SJC No. BD-2000-010

IN RE: BERNARD D. PEMSTEIN

S.J.C. Order of Reinstatement with Conditions entered by Justice Ireland on January 24, 2007.[1]

HEARING PANEL REPORT ON PETITION FOR REINSTATMENT

On June 2, 2000, a justice of the Supreme Judicial Court (Ireland, J.) suspended the petitioner, Bernard D. Pemstein, from the practice of law for an indefinite period, effective thirty days thereafter. Matter of Pemstein, SJC No. BD-2000-010 (2000). He has now filed the instant petition for reinstatement. For the reasons set forth below, the Hearing Panel recommends that Mr. Pemstein's petition be allowed.

A. Background

After graduating from Boston University Law School, the petitioner was admitted to the Massachusetts bar in November of 1964. He received an LLM in taxation the following year. He then practiced with various Boston law firms before entering into a partnership with Attorney David Lipton in the late 1970s. That partnership ended in a rather acrimonious split in 1993. The petitioner and Lipton remained in the same suite after their split but practiced separately. It was during this time period that the misconduct leading to his suspension took place.

1. The Petitioner's Suspension

For purposes of this memorandum, the Hearing Panel will adopt the summary of the events leading to the petitioner's suspension set forth in the Board's Memorandum recommending his suspension.

In October 1993, Lauravia Simmons consulted the [petitioner], an experienced practitioner with a concentration in estate planning and probate practice, on how to preserve the assets and Medicaid eligibility of her husband, who was eighty-four and suffering from dementia. She did not retain the [petitioner] at that time.

Mr. Simmons was hospitalized about two months later and, in January 1994, his sister and daughter successfully moved their appointment as his temporary guardians. Mrs. Simmons then retained the [petitioner] to assist her in opposing the guardianship and in securing long-term care for her husband. The hearing committee determined that the parties did not reach agreement on the hourly rate the [petitioner] would charge for his services.

On Jan. 17, 1994, the [petitioner] recorded the receipt of Mrs. Simmons' $1,000 retainer, and two days later he filed a motion to vacate the temporary guardians' appointment. In mid-February he advised Mrs. Simmons to set aside $15,000 for her husband's nursing home care and to spend down any joint savings she had with her husband so that he would be eligible for Medicaid. On Feb. 23, 1994, Mrs. Simmons cashed out a certificate of deposit and gave the [petitioner] a $15,000 treasurer's check to hold in escrow for the particular purpose of providing for her husband's nursing care costs.

The [petitioner] deposited the check to his IOLTA account and immediately transferred the funds to an interest-bearing escrow account in Mrs. Simmons' name. Mrs. Simmons proceeded

to spend down the couple's joint savings, prepaying their funeral expenses and paying Mr. Simmons' hospital bill.

In April 1994, Mr. Simmons entered a nursing home. The home never required any payments for his care. The [petitioner] negotiated an agreement with the temporary guardians to permit Mrs. Simmons to visit her husband in the nursing home. In May 1994, Mrs. Simmons moved to Virginia.

Without prior notice to or authorization by Mrs. Simmons, the [petitioner] on June 14, 1994, closed her escrow account and transferred the funds to his IOLTA account. On the same day, he drew a $3,000 check on the transferred funds and deposited it in his office account. He claimed the $3,000 was a fee for services rendered on Mrs. Simmons' behalf. Over the next two days he used $2,000 of the funds to reduce the [overdraft] on his personal bank account and $1,000 to meet the office payroll and other business needs. Crediting Mrs. Simmons' testimony over the [petitioner]'s, the committee found that Mrs. Simmons had not authorized the withdrawal. The committee noted that the amount taken was approximately $1,000 more than fees owed the [petitioner] even by his own reckoning, that he never billed her, and that he had no written evidence of the claimed authorization.

By letter dated Sept. 19, 1994, Mrs. Simmons requested return of her escrowed funds. The [petitioner] stipulated that he received this letter. Instead of complying with her request, he withdrew another $2,000 of Mrs. Simmons' funds on Sept. 27 and $2,000 more on September 29. He deposited these finds into his office account and used them to pay his payroll. The committee found that, but for these two deposits, the [petitioner] would not have been able to meet his payroll. The committee expressly rejected his claims that the September 27 withdrawal was a "sloppy" mistake occasioned by his forgetting the withdrawal made two days earlier.

On Oct. 5, 1994, the [petitioner] sent Mrs. Simmons a check in the amount of $5,000 and wrote her that he was retaining the balance for future costs. His letter did not advise her that the escrow account had been closed or that he had withdrawn $7,000 of his own use, whether as fees or otherwise. Mrs. Simmons requested the balance of her funds by letter dated Nov. 16, 1994. On Nov. 24, the [petitioner] sent her a check in the amount of $3,104.43, which he said represented "the balance of the account." Again, he did not supply an accounting of the remaining funds or disclose that he had taken $7,000.

In January 1995, Mrs. Simmons' husband died. She asked the [petitioner] to return the balance of her funds. When she received no response to a written request dated Dec. 11, 1995, she sent a copy of the request to the Office of Bar Counsel. In response to Bar Counsel's inquiry, the [petitioner] claimed he was "authorized and directed" by his client to take the $7,000 as fees, but that $3,716.30 was due her as she had overpaid him. The $3,716.30 was not remitted until July 17, 1996. He finally paid her the balance, $3,505.45, in February 1998.

The hearing committee found that the [petitioner] had intentionally taken his client's funds without authorization, with intent to deprive her of the use of those funds, and with actual deprivation resulting. It concluded that this conduct violated Canon One, DR 1-102(A)(4) and (6), and Canon Nine, DR 9-102(A)(C). The committee rejected Bar Counsel's allegations that the takings also violated Canon Seven, and it found insufficient evidence to establish that the [petitioner] had failed to maintain reasonable communications with his client in violation of Canon Six, DR 6-101(A)(3).

In aggravation, the committee found the [petitioner] had substantial experience, particularly in estate planning and Medicaid work, that he took advantage of a vulnerable elderly woman who had limited resources and had moved out of stat, and that he gave "misleading, deceptive or evasive testimony and/or accountings, and otherwise evinced a lack of candor during the disciplinary proceeding."

In mitigation, the [petitioner] claimed he was suffering from major depression at the time of the misconduct. The hearing committee found that he had been treated since 1970 by a psychiatrist for various problems, including irritability, depressed mood, and difficulty with concentration. The committee also found, however, that the [petitioner] seldom saw the psychiatrist during [the] period in which the misconduct took place, that the doctor did not have medical records for any period before July 1997, and that he considered the [petitioner] to be mildly depressed in late 1998. The committee rejected the psychiatrist's contention that the [petitioner] suffered from major depression sometime in 1994, and was not persuaded, in any event, that the illness was a cause of his misconduct.

Citing Matter of Schoepfer, 426 Mass. 183, 187, 13 Mass. Att'y Disc. R. 679, 684 (1997), the committee concluded that the [petitioner] had not met his burden of demonstrating why the presumptive sanction of disbarment or indefinite suspension should not be imposed. Because complete restitution was eventually made, the committee recommended an indefinite suspension.

2. The Petitioner's Evidence At The Reinstatement Hearing

At his reinstatement hearing on July 19, 2006, the petitioner called Norman Berman, Robert Hill and Philip Goldman as witnesses, and also testified on his own behalf. He also submitted letters in support of his reinstatement by Attorney Don Freedman, Rabbi Wes Gardenswartz, Dr. Ed Alexander, and Attorney David Banash. Below is a very abbreviated account of the hearing testimony.

In his direct testimony, the petitioner acknowledged that he had taken $7,000 in client funds, that there was no justification for his actions, and that he ought not to have taken the funds. After some soul searching, he expressed regret for the harm he had caused to Mrs. Simmons, to his own family, and to the profession as a whole.

During a portion of the period of his suspension, he worked as a consultant. He also engaged in charitable work. He participated in study groups, he took courses on a variety of subjects (including a course in ethics at Boston University), and he did a substantial amount of reading and self-study. He took and passed the MPRE.

The petitioner's witnesses spoke highly of his character and expressed sadness at his misconduct. When he spoke of his misconduct, he did not make excuses or attempt to justify what he had done. He simply expressed regret. His witnesses each indicated that the misconduct seemed to be out of character for the petitioner.

B. Discussion

A lawyer seeking reinstatement to the Bar bears "the burden of proving that he has satisfied the requirements for reinstatement set forth in S.J.C. Rule 4:01, § 18(5), as appearing in 430 Mass. 1329 (2000)." Matter of Daniels, 442 Mass. 1037, 1038 (2004). That section requires proof "that he possessed 'the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his ... resumption of the practice of law [would] not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest.'" Id., quoting S.J.C. Rule 4:01, § 18(5). See Matter of Dawkins, 432 Mass. 1009, 1010 (2000); Matter of Pool, 401 Mass. 460, 463 (1988). In determining whether the petitioner has satisfied these requirements, a panel considering a petition for reinstatement "looks to '(1) the nature of the original offense for which the petitioner was [suspended], (2) the petitioner's character, maturity, and experience at the time of his [suspension], (3) the petitioner's occupations and conduct in the time since his [suspension], (4) the time elapsed since the [suspension], and (5) the petitioner's present competence in legal skills.'" Id., quoting Matter of Prager, 422 Mass. 86, 92 (1996), and Matter of Hiss, 368 Mass. 447, 460 (1975).

"The act of reinstating an attorney involves what amounts to a certification to the public that the attorney is a person worthy of trust." Matter of Prager, supra.; Centracchio, petitioner, 345 Mass. 342, 348 (1963). In fact, "considerations of public welfare are dominant. The question is not whether the petitioner has been punished enough." Matter of Cappiello, 416 Mass. 340, 343 (1993); see Matter of Keenan, 314 Mass. 544, 547 (1943).

In this case, Bar Counsel does not object to the petitioner's reinstatement, and we agree that he should be reinstated. While the misconduct was serious, the petitioner has acknowledged the seriousness of and taken responsibility for his actions. That misconduct seems to be an aberration in a lengthy and otherwise unblemished career. Given the undisputed evidence as to his character, as well as his competence and skill in his field, the petitioner has met his burden of demonstrating his entitlement to reinstatement.

At the conclusion of the hearing, Bar Counsel expressed some legitimate concerns surrounding the petitioner's reinstatement, and the panel has similar concerns. Because the petitioner has not practiced for more than six years, there is some question as to whether his skills are sufficiently up to date. Further, the petitioner's poor record-keeping appears to have contributed to the misconduct to some degree. In order to address these concerns, his reinstatement should be contingent on the following conditions:

1. That the petitioner's financial record-keeping be monitored for twelve months by a CPA, who will submit to Bar Counsel the reconciliation reports required of the petitioner under Mass. R. Prof. C. 1.15.

2. As a precondition to reinstatement, the petitioner shall enroll in two courses in substantive law satisfactory to Bar Counsel and pertinent to the substantive areas in which the petitioner intendeds to practice. The petitioner shall provide to Bar Counsel certificates of completion from the course providers.2

Accordingly, subject to the above conditions, we recommend that the petitioner's request for reinstatement be allowed.

FOOTNOTES

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

[2] Bar Counsel mentioned these conditions at the hearing, and the petitioner indicated that such conditions would be acceptable to him.