STATE OF MICHIGAN

FILED
ATTORNEY DISCIPLINE BOARD
June 18, 2021

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of Peter T. Howe, P 57973,

Petitioner/Appellee.

Case No. 19-77-RP

Decided: June 18, 2021

Appearances

Michael K. Mazur, for the Grievance Administrator/Appellant
Timothy A. Dinan, for the Petitioner/Appellee

BOARD OPINION

Tri-County Hearing Panel #66 of the Attorney Discipline Board entered an order of eligibility for reinstatement with condition on October 20, 2020, granting the reinstatement petition filed by petitioner upon verification that petitioner was recertified by the Board of Law Examiners, that he paid his bar dues in accordance with Rules 2 and 3 of the Rules concerning the State Bar of Michigan, and that he had designated a third party of his choosing, acceptable to the Grievance Administrator, to administer his office bookkeeping and IOLTA account. The Grievance Administrator petitioned for review on the grounds that the panel failed to address petitioner's large outstanding obligations owed to the IRS and the Illinois Client Protection Program, and asking "the Board to review whether Petitioner's presentation of evidence and the hearing panel's report as written are consistent with a finding that Petitioner is eligible for reinstatement." Petitioner requests that the Board affirm the hearing panel's order of eligibility of reinstatement.

The Attorney Discipline Board conducted a virtual review proceeding via Zoom video-conferencing, in accordance with General Order ADB 2020-2, and MCR 9.118, on February 17, 2021, which included a review of the entire record before the panel and consideration of the briefs and arguments presented by the parties. For the reasons discussed below, we reverse the hearing panel's order of eligibility for reinstatement in its entirety and deny petitioner's petition for reinstatement.

I. Panel Proceedings/Background

Petitioner filed his petition for reinstatement on August 1, 2019, asserting that he was in compliance with MCR 9.123(B)(1)-(9) and the order of disbarment (by consent) issued by Tri-County Hearing Panel #69 in *Grievance Administrator v Peter T. Howe*, 11-37-AI; 11-52-JC; 12-22-RD. On August 2, 2019, this matter was assigned to Tri-County Hearing Panel #66. On May 4, 2020, the Grievance Administrator filed his investigative report, which included a transcript of petitioner's investigative interview conducted on November 5, 2019, pursuant to MCR 9.124(C)(2).

Petitioner was the subject of two prior formal disciplinary proceedings that underlie the instant petition for reinstatement, as follows:

On March 24, 2011, petitioner's license to practice law was suspended, effective March 9, 2011, the date on which he pled guilty to larceny by conversion $1,000 to $20,000, a felony under MCL 750.362.[1] On April 26, 2011, a notice of filing of a judgment of conviction was filed by the Grievance Administrator in *Grievance Administrator v Peter T. Howe*, 11-37-AI; 11-52-JC. The matter was assigned to Tri-County Hearing Panel #69.

After conducting proceedings pursuant to MCR 9.120(B) and based on petitioner's felony conviction, Tri-County Hearing Panel #69 ordered that petitioner's license to practice law in Michigan be suspended for two and half years, retroactive to March 9, 2011, the date of his felony conviction. On November 21, 2011, the Grievance Administrator filed a petition for review, seeking an increase in discipline to disbarment and thereafter, review proceedings were scheduled for March 21, 2012.

On February 24, 2012, the Grievance Administrator filed a motion to remand the proceeding to Tri-County Hearing Panel #69 to reopen the hearing on discipline for the reason that the Grievance Administrator had discovered a prior history of discipline imposed against petitioner in

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[1] The plea represented a compromise, as petitioner had actually taken approximately $49,565.62 from his client. In June 2009, petitioner represented Jonathan Davis, a family friend, regarding injuries sustained by Mr. Davis in a car accident. Without filing a civil complaint, petitioner negotiated a $75,000 settlement, to his client's satisfaction. Petitioner received the $75,000 in settlement funds from the insurance carrier and deposited them into his trust account. Thereafter, petitioner failed to notify Mr. Davis of the funds, misled and delayed Mr. Davis in realizing the settlement had been paid, and misappropriated the funds for his own use without the consent or knowledge of Mr. Davis. Approximately 9-10 months later Mr. Davis learned that a check had been sent to petitioner and he confronted him about it. Petitioner admitted to taking the funds but was unaware that Mr. Davis was recording their conversation. Shortly thereafter, petitioner paid Mr. Davis the total amount owed to him. Mr. Davis then reported petitioner to the local police and petitioner was subsequently prosecuted.

the State of Illinois.[2] On February 28, 2012, the Administrator filed a reciprocal discipline proceeding, *Grievance Administrator v Peter T. Howe*, 12-22-RD, based on the discipline imposed in Illinois.

On March 6, 2012, the Grievance Administrator and petitioner filed a stipulation to remand the judgment of conviction proceeding, (11-37-AI; 11-52-JC), to the hearing panel. Contemporaneous with that stipulation, the parties filed a second stipulation requesting that the reciprocal discipline proceeding, (12-22-RD), be assigned to Tri-County Hearing Panel #69 and consolidated for consideration of a stipulation for consent order of discipline which the parties intended to file to resolve both matters. Both motions were granted by the Board in an order entered March 8, 2012.

As a result of the Board's March 8, 2012 order, Tri-County Hearing Panel #69 had before it both the judgment of conviction, which was the subject of the earlier panel proceedings, and the reciprocal discipline action under MCR 9.120(C) based upon an order entered in the Supreme Court of Illinois on September 20, 2011, granting respondent's motion that his name be stricken from the role of attorneys licensed to practice law in Illinois.

On April 17, 2012, in accordance with MCR 9.115(F)(5), the parties filed a stipulation for consent order of discipline stipulating that respondent be disbarred. On May 23, 2012, Tri-County Hearing Panel #69 entered an order of disbarment (by consent), that disbarred petitioner from the practice of law in Michigan, effective March 9, 2011. On May 31, 2012, the Board issued an order

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[2] The Grievance Administrator's counsel discovered that petitioner was disbarred by consent in Illinois for conversion of client funds, effective September 20, 2011. Notably, the Illinois discipline was not disclosed to the Administrator's counsel by petitioner or his counsel. Rather the Illinois complainant reached out to the Michigan complainant who provided the Grievance Administrator's counsel's contact information to the Illinois complainant which then allowed the Administrator's counsel to contact counsel at the Illinois Attorney Registration and Disciplinary Commission (IARDC) to confirm the events that had occurred.

The Administrator's counsel learned that in June 2007, petitioner agreed to represent Patricia Gallagher in connection with her claim for personal injuries after falling in an Aldi grocery store in Chicago. Petitioner was to receive one-third of any recovery obtained relating to her injury. In October 2008, Aldi agreed to pay $200,000 to Ms. Gallagher to settle her claim. In December 2008, petitioner received from Aldi's insurers two checks totaling $200,000. Petitioner deposited the checks into his client trust account.

As of December 15, 2009, petitioner had distributed $68,305.20 from his client trust account to Ms. Gallagher, to others on her behalf, and $65,363 to himself for his fees. Thus, at that time approximately $66,331.80 of the settlement funds remained. On December 15, 2009, petitioner drew the $66,331.80 balance in the account down to $12.38 by withdrawing funds from the account for his own personal or business purposes, thereby misappropriating the majority of the remaining balance of Ms. Gallagher's personal injury settlement.

vacating the panel's November 9, 2011 order of suspension that had suspended petitioner's license for 2½ years, effective March 9, 2011. Nothing further occurred until petitioner filed his petition for reinstatement on August 1, 2019.[3]

The parties appeared before the panel, on June 25, 2020, for a Zoom hearing on petitioner's petition for reinstatement. Petitioner and his wife testified at the hearing. The Administrator's counsel took no position as to petitioner's reinstatement noting that "rather than an adversarial hearing, we're all here to have, frankly a discussion regarding [petitioner's] reinstatement request," further noting that he "had much respect for [petitioner] and his candor," and leaving petitioner's reinstatement to the discretion of the hearing panel. (Tr 6/25/20, pp 8, 79.)

On October 20, 2020, the panel issued its report finding that petitioner established his eligibility for reinstatement. The Grievance Administrator filed a timely petition for review arguing that the panel failed to address petitioner's obligations to the IRS or the Illinois Client Protection Program in concluding that petitioner had established his eligibility for reinstatement and objecting to the condition that petitioner designate a third party to administer his office bookkeeping and IOLTA account, as set forth in the panel's report and order, because it did not impose a specific duration of the ordered supervision. The Administrator requests that "the Board . . . review the hearing panel's conclusion" that "petitioner met MCR 9.123(B)(7) and the other standards . . ."

II. Discussion

MCR 9.123(B) provides, in relevant part:

> An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:
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> (5) his or her conduct since the order of discipline has been exemplary and above reproach;
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> (6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

[3] Petitioner's license has been continuously suspended in Michigan since March 9, 2011, and he has been eligible to file a petition for reinstatement in Michigan since March 2016.

> (7) taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she nevertheless 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.

Although lengthy, we have indicated on numerous other occasions that the most effective way to fully understand the above-referenced requirements in a reinstatement case, is to consult the following section of our opinion in *In Re Reinstatement of Arthur R. Porter, Jr.*, 97-302-RP (ADB 1999), which states that:

> "The passage of time, by itself, is not sufficient to support reinstatement." *In Re Reinstatement of McWhorter*, 449 Mich 130, 139; 534 NW2d 480 (1995) . . .
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> We have previously underscored the fact that the passage of the time specified in a discipline order or court rule, does not, in light of the other reinstatement requirements, raise a presumption that the disciplined attorney is entitled to reinstatement because she has "paid her debt" or he has "served his time." In *In Re Reinstatement of James DelRio*, DP 94/86 (ADB 1987), this Board held:
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> > Under the rules governing reinstatement proceedings, the burden of proof is placed upon the petitioner alone. While the Grievance Administrator is required by MCR 9.124(B) to investigate the petitioner's eligibility for reinstatement and to report his or her findings in writing to the hearing panel, there is no express or implied presumption that a petitioner is entitled to reinstatement as long as the Administrator is unable to uncover damaging evidence. In this case, our finding that petitioner DelRio has failed to meet his burden of establishing eligibility for reinstatement by clear and convincing evidence would be the same if the record were devoid of evidence tending to cast doubt upon his character and fitness since his suspension.
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> Subrule 5 of MCR 9.123(B) requires that the suspended or disbarred attorney's "conduct since the order of discipline has been exemplary and above reproach." In *Eston*, supra, we adopted a panel member's opinion defining these terms:

> "exemplary" [means] "serving as a pattern or model for imitation; worthy of imitation." To be "above reproach" connotes behavior consistently superior to that which one might ordinarily expect.

Subrule 6 "is primarily directed to the question of the applicant's ability, willingness and commitment to conform to the standards required of members of the Michigan State Bar." [*Grievance Administrator v August*, 438 Mich 296, 310; 475 NW2d 256 (1991)]; *McWhorter*, 449 Mich at 138 n 10.]

Subrule 7 focuses on "the public trust" which the Court, the Board and hearing panels, have "the duty to guard." *Id*. This inquiry involves the nature and seriousness of the misconduct,[8] evidence of rehabilitation,[9] and essentially culminates in a prediction[10] that the petitioner will abide by the Rules of Professional Conduct.

Taken together, subrules (5)-(7) 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. Our Supreme Court has recognized that application of MCR 9.123(B) involves "an element of subjective judgment." *August*, 438 Mich at 311.

The reason for all of these standards, and for requiring a petitioner to prove their attainment by clear and convincing evidence, is "'the fact that the very nature of law practice places an attorney in a position where an unprincipled individual may do tremendous harm to his client.'"[11]

Discipline matters are fact sensitive inquiries to be decided on the particular facts of each case. *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW2d 369 (1997). Accordingly, there can be no formula for reinstatement. The evidence necessary to establish compliance with MCR 9.123(B)'s requirements clearly and convincingly will vary depending on the circumstances of the individual petitioner. *August*, 438 Mich 309-310, 312 n 9.

Nonetheless, certain patterns do emerge. Subrule 7 requires the clear conclusion that the petitioner can safely be recommended as a person fit to be consulted in matters of trust and confidence. MCR 9.103(A) defines the license to practice law as "a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the

> administration of justice." To affix such a proclamation of safety, or "stamp of approval," *August*, 438 Mich at 311, upon someone who has committed serious misconduct would seem to require a searching inquiry into the causes for the conduct resulting in discipline and the most convincing showing that a genuine transformation has occurred.
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> 8 MCR 9.123(B)(7); *August*, 438 Mich at 306.
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> 9 See, e.g., *August* at 306-307.
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> 10 See *In Re Albert*, 403 Mich 346, 363 (1978) (Opinion of Justice Williams) (suggesting that the Court must "prognosticate [petitioner's] future conduct").
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> 11 *August*, 438 Mich at 307, quoting *In re Raimondi*, 285 Md 607, 618; 403 A2d 1234 (1979), cert den 444 US 1033 (1980).
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> [*In the Matter of the Reinstatement Petition of Arthur R. Porter, Jr.*, 97-302-RP (ADB 1999).]

In a reinstatement proceeding, the burden of proof is on the petitioner who must establish that he or she has met the requirements of MCR 9.123(B)(1)-(9), by clear and convincing evidence - evidence that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995), quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987); *Chmura II*, 464 Mich at 71-72; *Grievance Administrator v Geoffrey N. Fieger*, 94-186-GA (ADB 2002).

While the Grievance Administrator is required by MCR 9.124(B) to investigate a petitioner's eligibility for reinstatement and to report his or her findings in writing to the hearing panel, there is no express or implied presumption that a petitioner is entitled to reinstatement as long as the Administrator is unable to uncover damaging evidence. Also, *Porter* makes clear that the parties cannot stipulate to reinstatement; the panel must hear evidence and determine that petitioner has met the standards of MCR 9.123(B) by clear and convincing evidence.

With respect to an order granting eligibility for reinstatement, the Court has repeatedly said that the "proper-evidentiary-support" standard of review applies in reinstatement cases as well as in decisions imposing discipline. See, e.g., *In Re McWhorter*, 449 Mich 130, 136 (1995), quoting

August, and citing other authorities on the standard of review. 449 Mich at 136 n 7. 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 from this Court." *Grievance Administrator v August*, 438 Mich 296 (1991); *In re Reinstatement Petition of Keith J. Mitan*, 12-2-RP (ADB 2013). The questions presented on review in reinstatement matters ultimately boil down to a basic determination of whether it is safe to reinstate this person to the practice of law.

In this matter, the panel concluded that petitioner "met each of the criteria in MCR 9.123(B)(1)-(9) by clear and convincing evidence and that he is therefore eligible for reinstatement." (Report 10/20/20, p 5.) Notwithstanding this, the hearing panel appropriately characterized the seriousness of petitioner's misconduct noting that "petitioner did something generally acknowledged as one of the worse [sic] offenses an attorney can perpetrate on a client, namely taking monies meant for the client." The panel's report also specifically referenced petitioner's testimony as to his underlying offenses:

> Petitioner testified as to the facts and the circumstances of stealing money from settlement funds meant for clients, on two occasions, once in Michigan and once in Illinois. He described the case of *Alex Kibeney*[4] *v AAA*, where he took the money for himself instead of disbursing it to the client. (Tr, pp 18-19.) He testified that he ended up paying the client the money that was owed to him about six to eight months later. Petitioner also testified that he had completed all the probationary conditions of his 2011 conviction for larceny by conversion in Oakland County. (Tr, p 19.) Petitioner also revealed theft from another client in Illinois named Pat Gallagher. Petitioner testified that he paid her $65,000 from a $200,000 settlement and held back approximately $65,000 and that he "never gave her that money." (Tr, pp 19-20.) The client then passed away and testimony revealed that her estate was made whole through the payment of $65,281 paid through the Illinois Client Protection Fund. (Tr, p 22.) Testimony revealed that petitioner has never been asked to reimburse any money to the Illinois Client Protection Fund. [Report 10/20/20, p 2.]

[4] Respondent's client, and the plaintiff in the action filed against AAA was actually Jonathan Davis. Respondent testified that Mr. Davis learned that a settlement check had been sent to respondent months earlier when Mr. Davis spoke to Alex Kibeney, one of AAA's insurance adjusters. (Tr 6/25/20, p 18.)

The record reveals that petitioner's reinstatement interview was taken on September 6, 2019, and he was asked generally about his obligations to both the Illinois Client Protection Program and his outstanding IRS tax debt. As for the funds paid by the Illinois Client Protection Program, petitioner acknowledged that it was a debt he still owed, that he had not made any payments to the program, and testified that he did not plan to start making payments now because "I don't have the money at this particular moment to do that." (Grievance Administrator's Investigative Report, Appendix F.)

With regard to Petitioner's taxes, the Administrator's counsel had in his possession at the interview copies of petitioner's tax returns for the years 2010 through 2017.[5] Petitioner was asked by the Administrator's counsel about the amount of adjusted gross income reflected on the returns, specifically noting that petitioner's adjusted gross income in 2017 was listed as $420,301.00. (Grievance Administrator's Investigative Report, Appendix F.)

A review of petitioner's tax records reveals that petitioner's adjusted gross income went from a low of $22,315.00 in 2010 to a high of $420,301.00 in 2017. Petitioner testified before the panel that during that time frame, he established Howe Office Management, LLC, a firm that petitioner described as one that did the "day-to-day" tasks of law firms, primarily of the Reifman Law Firm, allowing the attorneys of the firm to focus on the more profitable parts of their practice. (Tr 6/25/20, pp 13-14.) As reflected by petitioner's tax records, Howe Office Management, LLC became very profitable, and petitioner earned a lot of money, during this time frame. Howe Office Management, LLC's relationship with the Reifman Law Firm ended in November 2018 and while it is still in business, petitioner has not found any other businesses interested in using Howe Office Management, LLC's services. (Tr 6/25/20, pp 15-16.)

Petitioner's tax returns also revealed that, beginning in 2012 and continuing through 2018, he and his wife consistently owed tax payments to the IRS. In fact, as of 2018, petitioner and his wife owed tax payments to the IRS that totaled $155,245.00. Petitioner acknowledged that he has not paid any of these taxes owed to the IRS, that he does not currently have a payment plan in place to do so, but "there's a collection agency that's talking to us . . . we intend to get into a payment plan of some sort, whatever we can afford now." (Tr 6/25/20, p 45.) Petitioner was never asked why he

[5] At the time of the interview, petitioner had not yet filed his 2018 taxes, but they were subsequently provided and included in the Administrator's report.

could not pay the taxes at time these returns were filed, nor was he ever asked about the current balance of the taxes he owes, which must surely now include nonpayment penalties and interest.

We find it also important to note that the Illinois Client Protection Program paid $65,281 to petitioner's former, and now deceased, client's estate in April 2013, a year in which petitioner reported adjusted gross income of $165,558.00. Again, petitioner's income in the years following only increased, yet petitioner apparently made no effort to pay any portion of this debt, which he readily agrees he is responsible to pay.

After petitioner's reinstatement interview was conducted, the Administrator's counsel requested additional information about the debt owed to the Illinois Client Protection Program and petitioner was asked to "elaborate on his financial expenses and obligations over the past few years . . ." Petitioner did so noting that he had still not made any payments on the debt owed to the Illinois Client Protection Program and that he currently has "relied on family, my wife's earnings and life insurance proceeds" for "our day-to-day expenses." (Grievance Administrator's Investigative Report, Appendix I.) The Administrator's investigative report also revealed that petitioner had two civil judgements entered against him in 2019, one for $10,251.06 and the other for $2,000. Although petitioner agreed to make monthly payments on both, as of the date of the Administrator's report, he had not complied with his agreement to do so on either debt.[6] (Grievance Administrator's Investigative Report, p 14; Appendices N and O.)

Petitioner's debts, were also specifically discussed at the hearing, (Tr 6/25/20, pp 22, 38, 42-45, 85), and both panel members expressed their concerns about petitioner's financial circumstances:

> MR. ABBO: Okay. I'm going to be very honest with you. I'm not convinced that you're a good candidate at this point in time. That's my own personal feeling. So perhaps you can -- you can convince me otherwise . . . You owe the Internal Revenue a 150,000. It would suggest to me that you were making income and you weren't paying them.
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> * * *

[6] Approximately one and a half months after the reinstatement hearing, on August 7, 2020, petitioner filed amended responses to his petition for reinstatement advising that he had made a final payment on the $2,000 judgment and had entered into a monthly payment arrangement with the plaintiff on the $10,251.06 judgment to pay $100 or more until paid in full. Whether petitioner has made any of these monthly payments is unknown.

MR. ABBO: . . . Frankly, I would be hesitant to have you hold an Iota (sic) account on that.

THE WITNESS: I'm sorry to hear that.

MR. ABBO: Well, it just seems like -

THE WITNESS: I know how to -

MR. ABBO: It just seems like you're not responsible with that, on managing an Iota (sic) account on that. Not only with your clients, but when you receive fees and referral fees are due to somebody, you don't pay them. You wait until you get sued, still don't pay them. I don't know, I'm just -- Mr. Howe, I'm really conflicted here, and I apologize for that, but I'm sure you'd rather have me tell you exactly how I feel than tell you behind your back.

* * *

MR. APPEL: And how would you address Mr. Abbo's concern about looking at your past behavior, dealing with money? And I'm not critical, I'm not great with money, either. But how would you reassure Mr. Abbo and myself that if you do get reinstated, what assistance if any, would you allow yourself in reference to financial matters?

THE WITNESS: I would be happy to have a bookkeeper as soon as possible. I have no problem with that. No compunction with that at all. That could be my wife. I think she's very good with the books. It could be somebody that we hire. I don't know that I would have the money to hire somebody right out of the box, but I have no problem at all, being monitored in that manner.

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MR. APPEL: So I guess I would say that I share Mr. Abbo's concerns about handling of finances. That did jump out at me, the large amount of gross income in '16, '17, '18.[7] But I accept that -- your willingness to address that very directly. So as a concern of mine, like Mr. Abbo, that directly jumped out at me. [Tr 6/25/20, pp 63-64, 66, 68-69, 77.]

[7] In those years, petitioner reported adjusted gross income of $282,254.00; $420,301.00; and $312,625.00 on his tax returns. (Grievance Administrator's Investigative Report, Appendix G.)

The panel's report noted that their focus was on subrule 7 of MCR 9.123(B), but it did not indicate how these concerns expressed at the hearing were alleviated:

> The panel particularly focused on criteria #7 from MCR 9.123(B), in essence needing to be convinced that the public and the bar could be very confident that if reinstatement occurs, that the previous behavior would never happen again . . . The testimony at the hearing was convincing to the panel, in terms of petitioner taking responsibility for his actions and showing insight for why they may have occurred. The testimony was also credible in showing the panel that if given another opportunity to practice law, petitioner could safely be recommended to the public, the courts and the legal profession as a person fit to be consulted by others and represent them and that he now understood his responsibilities if he were to again become a member of the bar. The panel found him to be a credible witness and takes note of petitioner's counsel's convincing arguments as to why petitioner had demonstrated that he had changed and that any aberrant behavior towards clients was unlikely to again occur. [Report 10/20/20, pp 4-5.]

Again, as we noted in *Porter*:

> Subrule 7 focuses on "the public trust" which the Court, the Board and hearing panels, have "the duty to guard." *Id*. This inquiry involves the nature and seriousness of the misconduct,[8] evidence of rehabilitation,[9] and essentially culminates in a prediction[10] that the petitioner will abide by the Rules of Professional Conduct.
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> Subrule 7 requires the clear conclusion that the petitioner can safely be recommended as a person fit to be consulted in matters of trust and confidence. MCR 9.103(A) defines the license to practice law as "a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice." To affix such a proclamation of safety, or "stamp of approval," *August*, 438 Mich at 311, upon someone who has committed serious misconduct would seem to require a searching inquiry into the causes for the conduct resulting in discipline and the most convincing showing that a genuine transformation has occurred. *Porter*, at 10.

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[8] MCR 9.123(B)(7); *August*, 438 Mich at 306.

[9] See, e.g., *August* at 306-307.

[10] See *In Re Albert*, 403 Mich 346, 363 (1978) (Opinion of Justice Williams) (suggesting that the Court must "prognosticate [petitioner's] future conduct").

It should be clear that the fact that petitioner is in debt does not in and of itself disqualify him from reinstatement. However, it is entirely appropriate to consider a petitioner's financial responsibility as part of the reinstatement process:

> Plainly, a state court or attorney discipline agency may consider financial responsibility as part of an admission, discipline, or reinstatement process. This may include inquiry into the reason large debts have been amassed . . . Also of great importance is the manner in which fiduciary responsibilities to manage and account for another person's money or property have been handled.
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> Such issues of financial responsibility are necessarily encompassed within the reinstatement requirements contained in MCR 9.123(B)(5), (6) & (7). *Porter* at 19.

Financial responsibility was a major issue in Mr. Porter's reinstatement proceeding. Like petitioner here, Mr. Porter misappropriated funds belonging to a client - he was disbarred for neglecting an estate and converting $14,759.03 of the estate's assets while serving as attorney and personal representative for the estate.[11] The State Bar of Michigan Client Protection Fund subsequently paid $14,795.03 to the estate and Mr. Porter never made any payments to reimburse the fund. Instead, Mr. Porter filed for Chapter 7 bankruptcy and the debt owed to the Client Protection Fund was discharged.

Approximately 9 years later, in December 1997, Mr. Porter sought reinstatement of his license. The Administrator did not contest Mr. Porter's reinstatement, but asked the panel to condition reinstatement on reimbursement to the Client Protection Fund. The panel determined that they could not do so in light of the bankruptcy discharge. The Grievance Administrator petitioned for review, and like the instant matter, requested that the Board modify the panel's order granting his eligibility for reinstatement to require Mr. Porter to reimburse the Client Protection Fund as a condition of his reinstatement. The Board did a separate analysis independent of the bankruptcy issue, of whether a panel can and/or must consider the failure to reimburse the Client Protection Fund in deciding whether a petitioner meets the requirements of MCR 9.123(B)(7) and concluded that they absolutely can and should do so.

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[11] On review, the Board subsequently affirmed the panel's findings, but modified the discipline from disbarment to a five-year suspension, effective April 13, 1988.

The overriding concern presented here is to determine whether petitioner has convincingly demonstrated rehabilitation, i.e., that he meets the standards articulated in MCR 9.123(B) notwithstanding his misconduct in converting client funds some ten years prior. Restitution, in this case reimbursement to the Illinois Client Protection Program, is one widely recognized indicia of rehabilitation. See *In Re Joseph Menna*, 11 Cal 4th 975; 47 Cal Rptr 2d 2; 905 P2d 944, 952-953 (1995):

> While restitution is not necessarily determinative of whether rehabilitation has been proven, it is a legitimate and substantial factor to be considered in the overall factual showing made by the individual seeking reinstatement. (*Hippard v State Bar*, supra, 49 Cal.3d [10841 at p. 1093, 264 Cal.Rptr. 684, 782 P2d 1140 [denying application for reinstatement based in part upon petitioner's failure to demonstrate a meaningful attempt to make restitution or an inability to do so].) Notwithstanding the discharge in bankruptcy of applicant's debts resulting from his misappropriation of client funds, we may properly consider the relative absence of any serious effort to make even partial restitution as an indicator of rehabilitation. (*Id*. at p 1094, 264 CalRptr. 684, 782 P2d 1140; *Kwasnik v. State Bar*, supra, 50 Cal.3d [1061,] 1072, 269 CalRptr. 749, 791 P2d 319 [1990].)

In *In the Matter of Leonard Ziskie*, DP-92/82 (ADB 1983), Petitioner Ziskie, who had been disbarred in 1966 for misappropriating client funds and other misconduct, was denied reinstatement, seventeen years later, by a hearing panel. The panel concluded that Petitioner Ziskie's failure to reimburse his clients for misappropriated funds precluded his reinstatement. Petitioner Ziskie appealed the panel's order arguing, in part, that reimbursement is not a condition precedent to reinstatement. The Board agreed and granted the petition subject to Petitioner Ziskie fulfilling his agreement to make restitution after reinstatement and given his renewed ability to generate an income. One Board member, Leo Farhat, dissented and the Supreme Court later reversed the Board's opinion[12] for the reasons set forth in Member Farhat's dissent, which stated:

> Petitioner made no effort whatsoever to fulfill his moral and legal obligations. The reasons asserted for non-payment of these obligations are weak if not specious and, of themselves, give rise to the very serious doubts about Petitioner's judgment and attitude. GCR 1963, 972 requires that a reinstatement Petitioner show by clear and convincing evidence that he . . . has a proper understanding of

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[12] *Grievance Administrator v Ziskie*, 419 Mich 1206 (1984).

> and attitude toward the standards that are imposed upon members of the Bar . . . [and] 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 . . . In all the years of his disbarment, Petitioner has failed to take a single remedial step toward fulfillment of the obligations that resulted in his disbarment. Indeed, so much time has lapsed without any effort by Petitioner in this regard, one must question whether Petitioner meets the first criteria set forth under GCR 1963, 972.2(1), to-wit: that [Petitioner] desires in good faith to be restored to the privilege of practicing law in Michigan.
>
> On the other hand, the sheer length of time of a reinstatement Petitioner's disbarment certainly should not compel us to end his professional exile. We face the overriding responsibility of protecting the public and deterring in the strongest fashion possible any future misconduct of this nature.
>
> I would affirm the hearing panel and deny the petition for reinstatement until such time as Petitioner has made a convincing and substantial effort to fulfill these overdue obligations. *[In Re Leonard Ziskie*, DP 92/82 (ADB 1983) (dissenting opinion of Member Farhat).]

The Court's decision in *Ziskie* to consider efforts at restitution although the discipline order did not expressly require it, is consistent with reinstatement decisions in other jurisdictions. Further, a leading commentator has written:

> Even if restitution is not stated as an express condition, courts will refuse to reinstate a suspended lawyer if he or she, although able, fails to make restitution, only makes restitution at discounted figures, or only makes efforts at restitution on the eve of the reinstatement hearing. A lawyer who is valiantly and steadily paying off amassed debts, and who shows every indication of continuing to do so, will not be denied reinstatement solely because complete restitution has not been made. [Wolfram, Modern Legal Ethics (1986), §3.5, p 137; footnotes with citations omitted.]

Here, the panel found petitioner to be a credible witness and to have made a convincing showing that in fact a genuine transformation has occurred. We are not so sure it has. Perhaps if petitioner's underlying misconduct did not involve theft or dishonesty the panel's finding of eligibility would be easier to support. However, as we noted in *Porter*, "when funds belonging to another have been converted, serious scrutiny of the causes and a compelling demonstration of

rehabilitation are required to enable one to conclude that a reinstatement petitioner can safely be recommended to the public, the courts, and the legal profession . . ." MCR 9.123(B)(7). *Id*. at 19.

The reinstatement record below reveals that petitioner has been in tremendous debt for years, including years in which he appears to have earned significant income which should have allowed him to pay some, if not all, of his obligations, had doing so been prioritized. Petitioner even acknowledged as much at the hearing:

> When we started getting some money in, around 2015, I will admit that I balanced my, you know, my payment of these debts with my family finally having a little bit of money and having a little bit of fun . . . When I didn't have money, my kids didn't have shit. When, you know, I got a little bit of money in the bank, I splurged. Yes, I did. (Tr 6/25/20, pp 41-42.)

Both petitioner and his wife testified that they have now cut their personal household budget down and they both maintain that they no longer live beyond their means. But, petitioner also testified that he has had no income in 2019 and 2020, and is currently living off of the proceeds from a $160,000 HELOC loan he took out initially to pay off the tax debt, and the proceeds of his deceased father's life insurance policy. (Tr 6/25/20, pp 38, 42-43, 62-63.)

III. Conclusion

We cannot, at this time, conclude that petitioner can be safely recommended to the public. His failure to make any payments whatsoever to the Illinois Client Protection Program and the IRS, despite having the ability to do so, is disturbing and utterly inconsistent with the conduct to be expected of one seeking to regain a position of trust and to be readmitted as a member of the Michigan bar. There is a glaring lack of clear and convincing evidence that petitioner has changed his ways, has a proper attitude toward his professional obligations, and can safely be recommended to the public to act in the fiduciary capacity that is necessary in the practice of law.

We therefore order that the panel's order of eligibility for reinstatement be reversed, as authorized under MCR 9.118(D), and deny petitioner's petition for reinstatement.

Board members Jonathan E. Lauderbach, Barbara Williams Forney, Karen D. O'Donoghue, Linda S. Hotchkiss, M.D., Michael Hohauser, Alan Gershel, and Linda M. Orlans concur in this decision.

Board member Michael B. Rizik, Jr. is recused and did not participate.

Board member Peter A. Smit was absent and did not participate.