In the Matter of the Reinstatement Petition of

ARTHUR R. PORTER, JR., P-34977,
Petitioner/Appellee,

v

GRIEVANCE ADMINISTRATOR,
Appellant.

Case No. 97-302-RP.

Decided: January 26, 1999
Corrected: May 17, 1999

BOARD OPINION

Effective April 13, 1988, petitioner was disbarred by Wayne County Hearing Panel #4 for neglecting an estate and converting $14,759.03 of the estate's assets while serving as attorney and personal representative for the estate. In a January 1989 opinion, this Board affirmed the panel's findings and modified discipline by imposing a 5-year suspension. Petitioner filed a petition for reinstatement on December 8, 1997. After a brief hearing on March 10, 1998, Tri-County Hearing Panel #14 granted the petition for reinstatement. The Grievance Administrator has filed a petition for review, arguing that petitioner has failed to demonstrate compliance with MCR 9.123(B)(6), (7), and (9). The Administrator requests the Board to modify the hearing panel's order by imposing the condition that petitioner reimburse the State Bar of Michigan Client Protection Fund for sums paid to petitioner's former client. We vacate the hearing panel's order and remand this matter for further proceedings consistent with this opinion.

I. Background And Panel Proceedings.

A. Misconduct.

Wayne County Hearing Panel #4 found that Petitioner was retained in December 1984 to probate the estate of Irene Williams, deceased, and that he failed to prepare and file an inventory of

assets and annual accountings, failed to pay creditors of the estate, and failed to withdraw as independent personal representative, in violation of MCR 9.104(1)-(4) and provisions of the then applicable Code of Professional Responsibility. The panel also found that the allegations of a second count had been established, i.e., that Petitioner deposited $18,969.03 into an account opened in his capacity as personal representative of the estate and thereafter withdrew $710 for attorney fees and paid $3,500 to a beneficiary, but failed to account for and misappropriated the balance of the funds ($14,759.03). The panel found that $14,310.00 had been withdrawn between December 21, 1984 and November 5, 1985.

The panel also found that: "The evidence before the panel suggests that [petitioner's] use of the estate funds began prior to his admitted use of cocaine."

On review, the Board upheld the panel's findings, but imposed a five year suspension instead of revocation as ordered by the panel, noting petitioner's sincerity before the Board and "his apparent efforts to take control of his life by openly admitting his problem with cocaine and . . . his efforts to seek treatment."

B. Reinstatement Proceedings.

The hearing on the reinstatement petition was brief. Neither petitioner nor any other witnesses testified. No exhibits were admitted other than the Grievance Administrator's report compiled pursuant to MCR 9.124(C). Following an off-the-record conference, the panel chair stated that the Administrator would not contest the allegations in the petition and indicated that "we will essentially proceed on the basis of the Petitioner's pleadings" (Tr 3/10/98, p 4). Thereafter, the Administrator focused on restitution and asked that reinstatement, if granted, be conditioned on reimbursement of the Client Protection Fund.

Members of the panel expressed concern about imposing the condition of restitution without "permission by the bankruptcy court in order for him to now reaffirm that debt" (Tr 3/10/98, p 6-7, 10-11, 14-15). However, petitioner assured the panel that he

was certain that could voluntarily make payments, and indicated a willingness to do so.[1] The panel indicated that the members would consider whether the panel had the authority to impose the condition, and concluded the hearing with the understanding that additional authorities could be presented to the panel.

Six days after the hearing, petitioner filed his Brief in Support of Reinstatement. In that brief, he asserted that the Bankruptcy Code[2] prevented him from waiving his discharge or reaffirming his debt. Petitioner also attached a letter from him to the Attorney Grievance Commission dated February 13, 1998, in which he objected to the inclusion of a letter in the Grievance Administrator's investigative report. The letter, from the State Bar of Michigan, indicated that the Client Protection Fund paid the estate of Irene Williams $14,795.03, and that Petitioner had not made any payments to the fund. Petitioner's letter to the AGC asserted that the debt to the Client Protection Fund had been discharged.

After the Grievance Administrator responded to petitioner's brief, the panel issued a report concluding that it could "not properly require reimbursement of the Client Protection Fund" based on 11 USC 525(a). The report also contained the finding that petitioner "has established by clear and convincing evidence that he has satisfied the requirements of MCR 9.123(B)(1-7)." Accordingly, the panel entered an order reinstating petitioner subject to recertification by the Board of Law Examiners and other conditions not related to restitution.

C. The Investigative Report.

As we noted above, the Grievance Administrator's Investigative Report (GAIR), as supplemented by the Grievance Administrator's Supplemental Investigative Report (GASIR), was the only exhibit

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[1] "I have the right as a debtor to pay any debt I want." (Tr 3/10/98, p 6) "I have studied the bankruptcy law and I do know for a fact I can voluntarily pay the debt." (Tr 3/10/98, p 10.) "I would be more than willing to send you the section that says I can pay it voluntarily without going -- (Tr 3/10/98, p 14-15.)

[2] Petitioner cited 11 USC Sections 524(a) & (c) and 525(a).

introduced into the record. It contains various documents such as pleadings from the discipline proceedings which led to petitioner's suspension, driving records and other documents referencing criminal charges, pleadings from civil litigation arising out of an automobile accident, pleadings from civil litigation commenced by the State Bar of Michigan against petitioner to recover sums paid by the Client Protection Fund and a letter from the Fund, records relating to petitioner's May 13, 1997 conviction for Operating While Impaired, and a letter of recommendation.

Following the filing of the petition for reinstatement, and pursuant to MCR 9.124(B)(4), the Administrator conducted a recorded interview at which petitioner answered questions under oath. The transcript of that interview is also in the GAIR.

Some of these documents bear on the factors to be considered by the panel under MCR 9.123(B). Some pertain to the circumstances surrounding the misconduct and may be helpful to the panel in considering the nature of the offense. Others may relate to petitioner's claim of rehabilitation, whether his conduct has been exemplary, and/or whether he has a proper understanding of and attitude toward the standards of the profession and will conduct himself in accordance with them.

One document, a letter of recommendation, clearly tends to support the petition for reinstatement. Though short and solitary, it contains the writer's assertion that: "I believe that the last years have proven that Attorney Porter has been rehabilitated and can be trusted to respond as a responsible member of the Michigan Bar."

Other documents appear to have little connection to the issues on reinstatement. The pleadings from the auto negligence suit do not on their face tend to support or militate against reinstatement. Some documents, however raise, issues that they do not resolve. For example, the question whether petitioner's misappropriation commenced prior to the onset of his substance abuse arises again. This is relevant to the nature of the misconduct and to the type of rehabilitation called for. The transcript of petitioner's interview, consistent with the pleadings and orders from the discipline case, seems to indicate that the conversion of client funds took place before the cocaine use or

addiction.[3]

This is significant in part because petitioner's position has been, and remains, that his misconduct was related to his drug use. Transcript of Interview, 1/7/98, pp 7-10 at GAIR pp 85-87. He further stated that he no longer has a substance abuse problem, and that the OWI conviction was not indicative of a continuing problem. Id. He stated that, as a consequence of that conviction he was evaluated to determine whether substance abuse treatment was required, and it was determined that none was required. Id. at p 9, GAIR at p 87.

The substance abuse assessment is contained in the Supplemental Report, and it does state:

> The Michigan Alcoholism Screening test does not reflect problematic drinking issues needing follow up at this time. It appears that Mr. Porter may have used bad judgment and may lack the insight into the effects that drinking and driving have on himself and the public. [GASIR, p 131.]

However, the sentence prior to the one just quoted states:

> Mr. Porter stated that he has never been treated for alcoholism or drug abuse. In his family of origin, nor in his family of creation are there any problematic drinking or drug issues. [Id.]

Such a statement is inconsistent with various statements made in his interview regarding drug treatment.[4]

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[3] Petitioner stated that he worked for the City of Detroit Law Department from 1986 to 1988 (Transcript of Interview, 1/7/98, p 11 at GAIR p 89). Previously, petitioner had been in private practice, and the "probate matter occurred in '84 or '85" (id., p 12 at GAIR p 90). Petitioner also stated that his cocaine use "became a problem in probably '86 and it lasted until '88" (id. p 32 at GAIR p 110).

[4] The recorded interview included in the Administrator's report contains the following exchange:

> Q. Mr. Porter, have you ever attempted to commit suicide? ¶ A. Yes. ¶ Q. And when was that? ¶ A. That was while I was getting divorced. It was probably '85. ¶ Q. And was that on one occasion only? ¶ A. Yes. ¶ Q. And what did that involve? ¶ A. I slit my wrists. ¶ Q. And you received medical treatment for that? ¶ A. Yes, sir. ¶ Q.Did you ever receive any counseling or follow-up? ¶ A. Yes. ¶ Q. And who was that with? ¶ A. Eden Glen Hospital. I was an in-patient for about 30 days. ¶ Q. Was there any medication administered in connection with that treatment, or was it just counseling? ¶ A. No. It was drying out from cocaine also. [Transcript of Interview, 1/7/98, pp 31-32, at GAIR pp 109-110.]

Elsewhere in the interview, petitioner mentioned a stay at another treatment facility:

Information regarding payments by petitioner to the Client Protection Fund is also in discord. At his interview, petitioner stated that he made partial restitution.[5] However, court records from the State Bar of Michigan's action against petitioner,[6] and a letter from the Client Protection Fund's counsel[7] seem at odds with petitioner's statements.

Also, there is an insufficient basis from which to determine why the debt was not paid in accordance with the consent judgment and negotiated installment order, as the documents seem to suggest. There are some references to auto accidents and resulting injuries and medical expenses. And, petitioner mentioned college tuition for his daughter on the record at the hearing. But, almost no

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> Q. And were you treated professionally for the cocaine -- ¶ A. Yes. ¶ Q.-- abuse? ¶ A. Yes. ¶ Q. And who was that that treated you? ¶ A. Sacred Heart. I stayed in for 30 days. But that was after I got in all this trouble. The Judge made me do it. [Transcript of Interview, 1/7/98, p 8, at GAIR p 86.]

Finally, the Report contains a copy of petitioner's April 11, 1988 brief in support of his petition for review in the discipline case which quotes a colloquy in that case. The colloquy suggests that petitioner made two suicide attempts and was hospitalized on eight separate occasions, apparently for substance abuse. (Brief, p 10 found at GAIR, p 39, quoting transcript of discipline proceedings at p 69.)

[5] At the interview, petitioner was asked the following questions and gave these answers:

> Q. And how much was restored to the estate. ¶ A. Approximately -- it was paid directly to the person -- approximately $7,000.00 on my part. And then the client's security fund paid some. ¶ Q. And the client security fund then required you -- ¶ A. Yes. Actually they were subrogated to her claim, and they filed a lawsuit. And some payments were made. It was never paid in full. ¶ Q. And that's the lawsuit that's referenced in your petition in the State Bar vs. Porter? ¶ A. Yes. ¶ Q. And how much still remains unsatisfied between you and the State Bar -- ¶ A. To be honest with you -- ¶ Q. -- do you have an approximate idea? ¶ A. To be honest with you, I don't know because interested [sic] was added in. ¶ Q. So you remember approximately when you would have made your last payment to the client protection fund, what year? ¶ A. No, sir. [Transcript of Interview, 1/7/98, pp 13-14, at GAIR pp 91-92.]

[6] The file reflects an August 11, 1989 default judgment against petitioner for $14,795.03 plus costs. A subpoena for a creditor's examination was issued on April 30, 1993. Petitioner filed a motion for installment payments in September, and in November 1993 a consent judgment for installment payments was entered; it shows a principal sum of $21,255.40. Thereafter, a writ of garnishment on November 30, 1995 was followed by another motion for installment payments reflecting a judgment amount of $23,326.01. On January 30, 1996 an order for installment payments based on a judgment amount of $23,229.91 was approved as to form and substance by petitioner and counsel for the State Bar of Michigan.

[7] The letter reads:

> On March 21, 1989, the Client Protection Fund paid the Estate of Irene Williams $14,795.03 for the misappropriation committed by Arthur Porter, Jr. Our records reveal that to date Mr. Porter has not made any payments to our Fund.

detail as to the amounts of these obligations or their due dates is in the record.

However, the interview transcript does indicate that from 1988 to 1991 petitioner earned between $25,000 or $30,000 to $45,000 annually (Transcript of Interview, 1/7/98, pp 14-15 at GAIR pp 92-93), and that, after a 4 or 5 month period between jobs he earned between $30,000 to $45,000 annually for the years 1992 through May 1996 (Id. pp 16-17, at GAIR pp 94-95). Petitioner has lived in his parents' home for the last 13 years (Id, p 3 at GAIR p 81).

Petitioner stated that his employment was terminated in May 1996 because:

> They had a new pay structure going on. They were a little mad at me. I had a car accident while I was working, and I had a lot of off time, surgery twice, and they felt I was abusing the medical plan. [Id., p 18 at GAIR p 96.]

Shortly after leaving that employer he worked for a competitor "but that didn't work." Id. He then worked for a few weeks at a furniture store, but has otherwise been recovering from a broken neck. Petitioner stated that his doctor had not permitted him to return to work as of the date of the interview.

II. Reinstatement Standards

MCR 9.123(B) provides that:

> 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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> > (1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;
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> > (2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;
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> > (3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;
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> > (4) he or she has complied fully with the order of discipline;

> (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;
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> (8) he or she is in compliance with the requirements of subrule (C) [requiring recertification by the Board of Law Examiners], if applicable; and
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> (9) he or she has reimbursed the client security [now "protection"] fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

On review, the Board must determine whether or not a hearing panel's findings have proper evidentiary support in the whole record. In Re Reinstatement of Leonard R. Eston, 94-78-RP (ADB 1995); Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991).

"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). 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.

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:

> 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.

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." August, 438 at 310; 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

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

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

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.

The record in this case falls far short of containing proper

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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").

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

evidentiary support for the findings made under 9.123(B)(1), (5), (6), and (7). With the exception of briefs on the bankruptcy issues, the record contains only the petition and the Grievance Administrator's report.

The rule regarding reinstatement procedure provides:

> The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions regarding eligibility for reinstatement. [MCR 9.124(D).]

It is perhaps possible that a petitioner could discharge his or her burden of proof under MCR 9.123(B) without testifying, that the evidence on the elements thereof would be so plentiful and clear that the panel would have no questions for the petitioner. But, we can conceive of few such records, and this case does not present one.

The transcript of the hearing before the panel contains only brief comments by petitioner before he indicated that he would rely on his petition. After a conference off the record, the panel chair announced that the Administrator did not intend to offer any evidence to contradict the allegations that petitioner had satisfied MCR 9.123(B), except with respect to the issue of restitution. Thereafter, the proceedings revolved around the requirements of Bankruptcy Code.

Although "a proceeding on a petition must conform as nearly as practicable to a hearing on a complaint," MCR 9.124(D), a reinstatement proceeding is not an ordinary adversarial matter. For example, the Administrator's report is not a pleading, and does not restrict the presentation of evidence at the hearing. MCR 9.124(C). As a practical matter a petitioner's path will be easier if the Administrator does not object to reinstatement. However, we find nothing in the rules which permits the Administrator to stipulate to reinstatement. To the contrary, as we interpreted the rules in DelRio, supra, the record must contain the requisite degree of evidence that the petitioner is eligible for reinstatement. This requirement reflects the Court's policy determination that a petitioner for reinstatement must survive not only an investigation by the Administrator but also must present

clear and convincing evidence to a panel on the elements of MCR 9.123(B).

Because we cannot find evidentiary support for several of the MCR 9.123(B) requirements, we must vacate the order of reinstatement--irrespective of whether petitioner has complied with MCR 9.123(B)(9) (reimbursement of the Client Protection Fund). Indeed, we would be required to do so even if the Fund had been reimbursed years ago. Petitioner may ultimately be able to demonstrate compliance with the requirements of MCR 9.123(B). However, he has not done so in the record before us.

Because the abbreviated hearing and sparse record may be due to a misunderstanding of the nature of the proceedings rather than to petitioner's inability to muster the necessary proofs, we remand this matter to the panel to give petitioner another opportunity to establish compliance with MCR 9.123(B). We do this rather than dismissing the petition and thereby requiring petitioner to file another.

III. Petitioner's Discharge in Proceedings Under Chapter 7 of the Bankruptcy Code[12] and the Effect of Code Sections 524 & 525.

The Grievance Administrator argues that this Board should modify the panel's order and require petitioner to reimburse the Client Protection Fund as a condition of reinstatement. Although we have decided that the panel's order must be vacated on other grounds, we address this issue to provide guidance on remand.

Petitioner argues that, under §§ 524 & 525, his reinstatement cannot be conditioned upon restitution of converted client funds.[13] Specifically, in his brief to the panel, petitioner argued:

> There is no question that the ADB could have ordered restitution in 1988 as a condition of reinstatement despite a later bankruptcy. This panel cannot. It does not sit as a sentencing or suspension panel but only as a hearing panel on reinstatement.

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[12] Petitioner received a discharge under 11 USC 727. Unless otherwise noted, all subsequent statutory references are to Title 11 of the United States Code, 11 USC 101, *et seq.*, which may also be referred to as the "Bankruptcy Code" or "Code."

[13] March 16, 1998 Brief in Support of Reinstatement which petitioner filed with the hearing panel and referenced in his brief filed with this Board on review.

On review, petitioner is less emphatic about the ability of a pre-bankruptcy restitution order to survive the discharge, but he continues to maintain that the absence of such an order is critical.

The order suspending petitioner states:

> IT IS FURTHER ORDERED that the respondent is SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF FIVE (5) YEARS EFFECTIVE APRIL 13, 1988 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. [Grievance Administrator v Arthur Porter, Jr, ADB 204-87; 233-87 (Order dated January 30, 1989). Emphasis added.]

MCR 9.123(B)(9) was in effect at the time the order was entered. Thus, we question the premise that restitution is not required by the discipline order. In any event, as we explain below, the absence of an express mention of restitution in the discipline order would not be determinative.

Petitioner's argument primarily implicates the Code, but it also involves nonbankruptcy law to an extent. Petitioner appears to argue that there is no precedent for considering restitution to a lawyer's victims in reinstatement proceedings where restitution was not part of the discipline order. Yet, in In Re Leonard Ziskie, DP 92/82 (ADB 1983), a petitioner for reinstatement who had been disbarred in 1966 for misappropriation of client funds and other misconduct was denied reinstatement by the hearing panel. The panel noted the failure of petitioner Ziskie to reimburse his clients. On review, this Board agreed with the petitioner's argument that he should be reinstated, noting that restitution "was not and could not have been ordered by the panel which adjudicated the original Formal Complaint under [then applicable] State Bar Rule 15, Sec. 3." The Board noted petitioner's "agreement to make restitution after reinstatement" and imposed such a condition, stating that "petitioner's promise . . . is the basis for the Board['s] appraisal of fitness under GCR 1963, 972 . . . ."

The Supreme Court reversed the Board's opinion for the reasons

stated by Board member Leo A. Farhat in his dissent.[14] Grievance Administrator v Ziskie, 419 Mich 1206 (1984). 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.[15]

Since nonbankruptcy law does not preclude the consideration of a reinstatement petitioner's efforts at, or intention to make, restitution for converted client funds, we now turn to §§ 524 & 525.

Section 524(a) voids any judgment with respect to a debt discharged under the pertinent Code section (§727 in this case because petitioner filed under Chapter 7 of the Code). Section 524(b) enjoins actions "to collect, recover or offset" a discharged

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[14] Member Farhat's dissent read as follows:

> 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 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."
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> 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).]

[15] 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.]

debt. Section 524(c) sets forth requirements for reaffirmation of dischargeable debts.

Section 525(a) states, in pertinent part, that:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title . . . solely because such . . . debtor is or has been a debtor . . . , has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title . . . .

Stated briefly then, § 525 prohibits government discrimination against a debtor solely because of his or her: (1) status as a debtor; (2) insolvency prior to grant or denial of discharge; or, (3) failure to pay a dischargeable debt.

We conclude that §§ 524 & 525 are inapplicable for two independent reasons: (1) the governmental action here does not violate § 525 because it is not "solely because of" petitioner's bankruptcy or failure to reimburse the Client Protection Fund (assuming that obligation is dischargeable), and § 524 must be construed in light of § 525; and, (2) any obligation to make restitution for the converted client funds is not dischargeable and was, therefore, not discharged by the Bankruptcy Court's July 2, 1997 order of discharge. Although these are independent grounds, the analyses do intersect at points. We have attempted to keep the analyses distinct. Thus, we assume, in discussing the first question, that the obligation here is dischargeable, even though we decide, in discussing the second question, that it is not.

A. Would Requiring Restitution As A Condition Of Reinstating Petitioner's License To Practice Law Be "Solely Because" Of His Bankruptcy Filing or Discharge, Or His Failure To Pay A Dischargeable Debt?

Section 525(a) prohibits discrimination against a debtor "solely because of" the impermissible grounds there enumerated. 11 USC 525(a). "The better approach . . . taken by [United States Circuit, District, and Bankruptcy Courts] that have focused on the specific language of this section" is to read it narrowly. In Re

Exquisito Services, Inc, 823 F2d 151, 153 (CA 5, 1987) (courts adopting better approach "have generally required proof that the discrimination was caused solely by the debtor's status, holding that only differentiation between debtor and non-debtor is precluded by the statute"). See also Laracuente v Chase Manhattan Bank, 891 F2d 17, 22 n 2 (CA 1, 1989) (restating law as to subsection (a) of §525 and applying it to similar language in subsection (b)); Toth v MSHDA, 136 F3d 477, 479 (CA 6, 1998), cert den ___ US ___; 118 S Ct 2371; 141 L Ed 2d (1998) (section 525(a) "prohibits a governmental entity from 'denying a license . . . ' or discriminating with respect to such a grant' solely on the basis that the person seeking such a boon has been a bankrupt"); In Re Norton, 867 F2d 313, 317 (CA 6, 1989) (state statute "did not discriminate because it applied the same conditions to all debtors who failed to satisfy a driving-related debt"); In Re Collins, 199 BR 561 (Bankr WD Pa, 1996) ("'[s]ection 525(a) is not violated even if one of the grounds enumerated therein is present, so long as the governmental unit also has a *bona fide* reason other than those enumerated therein for taking action against [the] debtor.'").

But see, e.g., In Re Day, 208 BR 358, 364 (Bankr ED Pa, 1997) ("proving that the governmental entity would not act were the discharged debt not an issue should be sufficient to satisfy § 525"); see also cases cited but not followed in In Re Exquisito Services, Inc, supra.

Courts taking the narrow view appear to be in the majority. And one treatise has explained:

> The legislative history to section 525 makes clear that the list of prohibited types of discrimination does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily. Rather, section 525(a) is designed to protect persons from discriminatory treatment based solely on past financial difficulty. Therefore, if there is a bona fide nondiscriminatory examination of future financial responsibility in a particular licensing process, applicable to all persons regardless of the existence of prior debts or any bankruptcy filings, section 525 is not applicable. [4 Collier on Bankruptcy (15th Rev ed), ¶525.02, p 525-5; footnotes omitted.]

Application of these principles is partially illustrated by two cases cited in the passage from the above-quoted treatise. Compare In Re Alessi, 12 BR 96 (Bankr ND Ill, 1981) (Racing license denied based on Act containing financial responsibility, character, and fitness requirements, where Board found that unpaid obligations could subject applicant to pressure and endanger integrity of sport) with In Re Lambillotte, 25 BR 392 (Bankr MD Fla, 1982) (Contractor "certificate of competency" denied; no indication whether law required financial responsibility, but commissioners focused on this and based findings of lack of same solely on prior insolvency).

Section 525 does not prohibit assessment of a debtor's prospective financial responsibility or an examination of the causes of his or her bankruptcy:

> "[T]he prohibition of [section 525] *does not extend so far as to prohibit examination of the factors surrounding bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts*, or the examination of prospective financial condition or managerial ability . . . [I]n those cases where the causes of a bankruptcy are intimately connected with the license, grant, or employment in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." [Duffey v Dollison, 734 F2d 265, 273 (CA 6, 1984) (quoting legislative history); emphasis in original.]

See also, In Re Anonymous, 74 NY2d 938; 549 NE2d 472, 473 (1989).[16]

In this matter, the record does not now permit us to say whether "the causes of the bankruptcy" will ultimately be a significant issue in determining petitioner's fitness. At this stage, the overriding concern presented is to determine whether petitioner can convincingly demonstrate rehabilitation, i.e., that

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[16] In an opinion affirming an order denying admission to the bar, the New York Court stated: that § 525 "was not intended to shield debtors from reasonable inquiries about their ability to manage financial matters when the ability to do so is related to their fitness for the license sought"; that "the State [cannot] use its power to examine Bar applicants as a means of coercing them into reaffirming debts previously discharged"; and, that "[a] determination of unfitness must rest not on the fact of bankruptcy but on conduct reasonably viewed as incompatible with a lawyer's duties and responsibilities as a member of the Bar."

he meets the standards articulated in MCR 9.123(B) notwithstanding his misconduct in converting client funds some 10 years prior to his Chapter 7 filing.[17] Restitution is one widely recognized indicia of rehabilitation.[18]

It is true that MCR 9.123(B)(7) also mandates an inquiry into all of petitioner's past conduct, including conduct after discipline, and that this would obviously encompass the time period prior to and during petitioner's bankruptcy proceedings. But, the fact of a bankruptcy filing or discharge will not itself lead to a conclusion that petitioner is unfit. And, inquiry into the circumstances surrounding the bankruptcy proceedings may well tend to reassure a reinstatement panel regarding the petitioner's financial responsibility, trustworthiness, and fitness.

For example, we note from the sparse record below that respondent has had automobile accidents, and that he was separated from his most recent employment over the employer's concerns that he "was abusing the medical policy." If examination of these or other matters shows that respondent suffered financial hardships which do not implicate his fitness to be an attorney, then examining "the causes of bankruptcy" will not in any way preclude a finding of fitness.

On the other hand, if a petitioner's financial problems were caused by an unresolved addiction to substances, or gambling, or by untreated mental illness, or any other unremedied condition with the potential to affect his or ability or fitness to practice law,

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[17] See Grievance Administrator v August, 438 Mich at 306 (reinstatement condition in MCR 9.123(B)(7) requires showing of rehabilitation to demonstrate present fitness).

[18] 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 [1084] 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].)

See also, n 15, supra.

then we can and indeed must enter an order consistent with our Supreme Court's mandate to protect "the public, the courts, and the legal profession." MCR 9.102(A); MCR 9.105. We do this whether or not a petitioner has obtained a discharge of his or her debts in bankruptcy. See, e.g., In Re Reinstatement of Conlin, No 95-53-RP (ADB 1996).[19]

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, whether or not they have been discharged in bankruptcy. 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. 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).

Such issues of financial responsibility are necessarily encompassed within the reinstatement requirements contained in MCR 9.123(B)(5), (6) & (7), and it seems clear that bankruptcy law imposes no impediment to their consideration. A somewhat different question is whether §§ 524 & 525 preclude an order of reinstatement conditioned upon continuing efforts at restitution of

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[19] In Conlin, the hearing panel closely scrutinized petitioner's personal finances as well as testimony from his psychiatrist. Petitioner Conlin had not filed bankruptcy proceedings. The panel granted reinstatement "subject to certain conditions including the satisfaction of several specified debts, continued counseling as directed by his psychiatrist, the appointment of an attorney to monitor Conlin's law practice, and the requirement that, for a period of one year, any escrow or trust account maintained by Conlin must require the co-signature of the monitoring attorney." Conlin, p 1. The panel also retained jurisdiction to supervise compliance and revisit the conditions if necessary. Id., p 8 n 3. Petitioner had actually made restitution 3 years before his misappropriation was discovered. The panel examined the circumstances surrounding the misappropriation, including the collapse of petitioner's real estate investments and impaired judgment due to manic depressive illness. Testimony from the psychiatrist detailed petitioner's condition, recovery, current treatment, and prognosis. The panel also heard testimony at length as to the status of workout negotiations with various of petitioner's creditors and as to the impending closing on the sale of a commercial property. The panel conditioned reinstatement on the sale of a motel and liquidation of certain debts with the sale proceeds as proposed by petitioner is that "'it appear[ed] that this will eliminate a great deal of the financial pressures under which he has suffered.'" Id., p 3. The Grievance Administrator appealed the reinstatement order arguing that the conditions belied the panel's finding of present fitness. The Board affirmed the panel's order and conditions which it found were imposed pursuant to MCR 9.124(D) to afford "an extra measure of protection to the public, the courts, and the profession."

misappropriated client funds, assuming that the underlying obligation for repayment was discharged under Chapter 7 of the Bankruptcy Code.[20]

Applicable nonbankruptcy law gives the hearing panels, the Board, and the Court broad authority to impose conditions upon reinstatement:

> A reinstatement order may grant reinstatement subject to conditions that are relevant to the established misconduct or otherwise necessary

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[20] In a recent decision, the Colorado Supreme Court summarized some of the cases addressing this question in an attorney discipline context:

> In People v. Sullivan, 802 P.2d 1091, 1096 (Colo.1990), an attorney discipline case like this one, we stated:
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> > We also conclude that an order of restitution is warranted even though the probate court judgment was a claim in the bankruptcy proceedings. See Hippard v. State Bar of California, 49 Cal.33d 1084, 1092-94, 782 P.2d 1140, 1145, 264 Cal.Rptr. 684. 689-90 (1989) (requirement of restitution as a condition for reinstatement of attorney was appropriate despite discharge of the underlying debt in bankruptcy, and did not violate federal bankruptcy law). Although the order to pay restitution here is for the benefit of private parties, rather that a state client security fund as in Hippard, the primary reason we are imposing the restitution requirement is for the respondent to demonstrate his rehabilitation prior to reinstatement.
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> Compare In re Levine, 174 Ariz, 146, 847 P.2d 1093, 1123, n.21 (Ariz.1993) (indicating that attorney's possible discharge in bankruptcy did not prevent the court from imposing a post-discharge disciplinary sanction of restitution as a term of probation; restitution is part of the rehabilitative process rather than a reinstatement of discharged judgment against a debtor) and Brookman v. State Bar of California, 46 Cal.3d 1004, 251 Cal.Rptr. 495, 760 P.2d 1023, 1025-27 (Cal.1988) (holding that section 525(a) of the Bankruptcy Act did not preclude state supreme court from imposing restitution order in attorney discipline case after the attorney was discharged in bankruptcy; restitution in such a case serves the role of rehabilitation, not merely compensation) with Bradley v. Barnes (In re Bradley), 989 F.2d 802, 804 (5th Cir.1993) ("Section 525 does not prohibit a state from denying or revoking a license based upon a determination that the public safety would be jeopardized by granting or allowing continued possession of a license, but it does not prohibit a state from exacting a discharged debt as the price of receiving or retaining a license.") and Kwasnik v. State Bar of California, 50 Cal.3d 1061, 269 Cal.Rptr. 749, 791 P.2d 319, 325-26 (Cal.1990) (distinguishing Brookman and Hippard, court holds that state bar applicant would not be denied certification for admission based only on his failure to pay wrongful death judgment against him which was discharged in bankruptcy, where judgment was not related to applicant's practice of law and was not a debt owned as a result of processional misconduct). But see In re Borowski, 216 B.R. 922, 924-25 (Bankr.E.D.Mich 1988) (attorney discipline board would likely violate section 525(a) if it ordered attorney to repay a discharged debt as a condition of continuing to practice law); In re Discipline of Schwenke, 849 P.2d 573, 577 (Utah 1993) (holding that section 525(a) prohibits court from conditioning lawyer's reinstatement on his paying obligation discharged in bankruptcy); Keene v. Board of Accountancy, 77 Wash.App. 849, 894 P.2d 582, 58-89 (Wash.App) (Bankruptcy Code prohibits a state from conditioning CPA's reinstatement paying a debt discharged in bankruptcy), review denied, 127 Wash.2d 1020, 904 P.2d 300 (Wash.1995). [People v Huntzinger, 967 P2d 160, 163 (Colo 1998).]

> to insure the integrity of the profession, to protect the public, and to serve the interests of justice. [MCR 9.124(D).]

This case also involves the reinstatement rule's requirement that the petitioner show:

> he or she has reimbursed the client security [now "protection"] fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement. [MCR 9.123(B)(9).]

The validity of MCR 9.123(B)(9) and the power of reinstatement panels, this Board, and the Court to condition reinstatement upon payment of a discharged debt under that rule or MCR 9.123(B)(6) & (7) and MCR 9.124(D) may seem to be called into question by some language in decisions interpreting § 525.

For example, in In Re Bradley, 989 F2d 802 (CA 5, 1993), an insurance agent was alleged to have accepted money fraudulently. He listed the debt in a Chapter 7 proceeding and obtained a discharge. Thereafter, he agreed with the Insurance Commission that his license would not be revoked if he made restitution pursuant to an agreed upon schedule. The Circuit Court reversed the lower court dismissals for lack of jurisdiction, but stopped short of finding a § 525 violation while offering this interpretation:

> Section 525 does not prohibit a state from denying or revoking a license based upon a determination that the public safety would be jeopardized by granting or allowing continued possession of a license, but it does prohibit a state from exacting a discharged debt as the price of receiving or retaining a license. [Bradley, 989 F2d at 804.]

In order to avoid internal inconsistency, and to avoid nullifying the plain language of § 525 as well as its legislative history and numerous judicial interpretations, it is necessary to read the last clause of this passage from Bradley carefully. A governmental unit may not use its licensing authority to exact payment of a discharged debt where such payment serves no purpose other than compensation. That would be denying a license solely

because the debtor has not paid a dischargeable debt. But, where requiring payment serves a legitimate governmental purpose--such as the one identified in Bradley, protecting public safety--then § 525 is not violated.

Another example of broad language describing the reach of § 525 and the need for careful analysis is found in In Re Norton, 867 F2d 313 (CA 6, 1989), where the Sixth Circuit Court of Appeals said:

> This court concluded that "section 525 is intended to ensure that bankrupts are not deprived of a 'fresh start' because of governmental discrimination against them, based 'solely' on the bankruptcy." Duffey v. Dollison, 734 F.2d 265, 271 (6th Cir.1984). Section 525 "'prevent[s] the government either from denying privileges to individuals solely as a reaction to their filing bankruptcy or from conditioning the grant of privileges on the bankrupt's reaffirmation of certain debts.'" Duffey, 734 F.2d at 271 (quoting district court). [Emphasis added.]

After this quote, the Court explained that in Duffey:

> We held that [the Ohio Financial Responsibility Act--providing for the revocation of drivers' licenses in certain instances] did not discriminate because it applied the same conditions to all debtors who failed to satisfy a driving-related debt. [Norton, 867 F2d at 317.]

Based on this reasoning, the Court reversed the bankruptcy and district courts' rulings that a similar Tennessee statute violated § 525. The fact that financial responsibility must be demonstrated by all drivers, and that the statute effectively required this showing in some instances by payment of the debt, was not § 525 discrimination because it applied to "the bankrupt and non-bankrupt alike." Norton, 867 F2d at 317 n 9.

MCR 9.123(B)(9)'s requirement that restitution be made to the Client Protection Fund prior to, or as a condition of, reinstatement applies to all attorneys who commit a theft of client funds that is remedied by the Fund.[21] Such a requirement serves

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21 A claim paid by the Fund must involve a loss "caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a lawyer-client relationship or a fiduciary relationship between the lawyer and the claimant." Client Protection Fund Rule 9A. As used in the Fund's rules, "'dishonest conduct'

purposes beyond solely requiring an attorney to disgorge that which was obtained in violation of a client's trust. It is an important sanction to achieve the Michigan Supreme Court's goals in regulating the Michigan bar. As is discussed more fully in the next section, these goals include rehabilitation, public protection, and deterrence. Finally, reimbursement of the Fund does not in and of itself demonstrate fitness. A petitioner for reinstatement must meet all of the requirements in MCR 9.123(B). Restitution without more is insufficient.

The foregoing analysis is premised on the assumption that a discipline order or obligation for restitution is dischargeable. In the following section we conclude that it is not.

B. The Dischargeability of Restitution Obligations.

In concluding that it could not require reimbursement of the Client Protection Fund, the hearing panel found inapposite the Grievance Administrator's cited "authority which suggests that in criminal prosecutions the court may order restitution even though what is in reality the underlying debt has been previously discharged." The panel did not discuss the applicability of Brookman v State Bar of California, 46 Cal 3d 1004; 251 Cal Rptr 495; 760 P2d 1023 (1988), a case discussed by the Administrator in a post-hearing letter-brief. However, the panel relied on the recent decision in In Re Borowski, 216 BR 922 (Bankr ED Mich, 1998), in which the Court stated: "Accordingly, the [Attorney Discipline] Board would likely be in violation of § 525(a) if it ordered Borowski [the debtor attorney] to repay a discharged debt as a condition of continuing to practice law." 216 BR at 924. The Court noted Brookman following a "but cf." signal. 216 BR at 925.

The panel's report is premised on its stated assumption that "[t]he debt in question was . . . discharged." But, the panel was not squarely presented with the question whether any restitution obligation petitioner might have with respect to the converted client funds was in fact discharged in petitioner's bankruptcy case. Indeed, the Administrator does not so frame the issue in

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means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value." Id., Rule 9C.

this review. However, Brookman is again relied upon, and it raises this important issue by its adherence to Kelly v Robinson, 479 US 36; 107 S Ct 353; 93 L Ed 2d 216 (1986).

Dischargeability is required to trigger the provisions of §§ 524 & 525 relied upon by petitioner for the proposition that the panel may not require restitution. 4 Collier on Bankruptcy (15th Rev ed), ¶525.02, p 525-5 ("section 525 does not bar discrimination based upon nonpayment of a debt which is *not* dischargeable") (emphasis in original); In Re Williams, 158 BR at 490 ("If the Bar is correct in its argument, and the Debtor's obligation for the costs is not discharged, there is no injunction against actions [§ 524] to collect that debt afforded by the discharge.").

We conclude that Kelly and its progeny compel the conclusion that any restitution obligation petitioner may incur as a result of discipline proceedings is excepted from discharge under §523(a)(7).

Section 523 provides in pertinent part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt -
>
> * * *
>
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . .

"Though § 523(a)(7) would not appear on its face to provide for the nondischargeability of state court ordered restitution obligations, in Kelly the Supreme Court precisely held that it does." In Re Clark, 222 BR 114, 118 (Bankr ND Ohio, 1997) (concluding in light of legislative history subsequent to Kelly, that: "It is therefore clear that Congress continues to intend that restitution obligations will be nondischargeable.").

Kelly involved a debtor who was sentenced in state court to serve probation and make restitution prior to her bankruptcy petition which listed the restitution obligation as a debt. The relevant state agencies did not file proofs of claim or objections to discharge. The Bankruptcy Court granted the debtor a discharge pursuant to § 727. When the probation department informed the debtor that it considered the restitution obligation nondischargeable, she commenced a proceeding in bankruptcy court

seeking declaratory and injunctive relief.

Construing § 523(a)(7)'s exception to discharge for "a fine, penalty, or forfeiture," the Court first analyzed a long standing interpretation of the Code's predecessor, the Bankruptcy Act of 1898. Notwithstanding the absence of clear language on the point, courts and commentators were fairly unanimous in their view that criminal sentences imposing fines and penalties were not affected by a discharge. 479 US at 45-46; 107 S Ct at 358-359. The Kelly Court noted that some formulations of the principle included governmental sanctions imposed in civil proceedings, 479 US at 45 n 6; 107 S Ct at 359 n 6, and quoted a 1974 state court opinion determining that a sentence ordering restitution is unaffected by a discharge. 479 US at 46; 107 S Ct at 359.

The Court then considered federalism concerns, observing that "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." 479 US at 47; 107 S Ct at 360.

Finally, the Court examined the purposes behind restitutive sanctions. It was this last leg of the Court's analysis that led to the conclusion that "neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution."[22] Even though "[u]nlike traditional fines, restitution is forwarded to the victim, and may be calculated by reference to the amount of harm caused," the Court nonetheless found that § 523(a)(7) "creates a broad exception for all penal sanctions." 479 US at 51-52; 107 US at 362.

The following excerpts identify some of the objectives of restitution noted by the Court:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" a victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the

[22] "[T]he fines must be both 'to and for the benefit of a governmental unit,' and 'not compensation for actual pecuniary loss'." 479 US at 51; 107 S Ct at 362 (quoting § 523(a)(7).

> decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. [479 US at 52; 107 S Ct at 362.]

The Court explained that restitution is a valuable sanction because it promotes rehabilitation and deterrence by helping the wrongdoer connect the impact of his misdeeds to the tangible harm caused by them:

> Restitution is an effective rehabilitative penalty because it forces the defendant to confront in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. [479 US at 49 n 10; 107 S Ct at 360-361 n 10.]

Finally, the Court recognized the fact that sanctions such as restitution are designed in large part to achieve public protection when it noted that restitution

> is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate the offender by imposing a criminal sanction intended for that purpose. [479 US at 52; 107 S Ct at 362 (internal quotation marks omitted).]

We find the principles and holdings announced in Kelly to be fully applicable to this matter.

The threshold question whether Kelly should be applied outside the criminal context is answered in two ways. First, it has been so applied:

> The Supreme Court has given § 523(a)(7) a broad reading, and has held that it applies to all criminal and civil penalties, even those designed to provide restitution to private citizens. Kelly v Robinson, [supra] (criminal restitution obligation was not dischargeable); Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 562, 110 S.Ct. 2126, 2132-2133, 109 L.Ed.2d 588 (1990) (stating

> that § 523(a)(7) applies to both criminal and civil fines). [Dep't of HUD v CCMV, 64 F3d 920, 927 (CA 4, 1995), cert den ___ US ___; 116 S Ct 1673; 134 L Ed 2d 777 (1996).]

See also, In Re Towers, 217 BR 1008 (Bankr ND Ill, 1998) (state court order pursuant to consumer fraud act providing for restitution to named consumers held excepted from discharge in light of penal and public protection purposes of act).

A second reason for applying Kelly is found in the nature of these proceedings. In Michigan and elsewhere, "discipline is a hybrid proceeding with a legal complexion of its own." Wolfram, Modern Legal Ethics, §3.4.1, p 100. Civil procedure applies, primarily.[23] However, attorney discipline proceedings have been repeatedly categorized as "quasi-criminal." In Re Ruffalo, 390 US 544, 551; 88 S Ct 1222, 1226; 20 L Ed 2d 117 (1968); State of Michigan v Woll, 387 Mich 154, 161; 194 NW2d 835 (1972); In Re Doerr, 185 BR 533 (Bankr WD Mich, 1995) (excepting discipline costs from discharge under § 523(a)(7)).

MCR 9.105 states in part:

> Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession.

Virtually every jurisdiction defines the purpose of lawyer discipline this way. Modern Legal Ethics, supra, § 3.1, p 81. In a case applying Kelly and excepting the costs of attorney discipline proceedings from discharge under § 523(a)(7), a District Court rejected the argument that such a statement of purpose rendered Kelly inapplicable. In Re Cillo, 165 BR 46, 48 (MD FL, 1994).

In addition to protecting the public, the courts, and the legal profession, deterrence is often cited as a significant objective of attorney discipline. Modern Legal Ethics, supra, § 3.1, p 81. The Michigan Supreme Court's interpretation of MCR 9.105's predecessor rule recognizes that deterrence is important and penal sanctions may be required to achieve it:

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[23] See MCR 9.115(A) ("Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel").

> This section makes clear that the *purpose* of discipline cannot be punishment, but does not preclude the *effect* of discipline from being punishment. It would be a rare attorney indeed, who would not feel "punished" if precluded from practicing law. Further, the purpose of discipline--protection of the public, the courts and the legal profession--may at times best be achieved through the deterrent effect of punishment. We do not accept the assertion that "protection" and "punishment" are irreconcilable concepts and that the line between them cannot be crossed under GCR 1963, 954. [In Re Grimes, 414 Mich 483, 491; 326 NW2d 380 (1982). Emphasis in original.]

See also Woll, supra (quoting an early case discussing "disbarment proceedings:"'While not strictly a criminal prosecution, it is of that nature, and the punishment, in prohibiting the party following his ordinary occupation, would be severe and highly penal.'"); Grievance Administrator v Goldfarb, 454 Mich 1211 (1997) (finding discipline insufficient and remanding to Board "for reconsideration of the penalty imposed") (emphasis added).

In light of the purposes of discipline, several Bankruptcy Courts have held that costs prescribed by court rule or otherwise awarded to an attorney discipline agency or bar association as a result of discipline proceedings are nondischargeable under § 523(a)(7). See, e.g., In Re Haberman, 137 BR 292 (Bankr ED Wis, 1992); In Re Lewis, 151 BR 200 (Bankr CD Ill, 1992); In Re Williams, 158 BR 488 (Bankr D Idaho, 1993); In Re Betts, 149 BR 891 (Bankr ND Ill, 1993); In Re Cillo, 165 BR 46, 48 (MD FL, 1994); and, In Re Doerr, 185 BR 533 (Bankr WD Mich, 1995).

These courts have followed this trend because, as one put it:

> "[T]he ultimate goal of both criminal and attorney discipline proceedings is to protect the public. Sanctions imposed against the offender, whether as part of an attorney discipline proceeding or a criminal proceeding, promote the state's penal and rehabilitative interests." [In Re Cillo, 165 BR at 48 (quoting and affirming Bankruptcy Court).]

The foregoing authorities convince us that a discipline order

for restitution is not dischargeable under § 523(a)(7).[24]

We now consider petitioner's assertion that:

> The argument of the AGC must fail simply because no restitution was ordered before discharge. I agree that if restitution haed [sic] been part of the orginal [sic] order of suspension a different result would probaly [sic] follow. [Petitioner's Brief in Answer to Petition for Review, p 2.]

We have already explained that the order of discipline suspending petitioner required compliance with MCR 9.123(B) before reinstatement, and if the question he raises relates to notice or vesting, we are not persuaded by his contention. In fact, the significance of the distinction petitioner poses is not discussed. We conclude that the distinction, even if it existed, would not be material.

First, we must point out that petitioner is incorrect. The Grievance Administrator cited three pre-Kelly federal decisions holding that criminal restitution orders are not affected by a discharge. However, the Administrator also cited Brookman, supra, in which the California Supreme Court concluded under § 525 and Kelly that its post-discharge order requiring an attorney to reimburse that state's Client Security Fund was proper.

Brookman is not an aberration. It appears to be well established that "the timing of the order imposing restitution is irrelevant for purposes of [§ 523(a)(7)]." In Re McMullen, 189 BR 402, 408 (Bankr ED Mich, 1995).

In McMullen, the debtor, a contractor, failed to pay a supplier. Months later, the debtor filed a petition under Chapter 7, and listed the debt to the supplier. The supplier did not file

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[24] Section 523(a) provides that: "A discharge under section 727 . . . does not discharge an individual debtor from [various listed debts]." Debts excepted under § 523(a)(7) are not among those enumerated in § 523(c)(1) (requiring certain debts to be determined excepted by a bankruptcy court in a proceeding at the request of the creditor). And the Bankruptcy Court's July 2, 1997 Discharge of Debtor releases petitioner from "all dischargeable debts" (Discharge, ¶ 1), and voids any judgment by other than the bankruptcy court which, before or after entry of the discharge, determines debtor's personal liability "with respect to . . . debts dischargeable under 11 U.S.C. § 523 (Discharge, ¶ 2(a)). Accordingly, § 523(a)(7) "provides for automatic nondischargeability for [debts enumerated therein]," Kelly, 479 US at 42 n 4 and text accompanying; 107 S Ct at 357 n 4 and text accompanying; In Re Williams, 158 BR at 491 n 4. See also In Re Szafranski, 147 BR 976, 981 (Bankr ND Okla, 1992) "("Most exceptions to discharge may be determined at any time, either by the Bankruptcy Court itself, or by non-bankruptcy courts which entertain a plea of discharge as an affirmative defense.").

an adversary proceeding to have the debt excepted from discharge, nor did it seek to have the debtor's discharge denied. However, the supplier did file a proof of claim. The estate had no assets, and a discharge was granted in January, 1992. Upon the complaint of the supplier, debtor was arrested in April 1993. 189 BR at 407. After two trials for violating the Michigan Building Contract Fund Act, MCL 570.151 *et seq.*, both of which resulted in hung juries, and after several attempts by the prosecutor to plea bargain based on restitution, the debtor filed proceedings in bankruptcy court to have various persons, including the county prosecutors, held in contempt for violating the § 524(a) discharge injunction.

The court in McMullen thoroughly analyzed the issues in that case, which included application of Kelly and the § 523(a)(7) exception, among others. The court held that restitution may be pursued following a Chapter 7 discharge even if a complainant is motivated by recovering his or her losses and the prosecutor seeks restitution. The prosecutor's "objective was to protect homeowners from being 'ripped off by an unscrupulous contractor.'" He was not guilty of bad faith prosecution, even though the complainant merely sought payment of his purely private debt and "was not himself interested in the principles of punishment, rehabilitation, and deterrence to which Kelly alluded." 189 BR at 411. The court denied the debtor's motion and declared that the prosecution was not barred.

Finally, MCR 9.124(D) empowers the panels, the Board, and the Court to grant reinstatement subject to conditions "necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice." The interests of justice may be served not only by requiring disgorgement of converted funds, but also by the deterrent effect such an order will have. Accordingly, the purposes recognized by Kelly are involved at the reinstatement stage as well as at earlier stages in the discipline process.

We conclude that petitioner may be required to make restitution as a condition of his reinstatement (assuming the other requirements of MCR 9.123(B) are met) because such an obligation is not dischargeable and was not discharged in his Chapter 7 bankruptcy proceeding. This result is consistent with the "basic policy animating the Code of affording relief only to an 'honest

but unfortunate debtor,'" Cohen v De La Cruz, ___ US ___; 118 S Ct 1212, 1216; 138 L Ed 2d 1060 (1998),[25] with the specific purpose for § 523(a)(7) -- the exception exists "because discharge in bankruptcy is not intended to be a haven for wrongdoers" HUD v CCMV, 64 F3d at 927, and with the logical view that "[i]t would be a poor policy indeed to suggest that an attorney could elude punishment for professional improprieties by resorting to the Bankruptcy Code." In Re Williams, 158 BR at 491.

IV. Conclusion.

We conclude, after a review of the whole record, that petitioner has not established compliance with MCR 9.123(B) by clear and convincing evidence. We vacate the order of reinstatement and remand this matter to the panel for further proceedings consistent with this opinion. Petitioner may, at his option, proceed on remand to establish compliance with the rules or dismiss the petition and refile at a time of his choosing in accordance with MCR 9.123(D)(3).

The panel, on remand or in any subsequent proceeding, shall consider all aspects of petitioner's fitness and resolve any questions pertaining thereto whether or not they have been expressly addressed in this opinion. Nothing in this opinion is intended to preclude the panel from entering an order of reinstatement provided all requirements have been established to the requisite degree of proof.

Finally, we hold that a hearing panel, this Board, and the Court may condition reinstatement upon restitution paid to the Client Protection Fund without violating the Bankruptcy Code.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Michael R. Kramer, Roger E. Winkelman, and Nancy A. Wonch concur in this decision.

Board Member Kenneth L. Lewis did not participate in this decision.

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25 Although Cohen involved the fraud exception under § 523(a)(2)(a), the Court enunciated "basic policy animating the Code" and all of the discharge exceptions:

> The various exceptions to discharge in §523(a) reflect a conclusion on the part of Congress "that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtor's interest in a complete fresh start." [Cohen, 118 S Ct at 1218 (quoting Grogan v Garner, 498 US 279, 287 (1991).