

IN THE SUPREME COURT OF PENNSYLVANIA


In the Matter of : No. 1430 Disciplinary Docket No. 3
: :
JAY MARC BERGER : No. 159 DB 2008
: :
: Attorney Registration No. 26642
: :
PETITION FOR REINSTATEMENT : (Bucks County)

ORDER

PER CURIAM:

AND NOW, this 6th day of January, 2022, upon consideration of Petitioner's response to the Court's rule to show cause dated November 12, 2021, the rule is made absolute, and the Petition for Reinstatement is denied. Petitioner is directed to pay the expenses incurred by the Board in the investigation and processing of the Petition for Reinstatement. See Pa.R.D.E. 218(f).

A True Copy Nicole Traini
As Of 01/06/2022

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

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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 Order dated December 4, 2009, the Supreme Court of Pennsylvania disbarred Petitioner on consent, retroactive to August 13, 2009, the date of Petitioner's temporary suspension. By Petition filed on October 16, 2019, Petitioner seeks reinstatement to the practice of law. On January 21, 2020, Office of Disciplinary Counsel

("ODC") filed a response in opposition to reinstatement and filed a supplemental response on June 29, 2020, detailing an additional area of concern.

Following a prehearing conference on February 26, 2020, a District II Hearing Committee ("Committee") held a reinstatement hearing on September 14, 2020. Petitioner introduced exhibits P-1 through P-11, which were admitted into evidence without objection. Petitioner testified on his own behalf and presented the testimony of seven character witnesses. ODC introduced exhibits ODC-1 through ODC-26, which were admitted into evidence without objection. ODC presented the testimony of four witnesses.

On October 22, 2020, Petitioner filed a post-hearing Brief to the Committee requesting that the Committee recommend to the Board that the Petition for Reinstatement be granted. On November 19, 2020, ODC filed a post-hearing Brief to the Committee and requested that the Committee recommend to the Board that the Petition for Reinstatement be denied.

By Report filed on January 13, 2021, the Committee concluded that Petitioner failed to demonstrate sufficient quantitative or qualitative rehabilitation to ameliorate the detrimental impact of his conduct on the public trust, and failed to meet his burden under Pa.R.D.E. 218(c)(3) by clear and convincing evidence to establish that he possesses the moral qualifications and competence required to practice law in Pennsylvania and that the resumption of the practice of law within the Commonwealth will be neither detrimental to the integrity and standing of the bar or the administration of

justice nor subversive of the public interest. Therefore, the Committee recommended that the Petition for Reinstatement be denied.

On April 16, 2021, Petitioner filed a Brief on Exceptions to the Committee's Report and recommendation and requested oral argument before the Board. ODC filed a Brief Opposing Petitioner's Exceptions on May 4, 2021.

A three member panel of the Board held oral argument on July 7, 2021. The Board adjudicated this matter on July 23, 2021.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner is Jay Marc Berger, born in 1952 and admitted to the bar in Pennsylvania in 1977. Petitioner is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

2. On August 13, 2009, the Supreme Court of Pennsylvania placed Petitioner on temporary suspension. Petitioner submitted a verified statement of resignation on September 2, 2009 and was disbarred on consent by the Supreme Court of Pennsylvania on December 4, 2009, retroactive to the date of the temporary suspension. N.T. 145.

3. Prior to the misconduct for which he has disbarred, Petitioner had no other discipline of record.

4. After admission to the bar in 1977 until approximately 1981, Petitioner worked for several law firms performing general practitioner work, as well as ERISA, pension, real estate and title insurance work. N.T. 118- 120.

5. Sometime in 1981, Petitioner opened his own general law practice, which he operated until May or June 1983. N.T. 121.

6. At or about the same time, Petitioner opened and operated his own title insurance company, Unity Abstract Company. *Id.*

7. In 1983, Petitioner stopped practicing law and opened People's Mortgage Company in Bala Cynwyd, Pennsylvania, while also continuing with his title insurance company. N.T. 122.

8. Petitioner has not engaged in the practice of law since 1983. N.T. 144.

9. On July 25, 2007, Petitioner entered a guilty plea to mail fraud affecting a financial institution under 18 U.S.C. § 1341. N.T. 123.

10. Petitioner testified at the hearing concerning his criminal conduct, which he described as "floating mortgage payoffs." N.T. 126.

11. In the 1990s, Petitioner was very involved in litigation in federal court against Fannie Mae where his mortgage company was the plaintiff, which lasted approximately seven years. The litigation was not successful for Petitioner's company and as a result, Petitioner lost money and was in financial straits at the end of the 1990s. N.T. 127.

12. Petitioner refinanced his house but instead of paying back the mortgage company he paid other business debts. N.T. 127.

13. Petitioner testified that the extra mortgage “was still going to be me, in my reasoning, and so no one was going to call and report me to me.” N.T. 126.

14. Petitioner admitted that his conduct defrauded the mortgage company.

15. Unable to satisfy the outstanding mortgages, Petitioner’s financial problems worsened and he proceeded to defraud yet another mortgage company until there were three mortgage companies with outstanding debts, each believing it held a first mortgage. N.T. 129.

16. Petitioner conceded that eventually the debt service grew too large on these three mortgages and as a result, in order to address his rapidly increasing shortfall of funds, Petitioner approached clients and friends for purported re-mortgaging opportunities. *Id.*

17. Petitioner testified that between 12 and 14 individuals were defrauded by his conduct. N.T. 130.

18. Petitioner’s misconduct was discovered in 2004 when mortgage companies were calling borrowers and asking if they wanted to refinance their mortgages. Petitioner told the mortgage companies that they had already done so through Petitioner. At that point the mortgage companies contacted the title companies. N.T. 130, 131.

19. Petitioner cooperated with the authorities and gave two proffer meetings. N.T. 131,

20. Following Petitioner's guilty plea in 2007, on June 2, 2008, the Honorable Judge Michael Baylson sentenced Petitioner to 78 months incarceration followed by 5 years of supervised release. N.T. 132-133.

21. Petitioner was ordered to pay restitution in the amount of \$4,270,555.00, which has been reduced to a civil judgment. N.T. 130; ODC-16.

22. The title insurance companies paid all of the mortgages. *Id.*

23. Petitioner appealed his sentence and pursued various legal avenues over a three-year period. N.T. 143-145; 210-228; ODC-1 through ODC-14.

24. Petitioner's appeals were not successful.

25. Petitioner went into custody on June 2, 2008 and served three years of his sentence at the federal prison at Fort Dix, New Jersey. In May 2011, Petitioner was transferred to the federal prison at Lewisburg, Pennsylvania for an early release drug and alcohol abuse program. N.T. 133-135.

26. While acknowledging that he had been sober for three years during his incarceration at Fort Dix, Petitioner testified that he went into the prison drug and alcohol program because he wanted to address alcohol issues he had experienced during his prosecution and up to his sentencing. Petitioner acknowledged the program's incentive of an earlier release. N.T. 136, 137. Petitioner testified that the program was very intensive and involved over 500 hours of work. N.T. 137.

27. Upon successful completion of the drug and alcohol early release program in October 2012, Petitioner was released to a halfway house in Philadelphia for a six-month term. N.T. 138-139.

28. In January 2013, Petitioner was granted home confinement and released to live with his elderly parents in Bucks County. N.T. 139, 140.

29. After being denied early release in 2016, Petitioner completed his supervised release in April 2018. N.T. 140-141.

30. Petitioner complied with all terms and conditions associated with his incarceration and supervised release. *Id.*

31. At the time of the reinstatement hearing, Petitioner had completed his federal sentence except for restitution. N.T. 141, 142.

32. Petitioner currently pays the restitution payment of \$125.00 per month, which was the plan formulated upon completion of his supervised release. Petitioner has consistently met all monthly payments. N.T. 141-142.

33. During his home confinement and supervised release, Petitioner took care of his elderly parents, as his only sibling lived in Massachusetts. N.T. 148, 149.

34. Between December 2012 and late 2016, Petitioner worked for M & N Sales in Burlington, New Jersey, delivering auto parts. N.T. 150-151.

35. From 2016 to 2019, Petitioner worked as a certified peer specialist at the Reach Out Foundation, a support group organization for individuals leaving prison. N.T. 100, 151, 152.

36. Petitioner underwent a training program to become a certified peer specialist with Reach Out and testified that he led support groups. The groups consisted of individuals with mental health and substance abuse problems, criminal problems and those who were homeless. N.T. 152, 153.

37. Petitioner's employment with Reach Out was part-time at the rate of \$10 per hour. Currently, Petitioner is not performing peer support, but maintains involvement in Reach Out as a member of the board of directors. N.T. 151.

38. During his disbarment, Petitioner became active with prison reform advocacy through Jack Donson, a former correctional treatment specialist with the Federal Bureau of Prisons, who now works with inmates and their lawyers assisting the inmates to adjust to prison. N.T. 153-158.

39. In that capacity, Petitioner worked on educational courses with Mr. Donson, got a course approved by the Pennsylvania Continuing Legal Education Board called "Prisonology" and taught a CLE class with Mr. Donson at Temple University. N.T. 155-156.

40. Petitioner wrote an article focused on prison-related issues, which was published in *The Legal Intelligencer* in December 2015. N.T. 157; P-4.

41. In March 2019, Petitioner began full time employment as a legal assistant at the law firm of Silvers, Langsam & Weitzman. In that capacity, Petitioner takes telephone calls from potential clients. Petitioner's gross salary is \$44,000 per year. N.T. 158 159, 166.

42. Petitioner is supervised by Dean Weitzman, Esquire and Robert S. Nix, Esquire. N.T. 159, 160, 172-174; P-1(g).

43. During his employment, Petitioner initiated and maintained a profile on LinkedIn, an employment-oriented online service that operates via websites and mobile applications. The profile described Petitioner's professional experience and credentials and set forth his prior legal experience, but failed to disclose his disbarment and the fact that he was acting as a paralegal. N.T. 160-161; ODC-22.

44. Petitioner admitted that it was a mistake to have the LinkedIn page, as it inappropriately could suggest that he is an active lawyer. Petitioner testified he would take down the page. N.T.161.

45. Petitioner testified that he is not doing any work other than for the Silvers law firm. N.T. 162.

46. Petitioner was married for 28 years and divorced in 2009. N.T. 123, 162-163.

47. Petitioner and his ex-wife Marjorie Berger are involved in litigation in Delaware County, Pennsylvania. On October 1, 2019, Ms. Berger filed a Motion to Compel/Petition to Enforce Property Settlement Agreement against Petitioner, seeking to enforce payment of Petitioner's debt obligation as outlined in their 2009 Property Settlement Agreement. N.T.165; ODC-24.

48. Petitioner failed to disclose the litigation in his Reinstatement Questionnaire. N.T. 234-235; ODC-25.

49. As of the date of the reinstatement hearing, this litigation was pending. N.T. 166.

50. Petitioner pays student loan debts for his two adult daughters in the amounts of \$900 per month and \$152.32 per month respectively, despite being under no legal or financial obligation to do so. N.T. 168-169.

51. Petitioner testified that he has been paying the loans for about seven or eight years, since he returned home. Petitioner was incarcerated for the majority of his daughters' time in college. N.T. 169.

52. Petitioner testified as to his outstanding judgments.

53. Petitioner owes the Pennsylvania Department of Revenue approximately \$11,000.00 in unpaid payroll taxes from 2004 and is working on a payment plan with an agent from the Department. N.T. 178-179.

54. The parties stipulated on the record that John Gallone would testify that there is a debt owed to him from People's Mortgage in the amount of \$10,273.00 and that Petitioner never reached out to inquire about the nature of the judgement or make an offer to pay. N.T. 335. Petitioner testified that to his knowledge, the debt had been resolved. P-5, P-8; N.T. 175-176.

55. There is an outstanding judgment in the amount of \$8,811.00 on behalf of James Groelinger. This was one of the mortgages involved in Petitioner's underlying misconduct. P-5.

56. Petitioner testified that "when this whole thing was settled with the title company and all of the problems I caused were resolved, that [Groelinger] was resolved as a part of it, because I never heard anything else after that." N.T. 177.

57. There is a judgment owed to Samuel Lassoff, Esquire in the amount of \$4,313.00 for unpaid legal fees. Petitioner testified that he is not in a financial position to pay the judgment. N.T. 179-182.

58. In addition to his salary at the Silvers firm, Petitioner receives Social Security in the amount of \$1,272 per month. As to assets, Petitioner rents his apartment, has no property or stocks and has an IRA that is worth approximately \$1,000 to \$1,500. Petitioner testified that he is not able to pay any more on his debt at this time in addition to what he already pays. N.T. 167, 174.

59. Petitioner fulfilled his Continuing Legal Education credits required for reinstatement. N.T. 170.

60. Petitioner did not engage in the practice of law while disbarred. N.T. 184.

61. Petitioner reads *The Legal Intelligencer* and cases to keep apprised of the law. N.T. 171.

62. If reinstated, Petitioner's first intention is to see if there is an employment option as a lawyer with the Silvers law firm. N.T. 195.

63. On his Reinstatement Questionnaire, Petitioner expressed interest in obtaining a position in a federal criminal defense firm where he could work with clients facing incarceration and help them prepare to navigate their journey through

the prison system in a successful manner. Reinstatement Questionnaire No. 18; ODC-25.

64. In response to his counsel's question as to why he should be reinstated, Petitioner testified:

Well, I am making hundred percent effort since I got home to be the person I was before I did such an awful, stupid thing. I was a good person and respected and, you know, a good dad and a good family member and a good member of the bar, and I blew it. I'm 68 now. I've been trying now for seven years to get things back in order. It took me six of those years to get my foot into a law firm. And I would just like a second chance. I would just like another opportunity to be who I was for 30 years before – 25 or 30 before I screwed up. N.T. 185.

65. Petitioner testified that he does not blame anyone for what happened. He accepted full responsibility for his actions and testified that he lives with it "every minute of the day." N.T. 186.

66. . Petitioner admitted that committing a crime and going to prison caused harm to the profession, and he seeks a second chance to repair the damage that he caused. N.T. 267.

67. Petitioner assured the Committee that he would not engage in misconduct in the future, even if faced with financial difficulties. N.T. 194-195, 196, 197.

68. Petitioner testified that he is "terribly, terribly sorry" for the damage he caused to the bar, his family, his friendships, his reputation, and everybody impacted by his actions. N.T. 197.

69. Petitioner testified that his moral compass is in place because he knows the person that he was in the first 50 years of his life and he knows that is the person he will be. N.T. 194.

70. Petitioner's testimony is credible.

71. Petitioner presented the credible testimony of seven character witnesses.

72. Frederick Etskovitz is currently retired and was a CPA and chief financial officer in a public software company prior to retirement. He has known Petitioner since they were freshmen at Penn State University in the 1970s. Mr. Etskovitz and Petitioner have maintained their friendship and see each other regularly. N.T. 27-29, 37.

73. Mr. Etskovitz is aware of the details of Petitioner's misconduct. N.T. 30.

74. Mr. Etskovitz testified that Petitioner expressed acceptance of responsibility and remorse for his actions. N.T. 35, 36. Mr. Etskovitz has observed a "dramatic" improvement in Petitioner accepting responsibility through the years. N.T. 36.

75. Mr. Etskovitz has had the opportunity to talk to some people in their community who know Petitioner and he confirmed that currently, Petitioner has a good reputation as a peaceful and law-abiding person and as a truthful and honest person. N.T.32-33.

76. Mr. Etskovitz has no hesitation in recommending Petitioner's reinstatement to the practice of law. N.T. 34.

77. Laurie Berger is Petitioner's daughter. She works in California for a marketing company. Ms. Berger and her father maintain regular contact. N.T. 43, 44.

78. Ms. Berger testified that Petitioner has accepted responsibility for his criminal actions and to this day often says how sorry he is for what he did. N.T. 45.

79. Ms. Berger testified that her father helps partially pay her student loan and pays the entirety of her younger sister's loan. N.T. 45.

80. Ms. Berger testified to her father's good reputation in the community as a truthful and honest person and a peaceful and law-abiding person. Ms. Berger has no hesitation in recommending Petitioner's reinstatement to the practice of law. N.T. 46-48.

81. Francine Bourne is Petitioner's sister. She lives in Massachusetts and is a school teacher. Ms. Bourne testified that she has maintained constant contact with her brother and visited him in prison. N.T. 53.

82. Ms. Bourne testified that Petitioner accepted full and complete responsibility for his misconduct and did not blame anyone else. N.T. 53. Ms. Bourne confirmed that when Petitioner left prison, he took care of their parents while also working, and additionally was a devoted father and brother. N.T. 53-54, 63.

83. Ms. Bourne confirmed that Petitioner has an excellent reputation as a peaceful and law-abiding person and as a truthful and honest person. N.T. 56, 57.

84. Ms. Bourne has no reservations in recommending Petitioner's reinstatement to the practice of law. She testified how remorseful he has been and believes that he has paid his dues to society. N.T. 59, 60.

85. Jack Donson worked in the Federal Bureau of Prisons for 23 years as a correctional treatment specialist. Currently, Mr. Donson works as a prison consultant and advocates for prison reform. N.T. 65-66.

86. Mr. Donson met Petitioner when Petitioner contacted him after his release from prison. Mr. Donson testified that Petitioner was interested in helping and giving back and became active with prison reform activities, including presenting a CLE at Temple University on the issue of prison reform. N.T. 66-70.

87. Mr. Donson confirmed that Petitioner has a good reputation in their community as a truthful and honest, peaceful and law-abiding person. N.T. 71, 72.

88. Mr. Donson testified that he holds Petitioner in high regard and knows no reason why Petitioner should not be reinstated. N.T. 73-75.

89. Robert S. Nix, Esquire was admitted to practice law in Pennsylvania in 1999 and is an attorney at the law firm of Silvers Langsam & Weitzman. Mr. Nix testified that Petitioner is employed at the Silvers firm as a legal assistant performing new client intake. N.T. 82. Mr. Nix confirmed that he supervises

Petitioner, as does Dean Weitzman, Esquire, who is the managing partner and Mr. Nix's supervisor. N.T. 83, 84.

90. Mr. Nix testified that during Petitioner's employment with the law firm, he has not held himself out as a lawyer nor has he dispensed legal advice. N.T. 84.

91. Mr. Nix testified that Petitioner is one of the best assistants he has ever had, as he is focused, dependable and "on top of everything," and Mr. Nix depends on Petitioner. N.T. 85, 88.

92. Mr. Nix described Petitioner as "an integral part" of the firm and testified that the firm would love to have Petitioner as an attorney if he is reinstated. N.T. 85, 86.

93. Mr. Nix testified that Petitioner has expressed remorse and contrition for his past serious misconduct and "he's been nothing but contrite and up front and honest about his past problems, and he's been expressive of his willingness to move forward and put all of that behind him. I see evidence of that every day." N.T. 86, 90.

94. Mr. Nix testified it is his sense that Petitioner has come a long way and learned a lot through his experience. N.T. 86.

95. Mr. Nix testified that among the people he knows who know Petitioner, Petitioner has a very good reputation as a peaceful and law-abiding person and as a truthful and honest person. N.T. 89-90.

96. Mr. Nix explained that the Silvers firm has a history of employing attorneys who have had problems, and he believes that Petitioner is a stellar example of someone who should be reinstated. Mr. Nix has no hesitation in recommending Petitioner's reinstatement to the bar. N.T. 91.

97. Douglas Hicks is the Executive Director of the Reach Out Foundation, a drop-in center for individuals with drug, alcohol and mental health issues. N.T. 98. Mr. Hicks confirmed that Petitioner worked for three years as a support group facilitator and certified peer specialist for the organization, and currently serves in a volunteer position on the board of directors. N.T. 99-101.

98. Mr. Hicks testified that Petitioner accepted full responsibility for his misconduct and was working for a second chance. N.T. 102, 103.

99. Mr. Hicks confirmed Petitioner's excellent reputation in the community as a truthful and honest person and as a peaceful and law-abiding person, and has no hesitation in recommending Petitioner's reinstatement to the practice of law. N.T. 103, 104.

100. Alan Borowsky, Esquire was admitted to practice law in Pennsylvania in 2010 and is employed in private practice. He has known Petitioner all of his life, as Petitioner was friends with Mr. Borowsky's parents. Mr. Borowsky confirmed that his father was a victim of Petitioner's misconduct. N.T. 107, 108.

101. Mr. Borowsky has seen Petitioner periodically over the years since Petitioner's release from prison. N.T. 109.

102. Mr. Borowsky testified that he and Petitioner have discussed Petitioner's misconduct and based on these discussions, he believes Petitioner has empathy and understanding for what he put Mr. Borowsky's family through, as well as other victims. N.T. 110.

103. Mr. Borowsky testified that to his knowledge, Petitioner has not reached out to his parents since his release from prison. N.T. 113, 114.

104. Mr. Borowsky has suggested to Petitioner that he make amends with Mr. Borowsky's parents. According to Mr. Borowsky, Petitioner expressed that he is willing to contact his parents and Mr. Borowsky trusts that he will. N.T. 111.

105. Mr. Borowsky testified that Petitioner explained to him that he was afraid if he made amends prior to the reinstatement proceeding, it would not appear genuine. N.T. 112.

106. Mr. Borowsky confirmed that Petitioner has accepted full and complete responsibility for his misconduct and he has no hesitation in recommending Petitioner's reinstatement. N.T. 110.

107. Petitioner testified that he has not contacted Mr. Borowsky's parents because he was embarrassed and ashamed of his actions but he plans to call them. N.T. 189,190.

108. ODC presented the testimony of four witnesses.

109. David Rosenberg, Esquire testified he has known Petitioner since they were three years old. They attended the same college and were members of the same fraternity. N.T. 273-274.

110. In 1992, Petitioner borrowed approximately \$850,000.00 dollars from Mr. Rosenberg, made some initial payments on the loan, but has not paid it back in the entirety. Mr. Rosenberg confirmed that he and Petitioner have not spoken since approximately 2008. N.T. 274, 275, 277, 290; ODC-21.

111. Mr. Rosenberg has not taken any legal action to enforce the debt obligation. He testified that he is not angry that Petitioner has not repaid the money, but is disappointed, hurt and sad that a lifelong friend would treat him that way. N.T. 280-281.

112. Mr. Rosenberg testified that he believes Petitioner lacks character, integrity and good judgment and that in his community, Petitioner's reputation is that he is untrustworthy and dishonest. N.T. 283-287.

113. Mr. Rosenberg was not aware that Petitioner had admitted his misconduct in federal court and in his disciplinary proceedings. N.T. 290.

114. Petitioner confirmed that he has not repaid Mr. Rosenberg, does not have the money to do so, has not spoken to Mr. Rosenberg in many years, and feels remorse for his actions. He expressed regret that he has not reached out to Mr. Rosenberg and indicated he was too embarrassed and ashamed to do so, and did not have the courage to face up to him. Petitioner acknowledged that he betrayed a lifelong friendship and that his failure to reach out to Mr. Rosenberg compounded his underlying wrong. N.T. 187-189, 192.

115. Jeffrey Hiller, Esquire has known Petitioner since they were children. He has not spoken to Petitioner since before Petitioner was incarcerated. N.T. 295, 297.

116. Mr. Hiller testified that Petitioner's reputation in the community of people they both knew is that Petitioner lacks remorse and has not tried to make amends for his misconduct. N.T. 298-299.

117. Samuel Lassoff, Esquire testified that there is a \$4,333 judgment owed to him by Petitioner for unpaid legal fees and Petitioner has not contacted him to settle the judgment. N.T. 315, 316.

118. Marjorie Berger is Petitioner's ex-wife. Ms. Berger testified that Petitioner's criminal conduct negatively impacted her life and confirmed that she and Petitioner are still litigating matters related to their property settlement agreement. N.T. 325-326, 328.

III. CONCLUSIONS OF LAW

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

2. Petitioner has met his burden of proof by clear and convincing evidence that a sufficient period of time has passed since the misconduct, during which he engaged in qualitative rehabilitation. ***In the Matter of Jerome J. Verlin***, 731 A.2d 600 (Pa. 1999).

3. Petitioner has met his burden of proof by clear and convincing evidence that he has the moral qualifications, competency and learning in the law required for admission to practice law in the Commonwealth of Pennsylvania. Rule 218(c)(3), Pa.R.D.E.

4. Petitioner has met his burden of proof by clear and convincing evidence that his resumption of the practice of law in the Commonwealth of Pennsylvania will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest. Rule 218(c)(3), Pa.R.D.E.

IV. DISCUSSION

Petitioner seeks reinstatement to the practice of law in Pennsylvania following his disbarment on consent by Order of the Supreme Court of Pennsylvania dated December 4, 2009, retroactive to August 13, 2009. The misconduct giving rise to Petitioner's disbarment on consent was his July 25, 2007 federal criminal conviction in the United States District Court for the Eastern District of Pennsylvania and guilty plea to one count of mail fraud affecting a financial institution, in violation of 18 U.S.C.A. § 1341.

When a disbarred attorney seeks reinstatement, the Board and the Court must examine whether the magnitude of the breach of trust was so egregious as to preclude further reconsideration of the petition for reinstatement. As the Court held in *Keller*, "[i]n the case of disbarment, there is no basis for an expectation by the disbarred attorney of the right to resume practice at some future point in time." *Keller* at 875.

Petitioner engaged in egregious criminal conduct that led to his disbarment. Petitioner devised a scheme to defraud individual homeowners, banks, finance companies and title companies and to obtain money and property by means of knowingly false and fraudulent pretenses. Petitioner was sentenced to 78 months of incarceration, 5 years of supervised release and restitution in the amount of \$4,270,555.00. Petitioner completed his supervised release on August 19, 2018 and is paying the restitution at the rate of \$125.00 per month.

We conclude that Petitioner's misconduct, while extremely serious and a breach of his ethical responsibilities, is not so egregious as to prevent reinstatement. The decisional law contains examples of flagrant and deplorable acts by Pennsylvania lawyers, all of whom met the *Keller* threshold standard for reinstatement. See, *In the Matter of Sabrina L. Spetz*, No. 31 DB 2011 (D. Bd. Rpt. 1/3/2020) (S. Ct. Order 2/28/2020) (disbarred on consent for conviction of mail and wire fraud conspiracy arising from falsification of bank records; conduct not so egregious to preclude consideration of reinstatement); *In the Matter of Jay Ira Bomze*, No. 149 DB 2002 (D. Bd. Rpt. 11/21/2017) (S. Ct. Order 12/26/2017) (disbarred on consent for conviction of health care fraud for directing four clients in two separate personal injury matters to obtain unnecessary medical treatment and coaching the clients to lie about the circumstances in order to falsely inflate the value of the personal injury settlements; conduct not so egregious as to bar reinstatement); *In the Matter of Stephen Greg Doherty*, No. 69 DB 2010 (D. Bd. Rpt. 9/13/2017) (S. Ct. Order 10/27/2017) (disbarred on consent for conviction of mail fraud, wire fraud, bankruptcy fraud and money laundering based on a

scheme of real property sales and leaseback transactions; conduct not so egregious as to bar reinstatement).

The Board's inquiry does not end with the determination of the threshold issue. We next consider whether Petitioner has established by clear and convincing evidence that he has the moral qualifications, competency and learning in the law required for admission to practice law in Pennsylvania and that his readmission would not have a detrimental impact on the integrity and standing of the bar, the administration of justice nor be subversive of the public interest. Pa.R.D.E. 218(c)(3). Petitioner must prove that his post-disbarment conduct and efforts at qualitative rehabilitation were sufficient to dissipate the detrimental impact of his misconduct on the public trust. *Verlin* at 602. Upon this record, and after consideration of the Committee's Report, the parties' recommendations and oral argument, we conclude that Petitioner has met his reinstatement burden.

In Pennsylvania, disbarment is not permanent. Under Pa.R.D.E. 218(b), a petitioner may file for reinstatement after the expiration of five years from the effective date of the disbarment, thereby allowing a petitioner to prove that he or she deserves another opportunity to practice law in the Commonwealth.

In the *Verlin* matter, the Court noted that "almost eight years [had] passed" since his disbarment and although the Court believed this was "not an extremely lengthy period of time, [it] believe[d] that it [was] sufficient to dissipate the detrimental impact of Verlin's misconduct on the integrity and standing of the bar, the administration of justice,

and the public interest.” *Id.* at 52. The Court then examined Verlin’s “ongoing efforts to rehabilitate himself” during his period of disbarment, and found that Verlin “demonstrated a steadfast commitment to rehabilitating himself.” *Id.* The Court noted “[p]erhaps most importantly, the Disciplinary Board found that Verlin testified credibly as to his remorse for his actions, which he described as a breach of trust to himself, his profession, and his family.” *Id.* at 53. We conclude that like Verlin, Petitioner presented compelling evidence concerning his rehabilitation during his period of disbarment.

The record established that Petitioner engaged in qualitative rehabilitation during the disbarment period and clearly and convincingly established his moral qualifications, competency and learning in the law. Petitioner has been removed from the practice of law for approximately 12 years, after voluntarily resigning from the bar and accepting disbarment on consent in 2009. His criminal conduct occurred during the time frame of the late 1990s until 2004, more than 16 years ago. Petitioner cooperated with the authorities and pled guilty in 2007, was sentenced in 2008¹ and was incarcerated until 2012, when he was released to a halfway house followed by home confinement and supervised release. During his time in prison, Petitioner received counseling for alcohol issues and completed a rigorous drug and alcohol program that enabled him to be released to the halfway house. Petitioner complied with all requirements of his supervised release, which ended in 2018.

¹ Petitioner exercised his right to appeal his sentence, which appeals were denied.

Following his release to home confinement, Petitioner served as the primary caregiver for his elderly parents and delivered auto parts for approximately four years. Thereafter, he worked with the Reach Out organization as a peer counselor, providing support for individuals leaving prison. Petitioner continues to volunteer his time by serving on Reach Out's board of directors. Petitioner also volunteered with Mr. Donson in the area of prison reform and helped prepare and present a CLE at Temple University and wrote an article published in *The Legal Intelligencer*. In 2019, Petitioner obtained full-time employment with the law firm of Silvers, Langsam & Weitzman. In that capacity, he works as a legal assistant to Robert S. Nix, Esquire, performing intake services. Petitioner properly notified the Board of his employment with the firm, as confirmed by Mr. Nix. Although Petitioner's income is limited, he has striven to help his two daughters with their student loans. Petitioner explained that his daughters were in college at the time he entered prison and he desires to assist them at this time.

To maintain his learning in the law, Petitioner completed the Continuing Legal Education courses required for reinstatement and reads *The Legal Intelligencer* and cases regularly, particularly since his employment with the Silvers firm. The record established that Petitioner has not engaged in the unauthorized practice of law while disbarred and has not held himself out as an attorney. When it was brought to Petitioner's attention at the hearing that a LinkedIn page he created was problematic because it did not reference Petitioner's disbarment, he agreed that it was misleading and agreed to take down the page. If reinstated, Petitioner would like to work as an attorney for the

Silvers firm. He also indicated an interest in working for a firm that handles federal criminal defense.

At the hearing, testimony was elicited on the subject of Petitioner's obligations and debts. Petitioner owes restitution as part of his sentence, which he pays at the agreed-upon rate of \$125.00 per month. Petitioner is in full compliance with the monthly payments. There are several judgment holders Petitioner has not paid. Petitioner went through each of the holders and explained the status of the judgments. As to monies owed to the Pennsylvania Department of Revenue, he is in contact with an agent to formulate a payment plan. As to the other judgment holders, Petitioner credibly testified to his understanding that the judgments had been satisfied; in any event, Petitioner explained that he is unable to pay the debts at this time due to his financial situation.

Importantly, Petitioner conveyed genuine contrition at the hearing. Petitioner credibly accepted full and complete responsibility for his criminal conduct and clearly testified that his actions caused harm to between 12 and 14 victims. Petitioner credibly expressed sincere remorse, testifying that he is "terribly, terribly sorry" for the damage his serious misconduct caused to the bar, the victims, and his family. Petitioner has tried to make amends for his wrongdoing by the way that he has lived during his disbarment. Petitioner gave credible assurances that he has no intention of engaging in similar misconduct in the future and will do all he can to prevent it. Petitioner sincerely communicated his desire for a second opportunity, at the age of 68, to live his life the way he did prior to his wrongdoing and to repair the damage he caused.

In support of his reinstatement, Petitioner offered the credible and significant testimony of seven character witnesses.² Upon review, we find the strength of this testimony established Petitioner's genuine remorse, change, reform, acceptance of responsibility and current good character in the community. All of the character witnesses have observed Petitioner's remorse and efforts at rehabilitation during his disbarment period and none have any reservations that Petitioner's readmission will harm the public or the reputation and integrity of the bar.

Petitioner's daughter and sister credibly testified that Petitioner has accepted responsibility for his actions that harmed others, does not blame others, and has expressed genuine remorse. Both of these witnesses expressed that he has been a devoted father and brother to them, as well as a good son to his elderly parents. Ms. Bourne testified that Petitioner has an excellent reputation in the community for being truthful, honest, peaceful and law abiding.

The credible testimony of Mr. Donson and Mr. Hicks confirmed that Petitioner used his time during the disbarment period to help others by engaging as a peer counselor and member of the board for Reach Out and by assisting Mr. Donson's efforts at prison reform.

Attorney Robert S. Nix, Petitioner's supervisor at the Silvers law firm, provided compelling and weighty testimony that confirmed Petitioner's good character and competency. He testified that Petitioner has the qualities of focus and dependability

² The Committee's Report is silent on Petitioner's character testimony.

that make him one of the best assistants Mr. Nix has ever had. Mr. Nix described Petitioner as an essential part of the Silvers firm and confirmed that he would “love” to have Petitioner stay with the firm as a lawyer if reinstated. As to Petitioner’s past wrongdoing, Mr. Nix credibly testified that Petitioner has always been contrite and forthright about his past and has expressed willingness to move forward. It is Mr. Nix’s sense based on his observations that Petitioner has learned a lot from his experiences, and as such would not harm the profession if reinstated. Mr. Nix believes that Petitioner is a stellar example of an attorney who should be reinstated.

Frederick Etskovitz, a longtime friend of Petitioner since the 1970s, credibly testified that he has been in contact with Petitioner through the years, including during Petitioner’s incarceration, and knows people who know Petitioner. Among those people, Petitioner currently has a good reputation for honesty and truthfulness, as well as for being a peaceful and law-abiding person. Mr. Etskovitz noted that Petitioner has expressed remorse and has improved in a dramatic way through the years as far as his acceptance of responsibility.

Other compelling testimony was offered by Attorney Alan Borowsky, who has known Petitioner since childhood and whose father was a victim of Petitioner’s fraud. Despite the harm inflicted on his father, Mr. Borowsky supports Petitioner’s reinstatement, as he believes Petitioner has empathy and understanding for what he did to the victims of his crime. Mr. Borowsky candidly testified that he and Petitioner have discussed that

Petitioner needs to make amends with Mr. Borowsky's parents and he believes Petitioner is truthful when Petitioner told him he intends to do so.

ODC presented the testimony of four witnesses who oppose Petitioner's reinstatement. Upon review, we afford this testimony little weight. Marjorie Berger is Petitioner's ex-wife. Unsurprisingly, she was unhappy with how Petitioner's criminal conduct impacted her life and testified principally about pending litigation related to their property settlement agreement. Ms. Berger acknowledged that she does not speak to Petitioner. Mr. Lassoﬀ testified to the judgment he took against Petitioner for unpaid legal fees. Petitioner credibly testified that he is unable to pay the judgment at this time. Mr. Hiller was friends with Petitioner for many years and testified that people in his community who know Petitioner think that Petitioner has a poor reputation. However, Mr. Hiller acknowledged that he has not spoken to Petitioner since 2006 and did not know details about Petitioner's guilty plea and disbarment on consent.

Mr. Rosenberg's testimony confirmed that he made a substantial loan to Petitioner in the 1990s that has not been fully repaid. Mr. Rosenberg expressed disappointment and sadness that Petitioner would treat a childhood friend the way he has. Similar to Mr. Hiller, Mr. Rosenberg has not had contact with Petitioner since approximately 2008. Petitioner testified that he does not have the money to repay the loan and feels remorse for his actions. He expressed regret that he has not reached out to Mr. Rosenberg and indicated he was too embarrassed and ashamed to do so, and did not have the courage to face up to him. Petitioner acknowledged that he betrayed a

lifelong friendship and that his failure to reach out to Mr. Rosenberg compounded his underlying wrong.

On the whole, we conclude that the testimony of ODC's witnesses, who have not had any contact with Petitioner during his disbarment and have not spoken to him for many years, does not supply a sufficiently compelling basis to deny Petitioner's reinstatement.

Upon this record, we conclude that Petitioner's 12 year period of disbarment has been a time of genuine rehabilitation that has dissipated the breach of trust caused by his serious misconduct. In previous matters, the Court has reinstated disbarred attorneys who met their heavy burden during a disbarment period of similar length to Petitioner or less. See, *In the Matter of Cory Adam Leshner*, No. 159 DB 2013 (D. Bd. Rpt. 11/10/2020) (S. Ct. Order 12/16/2020) (reinstatement from disbarment on consent after seven years; conviction for conspiracy to commit wire fraud); *Bomze, supra* (reinstatement from disbarment on consent after 15 years; conviction of healthcare fraud); *Doherty, supra* (reinstatement from disbarment on consent after seven years; criminal conviction for mail fraud, wire fraud, bankruptcy fraud, money laundering); *In the Matter of Robert S. Teti*, No. 30 DB 1999 (D. Bd. Rpt. 12/13/2012) (S. Ct. Order 2/28/2013) (reinstatement from disbarment on consent after thirteen years; conviction for failure to make required disposition of funds).

Petitioner has met his reinstatement burden by clear and convincing evidence that he is morally qualified, competent and learned in the law, and that his

reinstatement will not be detrimental to the integrity and standing of the bar or the administration of justice. The totality of the record before us demonstrates that Petitioner is fit to practice law and does not pose a threat to the public. We recommend that the Petition for Reinstatement be granted.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that Petitioner, Jay Marc Berger, be reinstated to the practice of law.

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: /s/ John C. Rafferty, Jr.
John C. Rafferty, Jr., Member

Date: 09/13/2021