

STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition of
DAVID M. FOSTER, P 30041,

Petitioner.

Case No. 13-40-RP

FILED
ATTORNEY DISCIPLINE BOARD
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**ORDER AFFIRMING HEARING PANEL ORDER
DENYING PETITION FOR REINSTATEMENT**

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

Tri-County Hearing Panel #60 of the Attorney Discipline Board entered an order in this matter on December 11, 2013, denying the petition for reinstatement filed by petitioner, David M. Foster. Petitioner sought review of that decision by the Attorney Discipline Board in accordance with MCR 9.118. The Board has conducted review proceedings, including review of the record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing before the Board on May 21, 2014.

Petitioner previously pled no contest to the Grievance Administrator's allegation that, in connection with his motion for leave to appear *pro hac vice* on behalf of a client in the United States District Court for the Northern District of Illinois, he knowingly made false statements of material fact to a tribunal or failed to correct false statements of material fact previously made to the tribunal, in violation of MRPC 3.3(a)(1). For this, he was suspended for 180 days (by consent), *Grievance Administrator v David M. Foster*, Case No. 12-56-GA, effective November 24, 2012.¹

In its report filed December 11, 2013, the hearing panel delivered its unanimous opinion that petitioner had not clearly and convincingly satisfied the criteria found in MCR 9.123(B)(3) and (5)-(7). Specifically, the panel opined that petitioner had not clearly and convincingly established that he has a proper understanding of and attitude toward standards that are imposed on members of the bar, nor did he clearly and convincingly establish that he would conduct himself in conformity with those standards, both of which are required under MCR 9.123(B)(6). Similarly, petitioner did not clearly and convincingly establish that he can safely be recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and, in general, to aid in the administration of justice as a member of the bar and as an officer of the court, as required by MCR 9.123(B)(7). Additionally, the hearing panel determined that petitioner failed to establish by clear and convincing

¹ Specifically, petitioner knowingly provided a false answer to the question of whether he had ever been "censured, suspended, or disbarred, or otherwise disciplined by any court," when, in fact, petitioner's license to practice law in Michigan had been suspended for thirty months, effective October 31, 1994, as the result of a criminal conviction in the US District Court for the Eastern District of Michigan. *Grievance Administrator v David M. Foster*, Case No. 94-202-JC.

evidence, that he has not engaged in the practice of law during his suspension in violation of MCR 9.123(B)(3).

On review, petitioner requests that the panel's decision to deny his petition for reinstatement be reversed because the hearing panel erred in finding that petitioner was not credible with regard to his explanation for why he answered "no" to the question of whether he had ever been "censured, suspended, disbarred, or otherwise disciplined by any court?" and in finding that the work petitioner did during his suspension constituted the unauthorized practice of law.

In reinstatement proceedings, the Board reviews findings of fact for proper evidentiary support. *In re McWhorter*, 449 Mich 130, 136 (1995). However, granting or denying a petition for reinstatement under MCR 9.123(B) involves "an element of subjective judgment" and the ultimate "discretionary question whether the Court is willing to present that person to the public as a counselor, member of the state bar, and officer of the court bearing the stamp of approval by this Court." *Grievance Administrator v August*, 438 Mich 296, 311 (1991) as cited in *In re Reinstatement Petition of Keith J. Mitan*, 12-2-RP (ADB 2013). With regard to reinstatement proceedings, this Board has previously articulated that taken together, subrules (5)-(7) of MCR 9.123 "require scrutiny of the reinstatement petitioner's conduct, before, during, and after the misconduct which gave rise to the suspension or disbarment in an attempt to gauge the petitioner's current fitness to be entrusted with the duties of an attorney." *In re Reinstatement of Arthur R. Porter, Jr.*, 97-302-RP (ADB 1999). Applying both the standard of review and the criteria articulated in *Porter*, and based upon the record below, we find that there is proper evidentiary support for the hearing panel's conclusions that petitioner did not carry his burden of proof as to the criteria found in MCR 9.123(B)(6)-(7) by clear and convincing evidence.

As noted in the panel's report, petitioner's testimony that he believed the Attorney Grievance Commission was part of the State Bar and he therefore had been suspended by the State Bar, and that because he had no pending cases in any courts, he was not "suspended by a court," was simply not credible in light of the fact that petitioner was fully aware of the process having gone through an entire reinstatement proceeding that resulted from his prior thirty month suspension. Additionally, on cross-examination, petitioner admitted that when the matter was brought to the court's attention, he wrote a letter of explanation which did not include his apparent belief that he had been suspended by the State Bar, but rather, it indicated that he had voluntarily resigned. Petitioner called his therapist, Dr. Jorne, to testify that she believed petitioner answered the question incorrectly because it "subconsciously reminded him of the trauma that occurred in his childhood and the trauma from his imprisonment." To the extent that any of the panel's conclusions were based upon its assessment of petitioner's testimony, the Board will generally defer to those assessments in light of the panel's firsthand opportunity to judge credibility. *Grievance Administrator v Richard E. Meden*, 92-106-GA (ADB 1993); *Matter of Leonard R. Eston*, DP 48/85 (ADB 1987). The panel specifically determined that petitioner was not credible. It also found that petitioner had not transformed since his misconduct and that it could not conclude that petitioner had a proper understanding of the standards of conduct imposed upon a Michigan attorney or that he would conduct himself in accordance with those standards. The panel's findings and conclusions as to MCR 9.123(B)(6)-(7) are fully supported by the record.

Having found that there is proper evidentiary support for the hearing panel's finding that petitioner did not satisfy the criteria of MCR 9.123(B)(6)-(7), the Board need not review the panel's finding that petitioner did not clearly and convincingly establish that he had not practiced or attempted to practice law contrary to the requirement of his suspension and MCR 9.123(B)(3).

NOW THEREFORE,

IT IS ORDERED that the hearing panel order denying petition for reinstatement filed in this matter on December 11, 2013, is **AFFIRMED**.

IT IS FURTHER ORDERED that respondent shall, on or before **December 3, 2014**, pay costs in the amount of **\$136.00**, for court reporting costs incurred by the Attorney Discipline Board for the review proceedings conducted on May 21, 2014. Check or money order shall be made payable to the **Attorney Discipline System**, and submitted to the Attorney Discipline Board [211 West Fort St., Ste. 1410, Detroit, MI 48226] for proper crediting. (See attached instruction sheet.)

ATTORNEY DISCIPLINE BOARD

By: 
James M. Cameron, Jr., Chairperson

DATED: November 4, 2014

Board members Craig H. Lubben; Sylvia P. Whitmer, Ph.D.; Rosalind E. Griffin, M.D; Carl E. Ver Beek; Lawrence G. Campbell; Dulce M. Fuller; Louann Van Der Wiele; and Michael Murray concur in this decision.

Board Chairperson, James M. Cameron, Jr., was absent and did not participate.