

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

In the Matter of	:	No. 482, Disciplinary Docket
	:	No. 2 - Supreme Court
	:	
[ANONYMOUS]	:	No. 25 DB 85 - Disciplinary Board
	:	
	:	Attorney Registration No. []
	:	
PETITION FOR REINSTATEMENT	:	([] County)

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.

II. HISTORY OF PROCEEDINGS

Petitioner, [], filed a Petition for Reinstatement to the bar of this Commonwealth on June 28, 1996. Petitioner was Disbarred on Consent by Order of the Supreme Court of Pennsylvania dated April 4, 1985.

A reinstatement hearing was held on October 7, 1996 before Hearing Committee [] comprised of Chair [], Esquire, and Members [], Esquire, and [], Esquire. Petitioner was represented by [], Esquire. Office of Disciplinary Counsel was represented by [], Esquire.

The Committee filed a Report on April 28, 1997 and recommended denial of the Petition for Reinstatement. A Petition to Reopen the Record was filed by Petitioner on May 20, 1997. Office of Disciplinary Counsel filed an Answer on June 2, 1997. By Order of June 5, 1997, the Disciplinary Board granted the Petition to Reopen and remanded the matter to the Hearing Committee for the purpose of taking additional evidence.

An additional reinstatement hearing was held before Hearing Committee [] on September 15, 1997. The Committee filed a second Report on May 4, 1998 and recommended denial of the Petition for Reinstatement.

Petitioner filed a Brief on Exceptions and request for oral argument on June 5, 1998. Office of Disciplinary Counsel filed a Brief Opposing Exceptions on June 19, 1998.

Oral argument was held on July 28, 1998 before a three member panel of the Board.

This matter was adjudicated by the Board at the meeting of August 13, 1998.

II. FINDINGS OF FACT

The Board makes the findings of fact:

1. Petitioner was born on May 1, 1951, and was admitted to the bar in Pennsylvania in 1977. His current address is []. Petitioner has two minor children.

2. Petitioner was Disbarred on Consent by Order of the Supreme Court on April 4, 1985.

3. Petitioner's disbarment was based on two incidents of misconduct:

a. Petitioner received a settlement check for \$8,000. He failed to disburse the monies to his client and instead kept them for himself.

b. Petitioner represented a client in a collection of uninsured motorist benefits. He pursued two different insurance companies for payment of benefits without notifying the companies.

4. Petitioner was criminally prosecuted for this misconduct by the [] County District Attorney after he was disbarred.

5. In the first matter involving the settlement funds, Petitioner pleaded guilty to theft by failure to make required disposition and received a sentence of four years of probation and restitution. Petitioner made full restitution, including interest, to the Lawyer's Fund for Client

Security.

6. In the second matter, Petitioner was charged with deceptive business practices and received ARD.

7. Post-disbarment, Petitioner opened a business providing accounting services for businesses and individuals. These services include preparation of individual, corporate, and partnership tax returns, fiduciary, inheritance and pension returns, as well as payroll returns. Petitioner is not a CPA. Petitioner is responsible for the daily operation of his business.

8. In December 1992, while Petitioner was running his accounting business, he listed on stationary and in his office his membership with the National and Pennsylvania Society of Public Accountants.

9. Petitioner was not permitted to list his membership, as only CPAs were permitted to do so under state law.

10. Petitioner came before the State Board of Accounting and entered into a consent decree for improperly advertising his membership. Petitioner paid a fine of \$500. This violation was a minor and common one, and the National Society of Public Accountants has since changed its name to National Association of Accountants. (N.T. 9/15/97 p.47)

11. Petitioner was the subject of a disciplinary complaint filed against him in 1988 regarding matters that occurred prior to his disbarment.

- a. Petitioner represented [A] in a bankruptcy matter in approximately 1983. The bankruptcy was denied and [A's] house was turned over to the bank to be sold at a sheriff sale.
- b. Petitioner obtained [A's] consent to acquire his house. This occurred while [A] was held on criminal charges in a mental institution.
- c. Petitioner filed an Application for Approval of Assignment, which the bankruptcy judge granted.
- d. In 1986, [A] filed an adversarial action against Petitioner. The bankruptcy judge (a different one than in the previous proceeding) found that Petitioner engaged in self-dealing with [A] and ordered him to pay [A] \$31,000, which Petitioner did.

12. At the second reinstatement hearing, Petitioner testified that in 1994 and 1995 he used approximately \$40,000 set aside for payroll taxes for his business to finance personal debt, such as his mortgage. (N.T. 9/15/97, 79-81, Exhibit R-11 p. 127, 113)

13. Petitioner further testified that he entered into a payment plan with the IRS and paid in full. (N.T. 9/15/97, 81)

14. Petitioner was questioned as to whether his child support payments were current. This issue was being litigated by the parties to the divorce and the exact state of the obligation was unclear at the time of the hearings.

III. CONCLUSIONS OF LAW

The misconduct for which Petitioner was disbarred is not so egregious as to preclude immediate consideration of his Petition for Reinstatement.

Petitioner has been disbarred for thirteen years; however, he did not engage in a qualitative rehabilitation during this time and therefore has failed to meet the threshold burden set forth in *Office of Disciplinary Counsel v. Keller*, 509 Pa. 573, 605 A.2d 872 (1986).

IV. DISCUSSION

This matter comes before the Disciplinary Board upon a Petition for Reinstatement filed by []. Petitioner was disbarred on consent by Order of the Supreme Court dated April 4, 1985. The sole issue before the Board is whether Petitioner's request for readmission to the Pennsylvania bar should be granted. Petitioner bears the burden of proof by clear and convincing evidence that he is qualified for readmission. Pa.R.D.E. 218(c)(3)(I)

Petitioner's request for reinstatement is governed, in part, by the standard set forth by the Supreme Court in *Office of Disciplinary Counsel v. Keller*, 509 Pa. 573, 506 A.2d 872 (1986). The *Keller* opinion formulates the threshold which must be met by a disbarred petitioner before the petitioner's qualifications under Pa.R.D.E. 218(c)(3)(I) are examined.

The preliminary inquiry mandated by *Keller* is whether the "magnitude of the breach of trust would permit the resumption of practice without a detrimental effect upon the 'integrity and

standing of the bar or the administration of justice nor subversive of the public interest." *Keller*, 506 A.2d at 875. The Board must first determine whether the conduct for which Petitioner was disbarred is so egregious that consideration of his reinstatement petition should be precluded at this time. Such an inquiry requires an examination of the nature of the misconduct, as well as an analysis of whether a sufficient length of time has passed since the acts of misconduct occurred during which Petitioner engaged in a qualitative period of rehabilitation.

The misconduct for which Petitioner was disbarred concerned two matters. In the first matter, Petitioner settled a case for \$8,000. When he received the settlement proceeds, he failed to disburse them to his client, but instead kept the monies. In the second matter, Petitioner represented a client in a collection of uninsured motorist benefits. He pursued two different insurance companies for payment without notifying the companies. Petitioner was criminally prosecuted for both acts of misconduct subsequent to his disbarment. While this misconduct is certainly serious, it is not so repellant to the integrity of the bar and opposite to the interests of the public so as to prohibit reinstatement. This conclusion is based in part upon a comparison of Petitioner's misconduct with other Pennsylvania reinstatement cases. In the case of *In re Anonymous No. 14 DB 86*, 32 Pa. D. & C. 4th 495 (1996), an attorney who commingled and converted client funds and neglected client files was disbarred. This misconduct was not so egregious as to preclude reinstatement. In the case of *In re Anonymous No. 6 DB 83*, 26 Pa. D. & C. 4th 61 (1994), an attorney was disbarred for commingling and converting client funds in a trust and misrepresenting these facts to clients and third parties. The Board concluded that Petitioner's conduct, although repugnant to the public trust did not preclude Petitioner from consideration of his

reinstatement petition. The Supreme Court agreed with this conclusion.

The next issue is whether a quantitative period of time has elapsed during which Petitioner engaged in qualitative rehabilitation. This prong focuses on the amount of time a petitioner has been disbarred, and whether that time has been spent engaged in constructive activities. Under *Keller*, a disbarred attorney has the opportunity to petition for reinstatement five years after the effective date of disbarment; however, reinstatement is not automatic or guaranteed. Often times a longer absence from the practice of law suggests that a petitioner had an increased opportunity for meaningful rehabilitation, and a better chance of successfully demonstrating that he or she gained insight into the misconduct and an understanding about how to avoid it in the future.

There is no checklist of activities that a disbarred attorney must accomplish in order to show rehabilitation. Each case is different and depends on the underlying misconduct. Attorneys who have been disbarred on account of misconduct caused in part by personal problems, such as abuse of alcohol or drugs, have shown evidence that they received counseling and took strides to address the problems, thus demonstrating they engaged in qualitative rehabilitation. *In re Anonymous No. 73 DB 84*, 29 Pa. D. & C. 4th 204 (1994), *In re Anonymous No. 47 DB 82*, 29 Pa. D. & C. 4th 304 (1995). In a case involving embezzlement of settlement funds, the attorney who was disbarred received psychological counseling and overcame mental problems, he worked as a teacher and paralegal, and he administered a non-profit organization without any misconduct. *In re Anonymous Nos. 22 DB 79 & 33 DB 83*, 21 Pa. D. & C. 4th 450 (1993). An attorney who was disbarred as a result of misappropriation of estate funds showed that while he was disbarred for

eight years he worked as a licensed insurance agent and did not engage in financial improprieties or mishandle funds. In its opinion, the Board noted that the attorney's successful management of others' monies was proof that the attorney had been rehabilitated. *In re Anonymous No 33 DB 82*, 13 Pa. D. & C. 4th 464 (1991).

Petitioner has been disbarred for thirteen years. Several issues were raised relative to the conduct of Petitioner during his absence from the bar. The first issue concerns a disciplinary complaint that was filed against Petitioner in 1988 regarding his representation of a client prior to his disbarment. In 1983 Petitioner represented [A] in a bankruptcy matter. The bankruptcy was denied and the court ordered that [A's] house be turned over to the bank and sold at a sheriff sale. Petitioner met with [A] and obtained his consent to acquire the house. At the time this consent was given, [A] was being held on criminal charges in a mental institution. After receiving consent, Petitioner filed an Application for Approval of Assignment with the bankruptcy court. The court granted Petitioner's Application in 1983. In 1986, [A] filed an adversarial action against Petitioner. This action was heard by a different judge than the first matter, and this judge determined that Petitioner engaged in self-dealing with a client. This situation is somewhat convoluted, as two judges rendered different opinions on the situation. The Board does not perceive this situation to be compelling enough to weigh against Petitioner in the matter of his qualitative rehabilitation, since the activities in question took place prior to Petitioner's disbarment.

Another issue raised was a violation of the rules governing Petitioner's accounting practice. In 1992, Petitioner listed on stationary and hung in his office his certificate of

membership with the National and Pennsylvania Society of Public Accountants. Although Petitioner was a legitimate member of these organizations, he was not allowed to advertise this fact as he was not a CPA. In December 1992, Petitioner entered into a consent decree with the State Board of Accounting and paid a fine of \$500. The Disciplinary Board finds that this incident does not weigh against Petitioner, as the evidence shows the infraction to be commonplace and very minor.

Petitioner was questioned about his child support obligation and whether he was in arrears. Petitioner testified that he was current. Although the Domestic Relations spreadsheet indicated he was behind in payments, Petitioner explained that his divorce was still being litigated and certain issues pertaining to the obligation were ongoing. The Board does not consider this matter to impede Petitioner in his request for readmission.

The last issue raised relative to Petitioner's qualitative rehabilitation concerns his failure to pay payroll taxes for his business in 1994 and 1995. Petitioner testified that he used the payroll tax money to pay the mortgage on his home, as well as other personal debts. The amount set aside for the taxes was approximately \$40,000. Petitioner further testified that he entered into an installment plan with the IRS and had since paid the taxes in full.

This particular issue is troublesome, as it is very similar to the misconduct engaged in by Petitioner which resulted in his disbarment. Petitioner was disbarred in 1985, in part for failing to disburse settlement proceeds to his client and keeping the monies for himself. Ten years

later, in 1995, Petitioner made a conscious decision to use monies set aside for payroll taxes to pay his home mortgage and other personal debts, such as credit cards. This resulted in his failure to pay the IRS for at least two years. Petitioner was legally obligated to pay the taxes but chose to use the monies for other obligations he deemed more pressing at the time. Petitioner testified that he believes he did not intentionally fail to pay the IRS, but his actions refute this explanation. (N.T. 9/15/97) Petitioner's testimony demonstrates a lack of comprehension that what he did was inappropriate. Petitioner's actions raise a legitimate concern as to the choices he might make if reinstated and faced with the same personal obligations and access to client funds.

Petitioner testified at the hearing of October 7, 1996 that he feels he has changed and matured. (N.T. 127) In explanation, Petitioner testified that prior to disbarment he would keep \$20,000 in a cash box and "circumvent the law" to make cash transactions. (N.T. 127) Petitioner explained that he now has a great deal of respect for the tax laws and would not do anything improper. (N.T. 127-128) This testimony is contradictory to Petitioner's conduct in handling his payroll taxes. It is the Board's considered conclusion that Petitioner has not been rehabilitated during his thirteen year absence from the bar, and in fact engaged in similar activity as recently as one year before he filed his Petition for Reinstatement. He has not demonstrated to the Board a greater understanding of his obligations as an attorney. *Matter of Costigan*, 541 Pa. 459, 664 A.2d 518 (1995)

The Board concludes from the evidence of record that Petitioner has not met his burden pursuant to *Office of Disciplinary Counsel v. Keller*, that he engaged in a qualitative period

of rehabilitation during his disbarment. As Petitioner has failed to meet the *Keller* threshold standard for reinstatement, no further discussion is necessary as to Petitioner's qualifications under Rule 218(c)(3)(I).

For the above reasons, the Board recommends that the Petition for Reinstatement be denied.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Petition for Reinstatement of [Respondent] be denied.

The Board further recommends that, pursuant to Rule 218(e), 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: _____
Charles J. Cunningham, III, Member

Date: October 29, 1998

Board Members Elliott and Iole did not participate in the August 13, 1998 adjudication.

PER CURIAM:

AND NOW, this 22nd day of December, 1998, the Request for Oral Argument is denied and, upon consideration of the Report and Recommendations of the Disciplinary Board dated October 29, 1998, the Petition for Reinstatement is denied. Pursuant to Rule 218(e), 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.