

In the Matter of the Petition for Reinstatement
of William J. Conlin, P 12127,

Petitioner/Appellee.

95-53-RP

Decided: September 13, 1996

BOARD OPINION

I

The petitioner, William J. Conlin, was suspended for a period of one year for misappropriating client funds. He petitioned for reinstatement in March 1995. After protracted proceedings involving scrutiny of his personal finances, the hearing panel issued an order on February 13, 1996 granting the petition for 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.

The Attorney Grievance Commission petitioned for review seeking reversal of the hearing panel's order of reinstatement. After a review of the whole record, we conclude that the hearing panel's decision with regard to Conlin's eligibility for reinstatement has proper evidentiary support and that the panel correctly applied MCR 9.123(B). We affirm the panel's order.

II

On March 25, 1994, Washtenaw County Hearing Panel #3 ordered Conlin suspended for one year, commencing April 16, 1994, and imposed the condition that Conlin continue counseling. Conlin had admitted negotiating two checks totalling \$28,000 from a checking account under his control in his capacity as a trustee in the spring of 1989. He repaid the money between June and October 1989.

He left the law firm in late 1989. Approximately three years later, the firm discovered the misappropriation while conducting an audit and reported the matter to the Attorney Grievance Commission.

The panel which imposed discipline noted that Conlin took those monies for his own personal use at a time when he was undergoing personal and business problems. In the 1980's Conlin functioned primarily as a real estate developer. The record in the discipline case sets forth the collapse of Conlin's real estate investments and several other personal problems. The panel noted several factors in mitigation: Conlin's prompt voluntary repayment; a psychiatrist's report that Conlin was significantly depressed and his judgment was impaired during this period of "pressures and stresses that were very overwhelming"; Conlin's continuing treatment with that doctor; his cooperative attitude during the discipline proceedings; his involvement and reputation in the community; and a favorable prognosis. The Commission did not appeal the one-year suspension.

Conlin filed his petition for reinstatement on March 29, 1995. A hearing was held June 29, 1995, at which Conlin and a friend, who was business associate and former banker, testified. The panel also reviewed a letter from Conlin's psychiatrist. The hearing focused mainly on Conlin's financial condition and emotional state. At the conclusion of that day's proofs, the Commission was given leave to depose Conlin's psychiatrist, and the panel adjourned the proceedings.

Conlin's psychiatrist testified that he suffered from manic depressive illness which had not been diagnosed until he sought treatment from psychiatrist at the suggestion of his brother. From April 1991 until sometime after April 1992, Conlin met with his psychiatrist weekly. Thereafter, the sessions took place every other week. At the time of the hearing, the sessions were conducted at two to three week intervals. The psychiatrist also prescribed, and has continued to administer, antidepressant medication. In his view, Conlin has shown significant improvement.

With respect to his financial condition, Conlin testified that the impending sale of certain commercial property (The Lamp Post

Motel) would allow him to pay off the bulk of his obligations, and that negotiations with creditors were ongoing. The panel and counsel for the Commission questioned Conlin at length regarding his debts, and the status of his workout negotiations. The closing on the sale of the commercial property was to take place on November 15, 1995.

In its January 3, 1995 report, the panel found that Conlin "has met the criteria specified in [MCR 9.123](B)(1), (2), (3), (4), (5) and (6) [and that] MCR 9.123(B)(8) and (9) are not applicable." The panel also stated that Conlin "will be able to meet the criteria enunciated in MCR 9.123(B)(7) . . . once he has been able to complete the sale of the Motel, as it appears that this will eliminate a great deal of the financial pressures under which he has suffered." [Hearing Panel Report, p 3.] The panel ordered Conlin reinstated subject to various conditions.

III

The Commission raises two issues on appeal. First, it contends Conlin failed to establish that he can be safely recommended to the public and to aid in the administration of justice, as required by MCR 9.123(B)(7). Secondly, the Commission argues that a conditional order of reinstatement will not protect the public or the integrity of the legal profession. The Commission also raises concerns about the practicality and propriety of requiring the signature of a monitoring attorney on checks and withdrawals from Conlin's escrow or trust account.

In its brief, the Commission argues:

Petitioner's current financial condition is a clear indication that he moves very quickly from project to project without adequate consideration and care or regard for the consequences. Such a characteristic is evidence of Petitioner's present unfitness to practice law.

* * *

Although Petitioner may have good intentions or hopes of conducting himself in conformity with the rules and standards of professional

responsibility, considering his past actions, he may simply be unable to avoid the temptation to convert client funds for personal use. [Commission's brief, pp 3-4; emphasis added.]

These statements are followed by a discussion of several cases standing for the proposition that misappropriation is a most serious breach of professional ethics which ordinarily warrants stiff discipline.

Finally, the Commission argues:

The conditional reinstatement is overwhelming evidence that Respondent [petitioner] has failed to establish by clear and convincing evidence that he is fit for reinstatement and can be safely recommended to the public. [Commission's brief, p 13.]

IV

These arguments do not persuade us that the panel erred in ordering that Conlin be reinstated subject to conditions.

A

Misappropriation is indeed a serious offense and should result in severe sanctions meted out under the circumstances of the particular case, as the jurisprudence of our Court and this Board requires. Sanctions are imposed based on all of the facts presented in a particular case, and analogies to similar decisions have only limited value when the level of discipline is at issue. In Re Grimes, 414 Mich 483, 490; 326 NW2d 380 (1981); Grievance Administrator v Allen Meyers, 93-94-JC (Bd Op 6/16/95). The reinstatement rules reflect a counterpart to this principle: MCR 9.123(B)(7) requires that the fitness inquiry outlined therein be conducted while "taking into account the nature of the misconduct which led to the revocation or suspension."¹

¹ Following issuance of the panel's report the rule was amended to read:

(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

B

A centerpiece of the Commission's argument is that "[p]etitioner's current financial condition is dismal." This characterization is based in large part on the Commission's assertion that:

There is a 1.5 million dollar judgment against Petitioner arising out of the case, Edward F. and Doris Conlin v Colin [sic] McKenney and Philbrick, Washtenaw County Circuit Court, File No CA-92-411-NM. (T. 25). [Commission's brief, p 2.]

The referenced transcript page does not support that statement, and we are unable to find any support in the record for this assertion. The record shows that Conlin was questioned about a law suit brought against his former law firm and himself by his brothers. He stated that the matter had been settled on May 21, 1995, but that the judge had instructed the parties not to disclose the terms of the settlement. He testified that his malpractice insurance carrier retained defense counsel, and that the eventual settlement would be paid by the carrier.²

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; [The emphasized language was added by the Court's order of April 30, 1996, effective July 1, 1996.]

Although not dispositive in this case, the amendments further emphasize the importance of inquiring into the particular circumstances leading to the misconduct of each petitioner for reinstatement.

² Although not specifically required by subchapter 9.100, all review briefs filed with this Board should contain "a clear, concise, and chronological narrative" for its statement of facts. MCR 7.212(C)(6). "All material facts, both favorable and unfavorable, must be fairly stated without argument or bias." Id. This is important in any appellate proceeding, but has particular significance in reinstatement proceedings where the consequences are great and the adjudicators at all levels must review what should be an extensive factual record.

Although there are 169 pages of hearing transcript (in the reinstatement case alone), and numerous exhibits were admitted, including the deposition of Conlin's psychiatrist and the Commission's 331 page investigative report, the Commission's brief contains a one-page statement of facts with no citations to the record.

Further, the Commission's assertion that petitioner had a 1.5 million dollar judgment against him was an important evidentiary building block in support of the Commission's principal argument, i.e., that petitioner's financial picture is "dismal." Conlin's reply brief flatly denied that any such judgment had been entered against him. It goes without saying that a factual assertion in a brief should be supported by an accurate citation to the record. Also, we would expect

The panel determined that the satisfaction of certain debts will greatly improve Conlin's circumstances and is an appropriate condition to reinstatement. The Commission has not established that the panel erred in its judgment or in its calculations; thus, we affirm the panel's order requiring the resolution of certain creditor claims in this case.

The claim that Conlin's current financial condition proves that he "moves very quickly from project to project without adequate consideration and care or regard for the consequences," is also unconvincing. The purpose of these reinstatement proceedings is of course to judge Conlin's present fitness, among other things. The psychiatrist testified that Conlin's misconduct occurred at a time when he was in a manic phase, and that "he got involved in too many things too fast and didn't pay enough attention to the details." However, the Commission entirely disregards the psychiatrist's testimony as to Conlin's subsequent depressive phase which led him to seek the treatment that made him aware of his condition and brought about a significant change in his functioning.

The panel's report shows an awareness of the important judgments it was required to make. In concluding that Conlin has a proper understanding of and attitude toward the standards imposed on members of the bar, and that he will conduct himself in accordance with those standards, MCR 9.126(B)(6), the panel necessarily concluded that repetition of Conlin's misconduct is highly unlikely.

C

Addressing the Commission's primary argument, we decline to hold that reinstatement conditions designed to guard against repetition of misconduct, or to provide an early warning of the potential reemergence of the conditions surrounding the misconduct, demonstrate that a Conlin is not presently fit for reinstatement.

a claim of error to be acknowledged, explained or refuted in a supplemental brief or at the hearing. We cannot overemphasize the significance of a full yet concise statement of the material facts by both parties.

Conditions upon reinstatement are useful tools for achieving the aims of our discipline system. Before the court rules expressly provided that reinstatement orders may contain conditions, this Board, in imposing them, relied upon MCR 9.102(A)'s direction that the rules are to be liberally construed for the protection of the public, the courts, and the legal profession. See In Re Reinstatement of Basil W. Brown, 90-123-RP (Bd Op 7/8/92).

In 1994, the Michigan Supreme Court amended MCR 9.124(D) to provide:

A reinstatement order may grant reinstatement subject to conditions that are relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice.

This rule is consistent with the practice in other jurisdictions. For example, in In Re McConnell, 667 A2d 94 (DC App, 1995), the court reinstated an attorney who had been disbarred for several instances of misappropriation and neglect. The order of reinstatement was subject to several conditions, including regular attendance at AA meetings, monthly reporting to a lawyer counseling program (with directions to the program to report "any concerns"), and that McConnell be required to submit to random drug tests for a period of five years. McConnell had relapsed into substance abuse after a long period of abstinence, but in the years prior to petitioning for reinstatement made substantial strides in therapy toward resolving his underlying problems. The conditions were imposed to address what the hearing committee saw as "the hard question" presented by the relapse. The conditions in this case serve similarly in some respects.

The panel conditioned Conlin's reinstatement upon: (1) sale of the Lamp Post Motel and settlement of certain debts from the sale proceeds; (2) continued psychiatric treatment; (3) appointment of

a practice monitor who shall report quarterly to the panel³; and, (4) designation of the practice monitor as a required signatory on any escrow or trust account established by Conlin. The order also provides that the latter three conditions shall continue in effect for the period of one year from the time the debts are settled (and costs and dues are paid), at which point the panel shall review the matter "taking into account all appropriate factors."

The Commission argues that the conditions are "meaningless" and show that the panel "clearly lacks confidence in Petitioner's ability to be entrusted with client funds." In our view, the Commission misunderstands the basis for the panel's report.

The conditions do not necessarily mean that Conlin cannot be trusted. Rather, it appears that the panel found clear and convincing proof that Conlin presently has sufficient insight and determination to avoid a repetition of the misconduct. But, it also appears that the panel wished to guard against recurrence of the circumstances in which Conlin found himself in 1989. In an exercise of caution, the panel added certain preventative measures to Conlin's own plans for debt reduction and continued medical treatment.

As the record demonstrates, debt liquidation is a long term and very fluid process. If the workout has not been completed in one year, the panel may decide to impose additional (or different)

³ The panel's report and order state that the report shall be made to "the Board." We interpret this, and other such references in this matter, as meaning Washtenaw County Hearing Panel #4 of the Attorney Discipline Board. This is most consistent with the obvious intent of the panel to retain jurisdiction to ensure compliance with the conditions. For example, in one portion of the report, the panel states: "Accordingly, at such time as the Petitioner provides the Hearing Panel with an appropriate showing that a closing has occurred, and that the closing proceeds have been disbursed to the above [creditors], he may be reinstated to the practice of law." When Conlin approaches the panel with evidence of a closing, the panel will have to determine, in accordance with its order, whether the initial debt liquidation condition has been satisfied by the transaction. Unlike the ministerial assessment that a condition requiring payment of dues or costs has been satisfied, the determination that this condition has been fulfilled may call for factfinding -- which is the function of the panels and not of this Board. See, e.g., In Re Reinstatement of David Robb, 90-16-RP (Bd Op 6/14/91); MCR 9.111(B)(2); and compare MCR 9.118(C)(2). Also, the panel's decision to retain jurisdiction to supervise and revisit the conditions was wise in that the panel is in the best position to determine initially whether the petitioner's efforts amount to compliance with its conditions, and whether further conditions are required.

conditions. Or, it may decide that sufficient progress has been made to warrant dispensing with some or all of the conditions. Also, and perhaps most important, the panel can assess Conlin's treatment progress at that time.

We do not believe the panel compromised the clear and convincing standard applicable to reinstatement matters. Nor do we construe the panel's report as a finding that Conlin would misappropriate unless monitored. Rather, our review confirms that the conditions were imposed to provide an extra measure of protection to the public, the courts, and the profession.

D

The Commission also perceives certain problems in the implementation of the condition regarding management of any trust or escrow account maintained by Conlin. We are not persuaded that these objections are well-taken. Indeed, such conditions were found practicable by the panel and parties in Grievance Administrator v Wayne Woodford, Nos 94-42-GA; 94-65-FA (Panel Order 9/26/94) (consent discipline; trust account handled by third party in first year following reinstatement, jointly in second year, alone in third, with monthly reports; treatment for depression until medically released, followed by annual check ups at direction of Commission).

Further, the State Bar of Michigan Ethics Opinion, RI-107, relied upon by the Commission is distinguishable from these circumstances. There, several office-sharing attorneys in private practice sought an opinion on the propriety of sharing an "IOLTA Account." The Standing Committee on Professional and Judicial Ethics opined that it would be improper to share such an account for several reasons.

A practice monitor appointed by a disciplinary agency for a specified period is in a different position than independent attorneys seeking to pool accounts of potentially adverse clients indefinitely. The discipline and regulation of the bar requires one independent attorney to monitor the professional activities of another in various circumstances which arise with increasing

frequency. Concerns regarding disclosure of confidential information and conflicts of interest are present and must be addressed in any monitoring situation -- even if the monitor has no check-signing duties. We are presented with no concrete facts suggesting the existence of such problems in this case, and we assume the panel will require its monitor to conduct a conflicts check and otherwise be sensitive to these matters.

For all of the foregoing reasons, the panel's conditional order of reinstatement is affirmed.

Board Members George E. Bushnell, Jr., Marie Farrell-Donaldson, Elaine Fieldman, Barbara B. Gattorn, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer and Kenneth L. Lewis concur.