

STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement
Petition of Allen N. Davey, 27194,

Petitioner/Appellant.

Case No. 90-118-RP

Decided: August 16, 1991

BOARD OPINION

The Petition for Review in this case has been filed by reinstatement petitioner Allen N. Davey. He seeks review of a hearing panel decision denying his petition for reinstatement on the grounds that he had failed to present clear and convincing evidence that he could be safely recommended to the public, courts and legal profession as a person fit to engage in the practice of law or that he has a proper understanding of and attitude toward the standards imposed on members of the Bar and that he will conduct himself in conformity with those standards in the future.

The Board has reviewed the record before the panel and has considered the arguments presented by the parties in review proceedings conducted in accordance with MCR 9.118. The Board understands the panel's concerns expressed in its order denying reinstatement but is unable to conclude that his conduct since his suspension from the practice of law in 1988 warrants an indefinite continuation of that suspension. The Board is persuaded that there is sufficient evidentiary support in the record for a finding that the petitioner has established his eligibility for reinstatement in accordance with the criteria set forth in MCR 9-123(B). The Petition for Reinstatement should therefore be granted.

The petitioner was suspended for a period for two years effective July 8, 1988. As the result of a written agreement with another attorney, the petitioner was to hold the sum of \$10,000 in trust pending the resolution of the competing claims of their respective clients. Petitioner left the state of Michigan, taking the funds with him to the state of Hawaii where they were admittedly deposited into his personal checking account. In his answer to a complaint charging commingling and misappropriation of client funds, the petitioner alleged that the shortfall of funds was inadvertent and that a friend had mistakenly written checks on the account. The petitioner's conduct was found to constitute a violation of Canon 9 of the former Code of Professional Responsibility, DR 9-102(A).

On appeal, the Attorney Discipline increased the six-month suspension imposed by the panel to a suspension of two years in light of the petitioner's disregard for his duties as a fiduciary and the aggravating effect of his failure to appear personally at any stage of the disciplinary proceedings.

The petitioner, who has resided in Hawaii since his suspension, was questioned extensively by the members of the hearing panel, as well as counsel for the Grievance Administrator, regarding his move to that state, his sources of income since his suspension, his arrearage in child support payments, and his extensive travels.

In its report, the panel commented not only upon the petitioner's presentation to the panel but his manner of presentation including his casual dress (athletic shoes and jeans). The following observations by the panel are taken from its report: "1) One of the primary factors for Petitioner's conduct which led to his suspension was the chaotic condition of his personal life. 2) There is no indication that Petitioner has put his life in order since leaving Michigan, or his suspension from the practice of law which is evidenced by: a) His living the life of a virtual vagabond, residing in a rooming house when not traveling over the world; b) Surviving on meager annuity payments and gifts of money from his parents; c) His having virtually no employment even though licensed as a CPA for four years; d) His having done nothing to keep himself current on the law or the ethical responsibilities of an attorney. 3) That petitioner attempted to deceive the panel with respect to his income and sources of income since 1986. 4) The panel further finds that one of petitioner's primary interests in seeking reinstatement is that the annuity funds on which he has been surviving will terminate shortly and not because he has a sincere interest in the law." (Panel Report pgs. 9,10)

Based upon its consideration of the record, the panel concluded that the petitioner had not established his eligibility for reinstatement by clear and convincing evidence.

The Board has previously reviewed hearing panel decisions denying reinstatement. Two of the more recent such cases considered by the Board including Matter of the Reinstatement Petition of J. Russell Hughes, Jr., ADB 84-89 (Brd. Opn. 6/29/90) and Matter of the Reinstatement Petition of David B. Huthwaite, DP 78/85 (Brd. Opn. 1/30/87). Many of the panel's concerns in this case are virtually identical to those expressed by the panel in Matter of David Huthwaite, supra. In that case, a hearing panel specifically cited the petitioner's arrearage in his child support obligations and his failure to engage in an active search for employment as examples of conduct which was not, in the panel's opinion, "exemplary and above reproach" as required by MCR 9.123(B)(5). Following its review, the Board noted that while it was distressed" by the failure to pay child support, it could not conclude that the failure to discharge one's private obligations would necessarily reflect upon the ability to serve the public as a member of the legal profession.

With regard to the petitioner's lack of employment during the suspension period, the Board noted in Huthwaite:

"Our primary concern is the protection of the public not the punishment of the attorney under investigation. See Matter of Friedman, 406 Mich 256 (1979); Matter of Trombley, 398 Mich 377 (1976). We are not able, from the record before us, to predict

with confidence that an attorney who has relied upon the generosity of his family while suspended might pose a greater or lesser danger to the public if reinstated than a suspended attorney who has obtained regular employment during that period."

In its decision to reverse the hearing panel in Huthwaite and to order reinstatement, the Board stated:

"We believe that there is ample support in the record to believe that Mr. Huthwaite's forced removal from his chosen profession has had a corrective effect in the sense that he is now accutely aware of the prohibition against the misappropriation of client funds and that he is aware from personal experience of the consequences of such conduct."

We believe that those observations are applicable in this case. There is, however, an additional factor in this case not present in Huthwaite, that is, the panel's conclusion that the petitioner attempted to deceive the panel with respect to the amount and sources of his income since 1986.

In a 1987 opinion reversing a hearing panel's decision to grant reinstatement, the Board cited the petitioner's testimony with regard to his personal finances and noted "We cannot say that petitioner's incomplete answers to the questions posed by the Administrator form the basis for much confidence that he can now safely be recommended to the public, the courts and the legal profession as a person fit to act in matters of trust and confidence. . ." See Matter of James DelRio, DP 94/86 (Brd. Opn- 8/11/87).

With that type of concern in mind, we have carefully reviewed the petitioner's testimony regarding his monthly income from certain annuities and stock dividends. We are unable to conclude that his testimony to the panel was deliberately evasive.

Bearing in mind the Supreme Court's admonition in Matter of Trombley, 398 Mich 377 (1976) that our paramount concern should be the protection of the public rather than sympathy for the attorney, we have concluded that petitioner Davey has satisfied the criteria for reinstatement set forth in MCR 9-123(B). The Board's decision to grant reinstatement in this case carries with it, however, an admonition to the petitioner to be more conscious of his personal and professional obligations in the future and to conduct himself at all times with an awareness that the license to practice law is accompanied not only by privileges but by the duty to conduct one's personal and professional life with circumspection.

All concur.