

IN THE SUPREME COURT OF PENNSYLVANIA

In the Matter of	:	No. 786 Disciplinary Docket No. 3
	:	
	:	No. 170 DB 2002
KIRK DOUGLAS RHODES	:	
	:	Attorney Registration No. 42045
	:	
PETITION FOR REINSTATEMENT	:	(Out Of State)

ORDER

PER CURIAM:

AND NOW, this 30th day of September, 2014, upon consideration of the Report and Recommendations of the Disciplinary Board dated April 22, 2014, the Petition for Review and response thereto, the request for oral argument and the Petition for Reinstatement are hereby denied.

Pursuant to Rule 218(f), Pa.R.D.E., petitioner is directed to pay the expenses incurred by the Board in the investigation and processing of the Petition for Reinstatement.

A True Copy Patricia Nicola
As Of 9/30/2014

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

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KIRK DOUGLAS RHODES : No. 170 DB 2002
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PETITION FOR REINSTATEMENT : (Out of State)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 218(c)(5) of the Pennsylvania Rules of Disciplinary Enforcement, The Disciplinary Board of the Supreme Court of Pennsylvania submits its findings and recommendations to your Honorable Court with respect to the above captioned Petition for Reinstatement.

I. HISTORY OF PROCEEDINGS

By Petition dated March 8, 2012, Kirk Douglas Rhodes seeks reinstatement to the bar of Pennsylvania following his disbarment by Order of the Supreme Court dated December 17, 2002. By Response to Petition filed on July 11, 2012, Office of Disciplinary Counsel opposes reinstatement.

A reinstatement hearing was held on March 19, 2013, before a District I Hearing Committee comprised of Chair Gerald E. Burns, Esquire, and Members Thomas

P. Wagner, Esquire and Maribeth C. Wechsler, Esquire. Petitioner appeared *pro se*. Petitioner offered into evidence Exhibits P-1 through P-13 and presented the testimony of six witnesses and testified on his own behalf. Office of Disciplinary Counsel offered into evidence ODC-1 through ODC-8.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on September 18, 2013 and recommended that the Petition for Reinstatement be denied.

Petitioner filed a Brief on Exceptions on October 10, 2013 and requested oral argument.

Office of Disciplinary Counsel filed a Brief Opposing Exceptions on October 30, 2013.

Oral argument was held before a three-member panel of the Disciplinary Board on December 6, 2013.

This matter was adjudicated by the Disciplinary Board at the meeting on January 15, 2014.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner is Kirk Douglas Rhodes. He was born in 1950 and was admitted to the practice of law in Pennsylvania in 1984. His current address is 453 Hunter Avenue, Scotch Plains, New Jersey 07076. Petitioner is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

2. By Order dated June 27, 2001, Petitioner was temporarily suspended from the practice of law in the State of New Jersey, where he had been admitted in 1981.

3. By letter dated November 6, 2001, Respondent advised the Disciplinary Board of the Supreme Court of Pennsylvania that he had been temporarily suspended in New Jersey. (ODC-1)

4. By letter dated November 28, 2001, Donna M. Snyder, Disciplinary Counsel, *inter alia*, advised Petitioner that:

a. he must notify the Board when a final order is entered in New Jersey; and

b. if there is a criminal conviction, he must report that conviction within 20 days. (ODC-2)

5. Petitioner received Ms. Snyder's November 28, 2011 letter. (N.T. 332)

6. On July 16, 2002, Petitioner entered a plea of guilty in the Superior Court of New Jersey, Union County, to one count of misapplication of entrusted property in a case captioned *State of New Jersey v. Kirk D. Rhodes*, No. 02-07-00752A. (ODC-8)

7. Petitioner's criminal conviction was a result of his misappropriation in excess of \$75,000 from six separate clients. Petitioner used the monies he misappropriated to fund his gambling habit and to pay business and personal expenses. (N.T. 267)

8. Petitioner was sentenced to seven years of incarceration and was ordered to make restitution in the amount of \$147,613.17. (ODC-8)

9. In addition, Petitioner also misappropriated fiduciary funds in the amount of \$32,300. (Questionnaire, 5(c))

10. Petitioner served six months in prison. (N.T. 267-68)

11. In December of 2003, Petitioner was released into the New Jersey Intensive Supervision Program ("ISP"). He was released in May of 2005. (N.T. 245, 277)

12. The New Jersey Client Security Fund paid claims totaling \$149, 837.14 on behalf of Petitioner. (Questionnaire, Tab 3)

13. On July 25, 2002, Petitioner was disbarred by consent in the State of New Jersey. (ODC-3)

14. In his Brief to the Committee, Petitioner misstates the date of his disbarment in New Jersey as "January 19, 2005."

15. Petitioner failed to notify the Secretary of the Board of his conviction, as required by Pa.R.D.E. 214(a), and further failed to notify the Secretary of his disbarment, as required by Pa.R.D.E. 216(e). (N.T. 332-34)

16. By Supreme Court Order dated December 17, 2002, effective January 16, 2003 (the "Disbarment Order"), Petitioner was reciprocally disbarred from the practice of law in the Commonwealth of Pennsylvania. (ODC-3)

17. The Disbarment Order required that Petitioner comply with all provisions of Pa.R.D.E. 217. (ODC-3)

18. By letter dated December 18, 2002, Elaine M. Bixler, Secretary to the Board, *inter alia*;

(a) enclosed a copy of the Disbarment Order;

(b) informed Petitioner that he was required to comply with the Pennsylvania Rules of Disciplinary Enforcement and the Disciplinary Board Rules; and

(c) enclosed a copy of Form DB-25, Statement of Compliance.
(ODC-3)

19. Petitioner received that letter. (N.T. 334)

20. Upon his disbarment from the practice of law in Pennsylvania, Petitioner failed to file a timely Statement of Compliance, as required by Pa.R.D.E. 217(e). (N.T. 334)

21. Petitioner failed to notify the United States Court of Appeals for the Third Circuit, as required by Rule 6(1) of the Rules of Attorney Disciplinary Enforcement of the United States Court of Appeals for the Third Circuit, and the United States District Court of New Jersey, as required by that Court's Civil Rule 104.1(c)(2), of his disbarment. (N.T. 330)

22. By letter dated September 11, 2003, Ms. Bixler informed Petitioner that a Statement of Compliance had not been filed. (ODC-4)

23. Petitioner received that letter, but did not file a Statement of Compliance at that time. At the hearing, Petitioner didn't offer an acceptable explanation for this failure. (N.T. 335-36)

24. By letter dated July 13, 2009, Petitioner filed a Statement of Compliance.

25. By Order dated October 23, 2003, Petitioner was disbarred in the United States District Court for the District of New Jersey. (Questionnaire, Tab 5)

26. Prior to filing his Petition for Reinstatement, Petitioner's criminal conviction was expunged. (N.T. 278, Questionnaire, Tab 9)

27. At the time that he filed his Petition, and at the time of the hearing, Petitioner was the subject of a lien by the State of New Jersey for unpaid taxes. (N.T. 315-16)

28. The amount of the debt that was the subject of this lien was approximately \$13,000. (N.T. 316)

29. Petitioner failed to disclose this unpaid debt and lien on his Reinstatement Questionnaire. Question 13(b) of the Questionnaire asks "Do you have any debts which are 90 days past due?" (N.T. 318-19)

30. Petitioner did not offer a plausible explanation at the hearing for his failure to disclose this debt and lien.

31. Petitioner offered character testimony from five witnesses.

32. Arthur F. Clarke, Jr., Esquire is a licensed New Jersey attorney and has known Petitioner since 2000. Petitioner did not inform Mr. Clarke that he had been convicted in New Jersey and disbarred in New Jersey and Pennsylvania. Mr. Clarke discovered on his own the fact of the disbarments and the surrounding details. (N.T. 19, 26, 30-31, 52) Petitioner later told Mr. Clarke in 2011 about the conviction when Petitioner was seeking expungement. (N.T. 19, 33) Mr. Clarke was unaware of Petitioner's gambling addiction until several weeks prior to the hearing. (N.T. 44-45)

33. James Allen is a close friend of Petitioner and has known him for 40 years. Mr. Allen was aware of Petitioner's conviction and disbarment, and the details of the conviction. (N.T. 90-92) Mr. Allen also knew of Petitioner's gambling problems. (N.T. 93) Mr. Allen described Petitioner as being well-respected in the legal community. (N.T. 98)

34. Martin Grant is Petitioner's employer at Gateway Funding Mortgage Services. He has known Petitioner since 2005. Mr. Grant did not know all of the details of Petitioner's conviction in relation to the amount misappropriated and did not remember if Petitioner told him about the disbarment in Pennsylvania. (N.T. 67-68, 81)

35. Frank Flores, D.O. is a physician board certified in emergency medicine. He has known Petitioner for more than seven years by way of participation in a service fraternity. Dr. Flores is aware of Petitioner's conviction, disbarment and gambling

issues. (N.T. 124-126) Among people that he knows who know Petitioner, Petitioner's reputation is good and he is held in high esteem. (N.T. 131-32)

36. Jim C is a member of Gamblers Anonymous and has known Petitioner since 2001. Mr. C has been Petitioner's sponsor since 2008. He related a "hiccup" experienced by Petitioner when Petitioner bought lottery tickets in 2008. Mr. C is not aware of any other gambling incidents. (N.T. 153, 159)

37. Jeffrey M. Beck is a certified compulsive gambling counselor. Currently, Mr. Beck is the assistant director of critical services, treatment and research at the Council on Compulsive Gambling of New Jersey. (N.T. 166-67)

38. Mr. Beck has never been qualified as an expert in any court or before any tribunal. (N.T. 175)

39. Mr. Beck interacted with Petitioner on two occasions: once in person for about 90 minutes, and once by telephone for about 20 minutes. Petitioner did not administer any tests to Petitioner, nor did he conduct any diagnostic assessment. Mr. Beck did not interview Petitioner's wife, family or friends, nor did he contact Petitioner's medical doctor to review his records. (N.T. 208-09, 214-15)

40. Mr. Beck reviewed the Report of Ed Looney (P-2), also a compulsive gambling counselor who evaluated Petitioner in 2001 and offered an opinion that there was a causal connection between Petitioner's misconduct and his gambling addiction. (N.T. 210)

41. Mr. Beck "got very good vibrations" that Petitioner was not gambling and that he was doing the things he should be doing. (N.T. 211)

42. Mr. Beck did not perform an evaluation to determine whether Petitioner was likely to have a relapse; instead, Mr. Beck relied on his "gut" and a "feeling", being a

former gambler himself, to believe that Petitioner would not have another relapse. (N.T. 229, 235)

43. Mr. Beck did not offer an opinion as to whether Petitioner currently has a gambling problem and whether he has recovered or is in remission from his gambling addiction.

44. Petitioner testified on his own behalf.

45. Following his admission to the bar in New Jersey in 1981, he worked as an assistant prosecutor for the Union County Prosecutor's Office in Elizabeth, New Jersey for a period of five years. He engaged in the private practice of law, either in firm settings or on his own, until his temporary suspension in New Jersey and subsequent disbarment. Petitioner has never practiced in Pennsylvania or worked on a Pennsylvania case. (N.T. 246-249)

46. In 1995, as a result of proceedings before the disciplinary authorities in New Jersey, Petitioner received an admonition for misconduct described as "the negligent invasion of clients' funds caused by a single incident - the inadvertent misdeposit of \$12,750 in [respondent's] business account." (Reinstatement Questionnaire Tab 5)

47. Petitioner started gambling occasionally in the 1970s and 1980s and by the 1990s this habit had escalated to a compulsion. He was evaluated by Ed Looney in 2001 and began attending Gamblers Anonymous.

48. In 2002, Petitioner suffered more than \$30,000 in gambling losses for which he claimed a deduction on his federal income tax return.

49. In or around August 2008, Petitioner suffered a gambling relapse and purchased lottery tickets.

50. Following the 2008 gambling relapse incident, Petitioner began treating with Dr. Peter Mitchell, a clinical psychologist, who had a specialty in compulsive gambling. (N.T. 281-82)

51. Petitioner indicates he last saw Dr. Mitchell approximately one year prior to the reinstatement hearing. (N.T. 285)

52. Petitioner did not call Dr. Mitchell to testify at the hearing, as he stated that Dr. Mitchell had health problems that prevented him from testifying in person. Petitioner did not request a continuance to present Dr. Mitchell's testimony, nor did Petitioner make any effort to present testimony from Dr. Mitchell by videotape or other means.

53. Petitioner attends Gamblers Anonymous meetings on a regular basis and the date of his last gambling activity is July 5, 2008. (N.T. 250-52, 267, 279, 324)

54. Petitioner has a GA sponsor, whom he speaks with and meets once per week at GA meetings. (N.T. 153-55)

55. Since his disbarment, Petitioner has been a licensed mortgage originator with several companies, most recently with Gateway Funding Diversified Mortgage Services, L.P. since 2005. Petitioner passed state and federal mortgage originator examinations and employment and criminal background checks. He is licensed pursuant to the New Jersey Residential Mortgage Lending Act and Federal Safe Acts. (Reinstatement Questionnaire)

56. Petitioner became involved in community service through his church and sports. (N.T. 285) He rejoined his fraternity and took a leadership role, particular in the areas of scholarship, mentoring and service to the homeless. (N.T. 288)

57. Petitioner fulfilled his Continuing Legal Education credits necessary for reinstatement. (Reinstatement Questionnaire)

58. Petitioner has not reviewed any legal periodicals, official reporters or advance sheets pertaining to Pennsylvania law during his disbarment. (Reinstatement Questionnaire)

59. Petitioner's Questionnaire indicates he intends to practice in Philadelphia if reinstated; however, he has offered no evidence of a clear plan for resumption of the practice of law nor did he present evidence as to how he expects to finance his resumption of practice.

III. CONCLUSIONS OF LAW

1. The misconduct for which Petitioner was disbarred is not so egregious as to preclude reinstatement. Office of Disciplinary Counsel v, Keller, 506 A.2d 872 (Pa. 1986)

2. A sufficient period of time has passed since the misconduct. In re Verlin, 731 A.2d 600 (Pa. 1999)

3. Petitioner has not demonstrated by clear and convincing evidence that he possess the moral qualifications, competency and learning in the law required to practice law in the Commonwealth Pennsylvania, nor has he demonstrated that his resumption of the practice of law within the Commonwealth will not be detrimental to the integrity and standing of the bar and the administration of justice nor subversive of the public interest. Pa.R.D.E. 218(c)(3)

IV. DISCUSSION

Petitioner seeks reinstatement to the bar following his disbarment in 2002. A petitioner who files a petition for reinstatement from disbarment must demonstrate that he or she has met the threshold inquiry articulated in Office of Disciplinary Counsel v. Keller, 506 A.2d 872 (Pa. 1986). The threshold inquiry requires that a petitioner first show that the magnitude of his breach of trust was not so egregious that he be forever barred from successfully seeking reinstatement. In re Perrone, 777 A.2d 413 (Pa. 2001). Petitioner was convicted of misappropriating fiduciary funds in excess of \$75,000 from six separate clients, and he misappropriated fiduciary funds in an amount not less than \$180,000 between June 1997 and May 2001. This misconduct is of the type that damages the public's confidence in the legal profession. However, Petitioner's breach of trust in misappropriating funds is not so egregious that he should be forever barred from successfully seeking reinstatement. In re Greenberg, 749 A.2d 434 (Pa. 2000) (misappropriation of two million dollars and commission of perjury not so egregious as to preclude reinstatement.) Office of Disciplinary Counsel concurs in this conclusion.

A related question in a reinstatement from disbarment matter is whether Petitioner has met his burden of proving by clear and convincing evidence that his resumption of the practice of law would not have a detrimental impact on the integrity and standing of the bar, the administration of justice or the public interest. Office of Disciplinary Counsel v. Keller, 506 A.2d 872 (Pa. 1986). Essentially, this question considers whether a sufficient amount of time has passed since Petitioner was disbarred, and whether a qualitative period of rehabilitation was engaged in by Petitioner.

Petitioner was disbarred on December 17, 2002, and at the time of the reinstatement hearing on March 19, 2013, had been removed from the practice of law for more than ten years. At the time of the oral argument before the Board panel in December 2013, Petitioner has been disbarred for eleven years. While a petitioner is rule-bound to wait five years before applying for readmission after disbarment, there exists no guarantee that the petitioner will be reinstated. Pa.R.D.E. 218(b). Whether sufficient time has passed must be determined by the unique circumstances of each case. Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186 (Pa. 1983). See In re Verlin, 731 A.2d 600 (Pa. 1999) (reinstatement from disbarment after a period of nearly seven years); Office of Disciplinary Counsel b. Mark Allen Kovler, 172 DB 2002 (Pa. 2009) (reinstatement from disbarment after a period of nearly six years); In re Greenberg, 749 A.2d 434 (Pa. 2000) (reinstatement denied after a disbarment period of nine years; second reinstatement request granted after 16 years).

In the instant matter, the Hearing Committee has concluded that Petitioner's length of disbarment was not sufficient, in light of the severity of his offenses. The Committee considered the following question when reaching its conclusion: "If the public knew of Petitioner's transgressions, would the fact that he was able to resume practice after [11] years of disbarment adversely affect the public's perception of the legal profession?" Greenberg 749 A.2d at 437. We disagree with the Hearing Committee on this issue.

The cases cited in support of the Committee's conclusion are not persuasive, as the conduct in the cited cases was more egregious than in the instant matter. Greenberg involved the fraudulent transfer of two million dollars, concealment of those transfers from the bankruptcy court, further conversion of funds, and the commission of

perjury by the petitioner. The Court rightly concluded that nine years of disbarment was insufficient for these egregious acts. Mr. Greenberg was reinstated after 16 years of disbarment. In re Perrone, 777 A.2d 413 (Pa. 2001) involved petitioner's conviction of theft by deception and tampering with public records for filing with the City of Philadelphia more than 200 false fee petitions which requested payment for legal services purportedly provided to indigent defendants in the amount of \$130,000. The Court concluded that eight years of disbarment was insufficient for reinstatement. The Court reinstated Mr. Perrone after 12 years of disbarment.

Comparatively speaking, we find that these cases actually bolster Petitioner's argument that he has passed a sufficient period of time, particular in light of Perrone, as eleven years is a lengthy amount of time in considering Petitioner's misconduct. The negative impact of Petitioner's misconduct on the public trust has dissipated, especially in light of the expungement order in the criminal conviction.

We next turn to the question of Petitioner's rehabilitation during the eleven years of disbarment. Petitioner is an admitted gambling addict who has been in remission since 2008. He attends Gamblers Anonymous meetings with regularity, has a gambling sponsor with whom he is in contact on a weekly basis, and has treated with a psychologist to address his problems. Although the Hearing Committee recognized Petitioner's "laudable" efforts at rehabilitation, they largely disregarded the testimony of Jeffrey Beck, a compulsive gambling counselor. Mr. Beck was not qualified as an expert and did not venture any opinion concerning the current nature of Petitioner's gambling addiction. Petitioner did not present testimony from Dr. Mitchell, his psychologist, as to this issue. Nevertheless, the Board is of the opinion that the record supports the conclusion that

Petitioner has put forth great effort to address his gambling problems during his period of disbarment.

Petitioner has held full-time employment in a non-legal capacity during his disbarment and has increased his level of community service during this time, particularly with his church and his fraternity. He presented character witnesses in support of his reinstatement.

Of particular concern to the Hearing Committee were the following factors: Petitioner submitted a false answer on his Questionnaire and failed to disclose a debt and lien of unpaid taxes in the amount of \$13,000; Petitioner failed to comply with the reporting requirements subsequent to his conviction and disbarment; Petitioner admitted he has never handled a single case in Pennsylvania nor has he studied any Pennsylvania law whatsoever; and he has no clear plan for resumption of the practice of law nor did he present evidence as to how he expects to finance his resumption of the practice of law.

On review of the record, we are fully persuaded that the concerns regarding Petitioner's competency to return to—or perhaps more accurately stated to “begin”—the practice of law in Pennsylvania are valid. Petitioner has never practiced law in Pennsylvania. He has not studied or reviewed any materials pertinent to Pennsylvania law, i.e.; advance sheets, legal periodicals and reporters. He has suggested no mentors or practitioners in Pennsylvania to support his commencement of practice in the Commonwealth. No Pennsylvania attorney stood in support of his reinstatement. Petitioner offered no plan for returning to the practice of law, either by affiliating himself with a law firm or corporation, or as a sole practitioner. This does not appear to be practical in light of Petitioner's financial issues. The record is clear that Petitioner has not met his burden of proof to show the competency and learning in the law required for admission to practice

law in Pennsylvania. Finally, his presentation lacked clear and convincing evidence that his resumption of the practice of law would not be detrimental to the public interest. Pa.R.D.E. 218(c)(3)

We are acutely aware that Petitioner was 63 years of age at the time of the reinstatement hearing. He made the compelling argument that if he is not readmitted at this time, he probably will not get back to practicing law in the future. We have sympathy for this argument and have duly considered Petitioner's position on this issue, but it remains that Petitioner has failed to meet his burden of proof.

For these reasons, we recommend that the Petition for Reinstatement be denied.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the reinstatement of Petitioner, Kirk Douglas Rhodes, be denied.

The Board further recommends that, pursuant to Rule 218(f), Pa.R.D.E., Petitioner be directed to pay the necessary expenses incurred in the investigation and processing of the Petition for Reinstatement.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: 

R. Burke McLemore, Jr., Member

Date: April 22, 2014