STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement
Petition of William Leo Cahalan, Jr., P 40433,

Petitioner/Appellant,

Case No. 04-129-RP.

Decided: March 22, 2006

Appearances:

Kenneth M. Mogill, for William Leo Cahalan, Petitioner/Appellant
Cynthia C. Bullington, for the Grievance Administrator

BOARD OPINION

The petitioner, William Leo Cahalan, Jr., was suspended from the practice of law in Michigan in three separate cases, for nine months, one year, and two years and nine months, respectively, with the first effective date commencing on August 9, 1997.[1] His misconduct included neglect, failure to return unearned fees, misappropriation of the fees, etc. He has not practiced since August 9, 1997, and he did not petition for reinstatement until October 7, 2004. Despite being eligible to do so earlier, petitioner held off attempting reinstatement until he was further along in "cleaning up the wreckage" from his years of substance abuse.

Numerous witnesses testified as to petitioner's successful efforts in combating alcoholism, cocaine addiction and depression. Respondent quit drinking before he stopped using cocaine. On April 16, 2002, William Livingston (Administrator of the State Bar of Michigan Lawyers and Judges Assistance Program) conducted an intervention at the request of petitioner's family to deal with his cocaine use. On August 16, 2002, petitioner concluded treatment with Western Michigan Addiction Center and has suffered no relapses, has maintained employment, has repaired his relationships, and has continued to progress.

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[1] See Case Nos. 96-168-GA; 96-197-FA (nine months commencing August 9, 1997); Case No. 97-143-GA (one year commencing March 3, 1998); and, Case Nos. 98-11-GA; 98-25-FA; 98-53-GA; 98-74-FA (two years and nine months commencing October 19, 1998).

Despite this record of recovery, the panel denied the petition for reinstatement finding that the requirements of MCR 9.123(B)(5)-(7) had not been established by clear and convincing evidence. We affirm the hearing panel's order, but remand this matter for a further evidentiary hearing to be held not sooner than December 1, 2006, at which time the panel shall conduct further proceedings consistent with this opinion.

The panel's report reads in part:

> The panel is impressed with the apparent strong recovery petitioner has made from his alcohol and drug addiction and associated problems. It is apparent to the panel both from the record, including the testimony of experts, and from petitioner's own testimony and demeanor that the likelihood that petitioner will remain sober is very good. Since petitioner's three suspensions have been deemed to be the result of alcohol and drug addiction, the panel believes that petitioner has made great strides toward becoming a responsible member of the Bar. The panel is sympathetic and respectful of the strides petitioner has made in getting his personal life together.
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> . . . . The panel does not believe that petitioner has reached a point in his recovery when it can recommend, on the basis of clear and convincing evidence, that petitioner is fit to be consulted by others and to aid generally in the administration of justice. While petitioner is on his way toward earning such a recommendation, the panel believes the very recent filing of his tax returns and his belated attempts at the conclusion of the reinstatement hearing to attend to the delinquent student loan preclude the panel from making such a recommendation. The panel finds, therefore, that the petitioner has not established by clear and convincing evidence that he has satisfied the requirements of MCR 9.123(B)(7). [Emphasis in original.]

Petitioner argues that the panel erred in applying MCR 9.123(B)(5)-(7), and focused inordinately on petitioner's tardy tax filings, failure to pay a student loan, and cocaine use during his period of suspension.

Relying upon decisions of this Board and an opinion of Justice Levin, petitioner argues "'the implicit assumption of a suspension, whether or not indefinite, is that the disciplined lawyer will ordinarily be reinstated at the end of the suspension.'" Grievance Administrator v Kalil, ADB 44/85 (ADB 1986), citing Petition of Albert, 403 Mich 346, 358 (1978) (opinion of Levin, J.). See also In Re Reinstatement Petition of James W. Daly, ADB 277-88 (ADB 1989) ("an attorney who has

completed a fixed term of suspension and has established, *prima facie*, his or her eligibility in accordance with the criteria enumerated in MCR 9.123(B)(1)-(9), should not be denied reinstatement in the absence of factual evidence tending to demonstrate his or her continued unfitness").

Justice Levin's opinion in Albert was signed by only one other Justice. When it revisited a reinstatement case in Grievance Administrator v August, 438 Mich 296, 304 (1991), the Court expressly considered again Justice Levin's objections to reinstatement rules and procedure but instead once more embraced a reading of those rules calling for individualized factual determinations in each case, and the exercise of "an element of subjective judgment" by panels, the Board and the Court. August also clearly rejected the notion that a presumption of fitness or entitlement to reinstatement is raised once an attorney passes the "temporal milepost" of five years from disbarment (entitling one to petition for reinstatement).

As for decisions of this Board, such as Kalil and Daly, they must be squared with the plain language of Rule 9.123(B). To the extent that they state or suggest that the burden of a petitioner for reinstatement may be shifted, lessened, or aided by a presumption, such cases must be subordinated to the rule itself. The state of the law on this point today is accurately reflected in our decision in In re Reinstatement of Arthur R. Porter, Jr., 97-302-RP (ADB 1999), pp 8-9:

> March 22, 2006The passage of time, by itself, is not sufficient to support reinstatement." In Re Reinstatement of McWhorter, 449 Mich 130, 139; 534 NW2d 480 (1995). Although this pronouncement was made in a case involving reinstatement following disbarment, MCR 9.123(B) also applies to reinstatement following suspensions of 180 days or more. Subrule 2, requiring the passage of certain minimum periods before reinstatement, is but one of several prerequisites to reinstatement.
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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.

We cannot agree that the panel misapplied the rules, or that the decision lacked proper evidentiary support, or, finally, that the ultimate decision was erroneous.

The portion of MCR 9.123(B) at issue in this case is of primary importance in most reinstatement cases, namely subrules (5)-(7):

> (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;
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> (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 . . .

In our decision in Porter, supra, we discussed each of these requirements:

> 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:
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> > "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." August, 438 at 310; McWhorter, 449 Mich at 138 n 10.
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> 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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> 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.
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> 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]

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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").

[11] August, 438 Mich at 307, quoting In re Raimondi, 285 Md 607, 618; 403 A2d 1234 (1979), cert den 444 US 1033 (1980).

It is not merely the unprincipled attorney who may do harm to the public. Even one with the best of intentions may not meet the standards of our reinstatement rules. This status need not be permanent. Fortunately, people can and do change.

The panel below was "impressed with the apparent strong recovery petitioner has made from his alcohol and drug addiction and associated problems," found "the likelihood that petitioner will remain sober . . . very good," stated that "that petitioner has made great strides toward becoming a responsible member of the Bar," and that it was "sympathetic and respectful of the strides petitioner has made in getting his personal life together."

This Board has never read MCR 9.123(B)(6) so stringently that "a single transgression, however minor, during a period of suspension would forever bar a suspended lawyer from gaining readmission." Kalil, supra, p 2. And, the panel in this case has not engaged in such a reading of the rule. Indeed, the opposite is true. The panel expects, and encourages, another attempt at reinstatement when its report observes, among other things, that "petitioner is on his way toward earning such a recommendation." Ultimately, however, the panel could not yet characterize the whole of petitioner's conduct since suspension as "exemplary." The progress, while substantial, was not sufficient to persuade the panel "that petitioner has reached a point in his recovery when it can recommend, on the basis of clear and convincing evidence, that petitioner is fit to be consulted by others and to aid generally in the administration of justice." The panel's concern about tax filings and unaddressed student loan payments was not nit-picking. Nor does this panel's reliance on those factors mean that they will be of the same import in every other case. Rather, they are simply part of the basis for the panel's conclusion in this case that the process of rehabilitation and "cleaning up the wreckage of the past," is not far enough along for the panel to hold petitioner out to the public just yet. We do not find a sound reason to overturn the panel's carefully considered judgment.

However, we share the panel's assessment that petitioner has made great strides and may soon be able to demonstrate fitness for reinstatement. Accordingly, while we find that the panel's decision to deny reinstatement at this time has proper evidentiary support and is otherwise appropriate, we will do more than simply affirm the order denying the petition for reinstatement. We will remand this matter for a further evidentiary hearing by the panel, to be held no sooner than one year from December 1, 2005, on whether petitioner has continued to abstain from using drugs and alcohol; has continued payment obligations such as student loans, taxes (and has kept current with tax filings); and has otherwise conducted himself in an exemplary manner and is fit for reinstatement at the time of the hearing on remand. The parties may file supplemental pleadings, affidavits, and materials prior to the hearing.

If the panel determines that respondent has satisfied the conditions for reinstatement, the panel should consider appropriate conditions such as those proposed by the Grievance Administrator. Monitoring by the State Bar of Michigan's Lawyers and Judges Assistance program should be required for an appropriate period, as should verification that petitioner remains current on student loan payments and tax filings and payments. The panel should also consider conditions appropriate to the type of practice petitioner intends to engage in. For example, if petitioner intends

to practice outside of a structured, supervised setting, appropriate law practice mentoring and monitoring procedures should be considered. We do not retain jurisdiction.

Members William P. Hampton, Lori McAllister, Marie E. Martell, Billy Ben Baumann, M.D., Hon. Richard F. Suhrheinrich, William J. Danhof, and William L. Matthews, C.P.A. concur in this decision.

Board Members Rev. Ira Combs and George H. Lennon did not participate.