility examination within one year prior to filing the petition; (2) establish rehabilitation; (3) establish present moral qualifications for reinstatement; (4) establish present ability and learning in the general law by providing proof of passage of the Attorney's Examination by the Committee of Bar Examiners within three years before filing the petition; and (5) prior to filing the petition, pay all discipline costs and reimburse payments made by CSF due to his prior misconduct. (See also rule 9.10(f).) Gordon must prove these requirements by clear and convincing evidence. (*Tardiff v. State Bar* (1980) 27 Cal.3d. 395, 403.)

Gordon filed his petition for reinstatement on August 22, 2013, nearly eight years after his disbarment. When he filed his application, he proved his learning in the law by having passed the Attorney's Examination in 2011 (rule 9.10(f)(3)). He also proved his passage of the professional responsibility examination (rule 9.10(f)(1)). Gordon further satisfied State Bar Act provisions by having paid in full about three weeks prior to the filing of his reinstatement

petition, the amounts paid clients by CSF (Bus. & Prof. Code, § 6140.5, subd. (c)), and the amounts of assessed costs of his two disciplinary proceedings. (*Id.*, § 6140.7.)

This focused the issue to be tried before the hearing judge as to whether Gordon had shown by clear and convincing evidence that he had been rehabilitated and that he had present moral qualifications for reinstatement. (Rule 9.10 (f)(2).)

III. GORDON FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF PRESENT MORAL FITNESS AND REHABILITATION

A. Legal Principles

Although the legal standards for rehabilitation vary somewhat from case to case, the following is representative of the case law: The law favors the regeneration of errant attorneys and should not place unneeded burdens on them. (*Resner v. State Bar* (1967) 67 Cal.2d 799, 811.) However, one seeking reinstatement bears a heavy burden of proving rehabilitation. (*Hippard v. State Bar, supra*, 49 Cal.3d at pp. 1091-1092; *Calaway v. State Bar* (1986) 41 Cal.3d 743, 745.) It requires proof by the most clear and convincing evidence that rehabilitative efforts have been successful. (*Hippard v. State Bar, supra*, at p. 1092; *Conservatorship of Wendland, supra*, 26 Cal.4th at p. 552.)

The hearing judge correctly applied the principle that rehabilitation is a state of mind. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) It is not solely a mathematical or statistical exercise of, for example, counting the passage of years since disbarment or the number of favorable character witnesses. In its opening brief on review, OCTC acknowledges the difficulty of measuring something not clearly defined in case law, particularly when the required quantum of evidence or demonstration of rehabilitation involves past discipline that did not include moral turpitude, as here. Yet OCTC cites to *In re Glass* (2014) 58 Cal.4th 500, 521-522—a case where moral turpitude and dishonesty were central to the misconduct—for the observation that most successful showings of rehabilitation involve truly exemplary conduct over a sustained period of

time. OCTC concludes that Gordon's stipulated misconduct and rule 9.20 violation created a heavy burden to show reform, and one which he did not prove over a sustained period. We find that, as discussed below, despite evidence of good character, community service, and gainful employment, Gordon's failure to pay restitution for nearly a decade shows that he is not sufficiently rehabilitated—even when his prior discipline did not involve moral turpitude.

B. Gordon's Personal Statement

Gordon's evidence of rehabilitation commenced with his 11-page personal statement attached to his 2013 reinstatement petition. Together with his trial testimony, Gordon never blamed anyone but himself for his disbarment. In fact, he complimented the OCTC attorney with whom he had negotiated his stipulated suspension, and blamed himself for not following her admonitions to comply with rule 9.20 and her offer to contact her if he had any questions in complying with the duties required of the suspension. He also showed regret for the clients he had disserved and vowed that if he were reinstated, he would practice in a structured manner that would prevent him from making the business decisions that led to his earlier distraction from serving his clients' best interests. Notably, however, his personal statement omitted any reference whatsoever to his failure to make timely restitution.

C. Gordon's Character Evidence and Community Service

Gordon's evidence and that of his positive character witnesses revealed that he had launched a successful law office support business with his wife, had demonstrated positive character, had performed community service activities, and was challenged by considerable debt and tax obligations going back many years, which he resolved.

Gordon offered the testimony of eight character witnesses. Three were attorneys, and three were in business. Of the eight, two were related to Gordon, and one of the attorneys was engaged to marry Gordon's son.

As the hearing judge found, these witnesses uniformly opined positively upon Gordon's honesty, integrity, and ethics. Collectively, they were adequately informed of the reasons for his disbarment, and they supported his reinstatement. In our view, the strength of their testimony was not weakened despite their familial connection since they had firsthand knowledge of Gordon's actions since revealing his disbarment.

OCTC concedes that Gordon's character evidence is worth consideration as a favorable factor toward reinstatement but urges it as less than impressive. Character evidence in and of itself, no matter how laudatory, is not decisive of rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.) In terms of range, number, and strength of witnesses, Gordon's showing was comparable to other cases where reinstatement was ordered, although at the low end quantity-wise and objectively. (E.g., *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 431.)

Gordon also engaged in a variety of community services in his post-disbarment period. For example, he coached his son's sports teams for about seven years, and provided costumes and transportation for students of one of his daughter's ballet companies. For his younger daughter who participated in an East San Diego County Youth Symphony, he provided frequent transportation to concert venues for players, helped set up and break down the orchestra practice spaces, and sat in on orchestra board meetings in preparation for one of the concert seasons.

OCTC argues that all that Gordon did to support his family and his community service were self-centered and merely that which would be expected of any citizen. OCTC does not view it as rehabilitative. The hearing judge disagreed, and we do as well.

Although the above activities were family-centered, they should not be excluded for rehabilitation credit merely for that reason, especially when similar youth and family support activities have been recognized as favorable factors toward rehabilitation. (See *In the Matter of*

Bodell (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459, 465, 468 [participation in Cub Scout activities and church activities]; *In the Matter of Salyer* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 816, 824 [extensive services to local Little League team and organizing speakers for at-risk youth]; *In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 5, 7-8 [many projects accomplished for daughter's school and Girl Scout organization; successful efforts to stabilize and secure petitioner's living arrangement from former spousal abuse]; *In the Matter of Ainsworth* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 894, 899 [care for relatives].)

D. Gordon's Operation of Shirley's Typing Service

Shirley's Typing Service was a business Gordon formed with his wife in about October 2005, and which lasted in some form until about 2011. Gordon contracted with other bankruptcy law firms to perform support activity for those firms. He testified that he told those attorneys who hired the service that he had been disbarred. Shirley's Typing Service, including Gordon at times, asked bankruptcy clients of other firms by telephone a series of financial history questions according to a fixed bankruptcy software program, entered the client answers verbatim into the fixed fields of the program, and transmitted the results to the hiring law firm. This model worked well for about four or five years, and then during the time of the 2008-2009 recession, hiring law firms started to do the work in-house, canceling Gordon's contracts for service. The hearing judge found none of Gordon's actions with Shirley's Typing Service to be inconsistent with rehabilitation. On review, we agree.

E. Gordon Failed to Voluntarily Pay Timely Restitution

"Restitution is fundamental to the goal of rehabilitation." (*Hippard v. State, supra*, 49 Cal.3d at p. 1094.) When misconduct "resulted in appreciable pecuniary loss to the applicant's clients, [we] may properly consider the absence of an applicant's efforts to make any restitution as an indicator of rehabilitation. [Citation.]" (*Ibid.*). Gordon was fully aware he was obligated

to reimburse three clients and CSF in 2004, as he stipulated to do so and the Supreme Court so ordered. Had Gordon complied with his agreement, he would have completed this restitution 15 months after his 2004 suspension. He also knew he had to reimburse CSF another \$9,320 for additional client claims. Yet Gordon made none of this restitution until 2013, shortly before filing his reinstatement application and only after he passed all required examinations.

As we stated in *In the Matter of Rudnick* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 27, 37, wherein we denied reinstatement in part due to inadequate evidence of restitution to former clients, “petitioner must show a proper attitude of mind regarding his offense before he can hope for reinstatement.” We find that the record is simply devoid of evidence that Gordon paid restitution that was “guided by a moral imperative consistent with the duties of an attorney,” rather than for his own benefit in seeking reinstatement. (*Ibid.*) Because of his nine-year delay in making restitution payments, Gordon failed to demonstrate that he understood the extent of harm his misconduct caused or that he possessed a willingness to remedy it. Accordingly, his failure to promptly repay his clients and reimburse CSF demonstrates his poor attitude toward restitution. (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674 [petitioners for reinstatement are judged by their ability to make restitution and their attitude toward payment].)

The hearing judge shared our concern, finding that Gordon had earned a sizeable net income between 2005 and 2009,⁷ yet made no effort to pay restitution to clients or CSF during that time. Instead, Gordon chose to pay substantial sums for discretionary family expenses, notably \$76,700 for the higher education of two of his adult children. Additional discretionary expenses Gordon prioritized over CSF reimbursement included \$13,640 for bar examination preparation and related expenses for reinstatement, and \$51,400 for increased premiums for auto

⁷ Between 2005 and 2009, Gordon’s and his spouse’s annual net income ranged between \$125,289 and \$218,076.

insurance for his children and payments for four family cars, including for his children. In light of this evidence, we reject Gordon's argument that he did not have sufficient funds to timely pay restitution.⁸

The hearing judge found correctly that Gordon's prioritization of expensive higher education expenses for his children over "making amends for his prior wrongful acts against his clients by paying his reimbursement" to CSF reflected adversely on his claim of rehabilitation. Despite this determination, the judge erred in ordering reinstatement because he failed to analyze adequately the rehabilitative import of Gordon's prioritization of the panoply of personal commitments over the making of restitution.

On review, OCTC urges that neither Gordon's belated payment of restitution nor his attitude toward it were consistent with rehabilitation, and we agree. While restitution in and of itself is not determinative of whether rehabilitation has been proven, it is to be considered as a factor in the overall factual showing for reinstatement. The weight accorded restitution is dependent in part upon the petitioner's attitude expressed regarding the matter. (*Hippard v. State Bar, supra*, 49 Cal.3d 1084 [reinstatement denied where petitioner failed to prove either inability to make restitution or effort to make restitution reasonably related to ability to pay].)

As we previously discussed, restitution was not considered by Gordon in his lengthy personal statement in support of his petition. When he devised a plan to seek reinstatement in 2005, it did not include the making of restitution. When the State Bar offered Gordon an opportunity in 2008 to avoid a civil judgment against him, he did not follow through nor seek a payment plan that the State Bar advised that he could apply for. Much of Gordon's testimony at

⁸ Gordon testified that he also had sizeable debts which he discharged in bankruptcy in 2010. However, these debts did not prevent him from spending \$141,740 on discretionary expense items *ante*. Gordon considered these discretionary expenses as "necessary, and owing, and time sensitive" and testified that he knew that he had until he filed his reinstatement application to reimburse CSF.

the trial below demonstrated that he had the financial ability to make the relatively modest restitution called for far earlier than in 2013.

Gordon argues that *In the Matter of Salyer, supra*, 4 Cal. State Bar Ct. Rptr. 816, where reinstatement was ordered, should guide our analysis. We disagree because *Salyer* is distinguishable. In *Salyer*, the petitioner paid \$12,508 of \$22,341 in restitution just months after CSF was directed to reimburse the client. (*Id.* at p. 826.) Further, the petitioner paid the balance owed four months before seeking reinstatement, albeit many years later. Importantly, we noted that the record did not establish whether petitioner “truly had the financial means to pay CSF much earlier.” (*Id.* at p. 827.) In fact, the record in *Salyer* proved that petitioner had a proper, sincere attitude toward the importance of restitution, as evidenced by his early payment of more than \$12,000. In contrast, Gordon paid no restitution until weeks before he sought reinstatement, despite evidence that he had long had the ability to pay.

In summary, we find the requirement of restitution to be crucial to assessing Gordon’s rehabilitation. We must therefore conclude that Gordon failed to sustain his burden of proving his rehabilitation by clear and convincing evidence. (*Hippard v. State Bar, supra*, 49 Cal.3d 1084 [burden on petitioner to establish inability to pay restitution].)

IV. CONCLUSION

For the foregoing reasons, the hearing judge’s decision recommending that petitioner, Robert Lewis Gordon, be reinstated is reversed, and the petition for reinstatement is denied.

STOVITZ, J.*

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.