STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of Keith J. Mitan, P 33207,

Petitioner/Appellant.

Case No. 12-2-RP

Decided: July 18, 2013

Appearances:

Keith J. Mitan, Petitioner/Appellant, In Pro Per
Patrick K. McGlinn, for the Grievance Administrator/Appellee

BOARD OPINION

Petitioner seeks review of a hearing panel decision denying his petition for reinstatement. The hearing panel in this reinstatement proceeding found that petitioner did not establish compliance with MCR 9.123(B)(1), (3), and (5)-(7). We find no error in the panel's decision, and we find ample evidentiary support for its findings. Accordingly, we will affirm the order of the hearing panel denying the petition for reinstatement.

Petitioner was previously found to have knowingly violated a court order, to have "made a false statement by omission," and to have been "intentionally evasive" during a hearing before a circuit judge. See *Grievance Administrator v Keith J Mitan*, 06-74-GA (ADB 2008). For this misconduct, he was suspended for one year and "and until further order of the Supreme Court, the Attorney Discipline Board or a hearing panel, and until respondent complies with the requirements of MCR 9.123(B) and MCR 9.124."[1] The nature of the misconduct leading to petitioner's one-year suspension is set forth in our opinion in *Mitan, supra.*

A lawyer required to petition for reinstatement must prove by clear and convincing evidence that he or she has met MCR 9.123(B)'s requirements which include, essentially sufficient evidence to enable the hearing panel to make a prognostication that the petitioner is fit, trustworthy, will act in accordance with the Rules of Professional Conduct, and can be safely recommended to the public

[1] September 30, 2008 order of the Board increasing 60-day suspension imposed by panel in Case No. 06-74-GA. Petitioner's suspension became effective January 9, 2009. He was eligible to file a petition for reinstatement on November 13, 2010. He filed the petition for reinstatement in this matter on January 4, 2012.

and to aid in the administration of justice as an officer of the court. The foregoing is but a terse summary of several important requirements the Michigan Supreme Court has carefully elaborated upon and insisted that a petitioner for reinstatement establish by clear and convincing evidence. See *In Re Reinstatement of Arthur R. Porter, Jr.*, 97-302-RP (ADB 1999) (discussing eligibility requirements for reinstatement under MCR 9.123(B)).

In reinstatement proceedings, as in other disciplinary matters, this Board and the Court review findings of fact for proper evidentiary support. *In Re McWhorter*, 449 Mich 130, 136; 534 NW2d 480 (1995). However, the grant or denial of 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 from this Court." *Grievance Administrator v August*, 438 Mich 296, 311; 475 NW2d 256 (1991).

The question of whether petitioner engaged in the practice of law contrary to his order of suspension took up much of the hearing. The panel properly determined that petitioner failed to establish compliance with the requirement that he not engage in the practice of law. MCR 9.123(B)(3).

Petitioner represented the estate of his father, Frank Mitan, in state and federal courts.[2] The cases were captioned such that petitioner's capacity as personal representative of his father's estate was reflected, as well as his status as a pro se litigant. Again we note that petitioner's order of suspension became effective on January 9, 2009. His father died on March 31, 2010.[3] His mother is the only beneficiary of the estate.[4] The *Osborn* case was filed in May 2010 and the *Advanced Bail* case was filed in July 2010. In both cases, the issue of unauthorized practice of law by respondent was raised and briefed by opposing counsel. Despite the extensive briefing of this issue, petitioner

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[2] See, e.g., *Keith J. Mitan, as personal representative of the Estate of Frank Mitan v A-Advanced Bail Bonds*, filed by respondent on July 19, 2010, in Oakland Circuit Court and subsequently removed by defendants to the United States District Court for the Eastern District of Michigan and assigned case number 2:10-cv-13014 (hereafter cited as "*Advanced Bail*") (See Grievance Administrator's Report, p 242 - ff), and *Keith Mitan, Individually and as Personal Representative of the Estate of Frank J. Mitan v Donna Osborn, et. al.*, United States District Court, Western District of Missouri, Case No. 10-cv-3207, filed by respondent on May 27, 2010 (hereafter cited as "Osborn") (See Grievance Administrator's Report, pp 176 - 177).

[3] Tr 05/18/12, p 109.

[4] Tr 05/18/12, pp 41, 43, 72.

told the panel, with regard to *Osborn*: "I don't know what the law is in Missouri, I never really checked, I can't really tell you whether this was improper or not proper." (Tr 05/18/12, pp 54-56.) We find this unlikely in light of the fact that the *Osborn* defendants briefed the issue as follows:

> In Missouri, the prohibition against a lay personal representative appearing in court on behalf of an estate is codified. Specifically, R.S, Mo. § 473,153.7 provides that [n]o personal representative, other than one who is an attorney, may appear in court except by attorney. (Emphasis added); see also 5A Mo. Prac., Probate Law and Practice § 864 (2010) (A personal representative, if not an attorney, must, as a matter of course, employ an attorney to represent the personal representative). And, of course, [a] nonresident attorney who is unlicensed to practice in Missouri ... is as much engaged in the unauthorized practice of law as would be a mere layman. *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 240 (Mo. App. 2000).
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> Even more on point is the controlling Eighth Circuit decision of *Jones v. Correctional Medical Services, Inc.*, 401 F.3d 950 (8th Cir. 2005). There, a non-attorney administrator purported to bring a wrongful death action on behalf of the decedent's estate. After the statute of limitations ran on the claim, the administrator obtained counsel. In affirming the dismissal of the lawsuit with prejudice, the court of appeals held that because the administrator, in bringing the lawsuit, was acting on behalf of all of the beneficiaries and creditors of the estate — and not just on behalf of herself – she was not acting as her own attorney, but as the attorney for the estate. [Administrator's Report, p 165 (p 33 of motion to dismiss/for summary judgment). Emphasis in original.]

As to *Advanced Bail*, petitioner offered the panel specious distinctions and untenable interpretations of Shenkman v Bragman, 261 Mich App 412, 416 (2004), to justify his representation of his father's estate in Michigan state and federal courts while suspended.

On review, petitioner argues that the panel's report "misinterprets the evidence" and his brief on review refers to the right to self representation embodied in 28 USC 1654. However, petitioner utterly ignores the case law interpreting that federal statute and similar decisions by state courts regarding the unauthorized practice of law in the specific context relevant here. For example, one such case, *Shepherd v Wellman*, 313 F3d 963, 970 (CA 6, 2002), states:

> Although 28 U.S.C. § 1654 provides that "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel," that statute does not permit plaintiffs to appear pro se where interests other than their own are at stake. *See Iannacone v.*

> *Law*, 142 F.3d 553, 558 (2d Cir. 1998) ("Because pro se means to appear for one's self a person may not appear on another person's behalf in the other's cause.") Moreover, the Second Circuit has held that "an administratrix or executrix of an estate may not proceed pro se when the estate has beneficiaries and creditors other than the litigant." *Pridgen v. Andresen*, 113 F.3d 391, 393 (2d Cir. 1997). Under *Pridgen* and *Iannacone*, Gary Shepherd cannot proceed pro se with respect to the § 1983 action because he is not the sole beneficiary of the decedent's estate. See *Jaco v. Bloechle* 739 F.2d 239, 240 (6th Cir. 1984) (noting that § 1983 actions are personal to the injured party and can only be brought by the executor of an estate).

This particular passage is significant because petitioner was apprised of this very holding in a brief filed in the *Advanced Bail* case in the United States District Court for the Eastern District of Michigan.[5] Moreover, this pleading was discussed at the May 18, 2012 hearing and much of the foregoing passage, quoting *Shepherd, Pridgen,* and *Iannaccone*, was read into the record by the panel chair.[6]

Again, petitioner told the panel he had no idea what the law provided with regard to unauthorized practice in his situation. He further said to the panel: "if somebody think's I'm doing something wrong, somebody better tell me because I'm doing it, continuing to do it, I'm still fighting these mortgages." (Tr 09/05/12, p 41.) He also filed a review brief before this Board which still fails to address or otherwise acknowledge the applicable law. Given his demonstrated proficiency at research and advocacy, this selective citation of the law raises significant questions about his candor, truthfulness and fitness as an officer of the court.

In addition to failing to demonstrate compliance with MCR 9.123(B)(3), the panel also found that petitioner failed to prove by clear and convincing evidence that his conduct since he was suspended has been exemplary and above reproach (MCR 9.123(B)(5)), that he has a proper understanding of and attitude toward the standards imposed on Michigan lawyers and will abide by them (MCR 9.123(B)(6)), and that, after considering all of his past conduct and the nature of his misconduct, he can nevertheless be safely recommended to the courts, the public and the profession as fit, trustworthy, and one who will aid in the administration of justice (MCR 9.123(B)(7)).

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[5] See Exhibit 10 – Reply Brief filed 08/31/10 in *Advanced Bail, supra,* n 2.

[6] Tr 05/18/12, p 80, quoting from Exhibit 10.

The hearing in this matter was conducted with great diligence, care, and thoughtfulness by the panel. Every effort was made to allow petitioner to meet his burden of proof. As we have noted, the panel found that petitioner failed to do so with respect to several requirements of MCR 9.123(B). The panel's report provides illustrations and explanations with regard to several such failings.[7] Our careful review of the whole record convinces us that the hearing panel's findings and conclusions are fully supported by the record before the panel, which contains page after page of petitioner's circumlocution, obfuscation, stonewalling, and baseless assertions and arguments in various settings and forums.

Finally, without filing a motion to supplement the record, petitioner attached to his brief two items not present in the record below and argued that we should consider them. The first is a decision from the United States Circuit Court for the Sixth Circuit in *Keith J. Mitan, as Personal Representative of Estate of Frank J. Mitan v Federal Home Loan Mortgage Corporation*, a case petitioner apparently continues to litigate on behalf of his father's estate. The second is a letter from attorney Patrick Cleary supporting petitioner's reinstatement. Neither of these items are appropriately before us, and were they so, would not alter our decision. As to the first, which represents a legal victory of sorts by petitioner, we echo the remarks of one of the hearing panel members below to the effect that Mr. Mitan's legal abilities have not been at issue in either his discipline or reinstatement matters. Rather, it is his veracity and willingness to comply with the rules and standards applicable to the profession that are of concern. With regard to the letter, we note that the substance of this letter was in effect before the panel through petitioner's testimony and characterization of Mr. Cleary's support for his reinstatement. We have no doubt that the panel considered it, as we have, in determining whether petitioner has established his eligibility for reinstatement.

For the foregoing reasons, the panel's order denying the petition for reinstatement is affirmed.

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

Board members James M. Cameron, Jr., and Rosalind E. Griffin, M.D., did not participate.

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[7] Neither this opinion nor the panel's report constitutes an exhaustive list of the ways in which petitioner has failed to meet the requirements of MCR 9.123(B)(5)-(7).