

IN RE: THOMAS E. FINNERTY

NO. BD-2008-055

S.J.C. Judgment Reinstatement entered by Justice Cypher on May 1, 2018.¹

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2008-055

IN RE: Thomas E. Finnerty

MEMORANDUM OF DECISION

Introduction

This matter came before the Court, Cypher, J., on a Petition for Reinstatement pursuant to S.J.C. Rule 4:01, § 18(5). Following a hearing, the Board of Bar Overseers Hearing Panel (Panel) recommended, in a thoughtful and well-reasoned written report, that the petitioner, Thomas E. Finnerty (Finnerty), be reinstated. Upon review of the same evidence, the Board of Bar Overseers (Board) disagreed, and voted to recommend denial of Finnerty's petition based on a perceived lack of moral fitness and incompatibility with the public interest. Having considered the contrasting positions of the Panel and the Board, and upon its own review of the Panel's factual findings and legal conclusions, the Court agrees with the Panel that Finnerty has satisfied the requirements of S.J.C. Rule 4:01, § 18(5). Accordingly, a judgment reinstating Thomas E. Finnerty as a member of the bar of the Commonwealth shall enter.

Facts¹

Finnerty was admitted to the Massachusetts bar on November 17, 1960. Panel Report at 2. In May, 2008, Finnerty was disbarred in Massachusetts for instructing his client to lie to a federal grand jury a decade before.² Id. at 2. In 1998, the grand jury was investigating whether anyone had helped James "Whitey" Bulger avoid law enforcement apprehension. Id. Finnerty's client revealed that Whitey Bulger had called the client's home in 1996 and spoke with Whitey's brother, John Bulger. Id. at 2-3. John Bulger appeared in front of the grand jury before Finnerty's client, however, and testified that he had had no contact with his fugitive brother. Id. In order to spare John Bulger from potential perjury prosecution, Finnerty - a long-time family friend of the Bulgers -- instructed his client to testify that while he had received a call from Whitey Bulger, no one else was present. Id.

Later, in 2003, the client approached Finnerty, and Finnerty instructed the client to hire a lawyer and tell the truth to the U.S. Attorney about the false testimony. Id. at 4.

¹ The Court draws the facts from the Panel because "the [Panel], as the fact finder, heard the testimony, observed the witnesses (including the petitioner), and thoroughly considered the evidence." Matter of Weiss, 474 Mass. 1001, 1002 (2016).

² Previously, in 1994, Finnerty was suspended from the practice of law for six months for stipulating in his own divorce to an undervaluation of his law practice. See Matter of Finnerty, 418 Mass. 821 (1994).

Finnerty instructed his client to do so in spite of the impact it would have on Finnerty and his career. Id. Still, Finnerty did not self-report his misconduct; rather, he began making preparations for disbarment. Id. The matter was eventually reported to bar counsel, and Finnerty was disbarred in 2008.³ Id.

In April, 2017, Finnerty filed a petition for reinstatement.— Id. at 1. The Panel held a public hearing in June, 2017. Id. Thirteen exhibits were admitted, Finnerty and six other witnesses testified on his behalf, and Finnerty submitted seventeen letters written in support of his reinstatement;⁴ bar counsel called no witnesses. Id.

In July, 2017, the Panel issued a fifteen-page written report in which it recommended Finnerty's reinstatement. The report reviews Finnerty's disciplinary background, including the events giving rise to his 2008 disbarment, as well as Finnerty's earlier suspension for misrepresenting his finances during his divorce, see Matter of Finnerty, 418 Mass. 821 (1994). Id. at 2-3. In examining Finnerty's "moral qualifications," S.J.C.

³ Finnerty was found have violated Mass. R. Prof. C. 3.4(b) (a lawyer shall not "assist a witness to testify falsely"), as well as Mass. R. Prof. C. 8.4(c), (d), and (h) (enumerating grounds for professional misconduct).

⁴ Finnerty's witnesses included Robert Jubinville, a member of the Governor's Council, and Paul Mahoney, a retired District Court judge.

Rule 4:01, § 18(5), the report discusses Finnerty's testimony before the Panel, id. at 4 ("The petitioner gave a fulsome and detailed description of the misconduct at issue here, going beyond the report in the single justice's summary"), describes the charitable nature of Finnerty's activities since he was disbarred (for example, he has been an active hospice volunteer for seven years now), and summarizes the witnesses' testimony and supportive letters. Id. at 3-9.

Pertinent to this Court's disposition, the report also highlights certain of the Panel's areas of concern when evaluating Finnerty's "moral qualifications," which the Court discusses further below. Id. at 9-12. First, the Panel took issue with Finnerty's description of his former associate as having taken a "sabbatical," when in fact the associate had been suspended from legal practice for three years. Id. at 12. In addition, the Panel devoted a section of its report to Finnerty's mischaracterization of certain payments he received from his son following disbarment, which Finnerty was required to disclose as part of the reinstatement questionnaire. Id. at 9-11.

Ultimately the Panel recommended that Finnerty be reinstated. Id. at 15. In concluding that Finnerty possesses the requisite "moral qualifications" to practice law, the Panel balanced the above areas of concern with Finnerty's otherwise

strong demonstration that he is reformed (the Panel mentioned that it found Finnerty's hospice volunteer work particularly compelling). Id. at 12. The Panel also concluded that Finnerty has the "competency and learning in law required for admission to practice law in this Commonwealth," and that Finnerty's reinstatement "will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest." Id. at 12-15, citing S.J.C. Rule 4:01, § 18(5).

In September, 2017, the Board voted to deny Finnerty's reinstatement. Bd. Bar Overseers Vote (Sept. 11, 2017). The Board based its rejection of Finnerty's petition on what the Board perceived as Finnerty's "continuing dishonesty." Id. Specifically, the Board focused on two of the areas of concern expressed in the Panel's written report: (1) Finnerty's "inaccurate designation in his petition for reinstatement of certain goodwill payments from his son as 'rent,' and [(2)] his mischaracterization at the hearing of his former colleague as on a 'sabbatical' when he had been suspended for dishonesty." Id. The Board added that "the public's confidence in and perception of the legal practice would be diminished by [Finnerty's] reinstatement." Id. Finnerty subsequently filed his petition for reinstatement with this Court.

Discussion

A petitioner for reinstatement to the bar bears the burden of demonstrating that he has satisfied the requirements set forth in S.J.C. Rule 4:01, § 18(5), namely, that he possesses "the moral qualifications, competency and learning in the law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public." S.J.C. Rule 4:01, § 18(5), as appearing in 453 Mass. 1315 (2009). While the findings and recommendations of the Board are entitled to deference, "the ultimate duty of decision rests with this court." In re Shaughnessy, 456 Mass. 1021, 2022 (2010) (rescript), quoting Matter of Gordon, 385 Mass. 48, 58 (1982).⁵

With respect to Finnerty's "moral qualifications," S.J.C. Rule 4:01, § 18(5), he must demonstrate that he is sufficiently rehabilitated and possesses the requisite moral qualifications for readmission to the Massachusetts bar. Matter of Ellis, 457 Mass. 413, 414 (2010). Finnerty testified that he has

⁵ "The factors to be considered in reinstatement hearings are as follows: '(1) the nature of the original offense for which the petitioner was disbarred, (2) the petitioner's character, maturity, and experience at the time of his disbarment, (3) the petitioner's occupations and conduct in the time since his disbarment, (4) that time elapsed since the disbarment, and (5) the petitioner's present competence in legal skills.'" Matter of Prager, 422 Mass. 86, 92 (1996), quoting Matter of Hiss, 368 Mass. 447, 460 (1975).

experienced a personal "180" since his disbarment, beginning around the time of his ex-wife's cancer diagnosis. Panel Report at 5 (noting that Finnerty testified "credibly" about his turnaround). After her passing, Finnerty began volunteering at hospice, and several witnesses testified to the caring and compassionate attitude that he has developed as a result. See, e.g., Tr. 19-20 (Mahoney). Finnerty explained that this work has given his life a religious overtone that has "profoundly" affected him. Panel Report at 6; Tr. 101-102. Finnerty's volunteer supervisor described him as "a person of compassion and intelligence" who has been "consistently . . . honest, dependable, and empathetic in his relationships not only with patients but with his colleagues[.]" Ex. 5 (70). He has been volunteering for over 7 years now, and according to his supervisor, his service to the hospice center's families and patients has been "exemplary." Ex. 5 (70).⁶

In addition to his hospice work, Finnerty has been helping Christopher Pina, an incarcerated individual, seek parole. Panel Report at 7. Finnerty represented Pina in a pro bono capacity before being disbarred, *id.* at 5, and he intends to continue doing so if his petition is granted. Tr. 161. In the meantime, Finnerty has maintained his relationship with Pina and

⁶ The Court, like the Panel, finds Finnerty's hospice volunteer work particularly commendable and compelling.

continues to visit Pina every other month. Tr. 26. Finnerty also intends to perform pro bono work with the Gavin Foundation. Tr. 177. The Gavin Foundation's mission is to assist individuals with addiction problems. Tr. 177.

While the Panel concluded on these facts that Finnerty possesses the requisite "moral qualifications" for the practice of law, the Board disagreed. First, the Board took issue with Finnerty's characterization at the hearing of the suspension of one of his law associates, Mr. Foley, as a "sabbatical." Bd. Bar Overseers Vote (Sept. 11, 2017). While being questioned about cases that Finnerty had worked on before being disbarred in 2008, Finnerty discussed the other attorneys in his office. Tr. 117-118. Finnerty stated that "[Mr. Foley], was on sabbatical, let me put it that way, between 2003 and 2006....[D]uring the sabbatical as I would say, I did ninety-nine percent of [the work], maybe one hundred percent." Tr. 118. Asked whether he knew that "Mr. Foley, was suspended," Finnerty said yes, "[h]e was in 2003." Tr. 164. Asked later to clarify his use of the term "sabbatical," Finnerty stated, "I called it a sabbatical....But it wasn't a sabbatical. [Mr. Foley] was suspended for three years." Tr. 179. The Board concluded that Finnerty was attempting to mislead the Panel, and that this was evidence of Finnerty's "continuing dishonesty." Tr. 179; Bd. Bar Overseers Vote (Sept. 11, 2017).

Examining Finnerty's use of the term "sabbatical" in its proper context, the Court is not persuaded that this is cause for questioning Finnerty's rehabilitation or moral qualifications. Finnerty qualified the phrase "sabbatical" by adding "let me put it that way," and "as I would say." Plainly, Finnerty was attempting to do nothing more than avoid an insult to his law associate, while at the same time acknowledging to the Panel that Foley's time away from practice was not a "sabbatical" in any legitimate sense. Indeed, Finnerty may well have presumed that the members of the Panel were already aware of the details of Foley's suspension, given that they represent the body that imposed Foley's sanction to begin with.

The Board also took issue with Finnerty's characterization of certain payments he received from his son as "rent." Bd. Bar Overseers Vote (Sept. 11, 2017). When applying for reinstatement, a petitioner must complete a questionnaire, which includes questions concerning the petitioner's financial situation since disbarment. Panel Report at 9. As part of the questionnaire, a petitioner must disclose any payments he received in exchange for rent. Asked about the payments he reported as "rent," Finnerty explained that they were in fact a part of his retirement, and that this approach was based on his accountant's recommendation. Panel Report at 10; Tr. 108. When pressed, Finnerty elaborated that the payments were not "rent"

at all, but rather, a part of his retirement plan, and represented compensation from his son for the "goodwill of the firm that [Finnerty] had generated over the years before his departure in 2008." Panel Report at 10; Tr. 137, 139-141.

Finnerty also expressed his opinion that because these payments were part of his retirement plan, they did not trigger any duty under Mass. R. Prof. C. 1.17(c) to notify his clients about a sale of his law firm. Tr. at 136.

In its written report, the Panel deemed this characterization "misleading" and "unsavory at best," and expressed concern that describing the payments as rent "may also have undermine[d] the tax laws by providing an offset where none should have been available." Panel Report at 10. At the same time, the Panel stated that this issue did not outweigh Finnerty's "moral qualifications," and concluded that Finnerty has shown that he is reformed. Id. at 12. The Board again disagreed, deeming the mischaracterization another example of Finnerty's "continuing dishonesty" that warranted denial of his petition. Bd. Bar Overseers Vote (Sept. 11, 2017).

The Court agrees that Finnerty's characterization of these payments as "rent" when they so clearly were not warrants pause. Finnerty repeatedly stated that he deemed these payments "rent" based on the advice of his accountant. Panel Report at 10. It is unclear why Finnerty felt the need to represent them as such

on a reinstatement questionnaire; the questionnaire is not a tax return or the like, and bar discipline proceedings are certainly not the occasion for pursuing tax write-offs. Despite the legitimate concern that Finnerty's categorization may undermine tax laws, however, the Panel found it lacked sufficient information about whether there were tax code violations. Panel Report at 10. The Court defers to the Panel's finding.

Finnerty also described the payments as part of his retirement and in exchange for the goodwill of his firm; accordingly, they may represent the sale of his firm, triggering Mass. R. Prof. C. 1.17(c)'s requirement that the seller of a firm notify his clients of the sale. Because, as the Panel points out, Finnerty has not retired "in any conventional sense" -- he practiced until he was disbarred, and intends to resume practicing if his petition is granted -- the Court is not persuaded by Finnerty's argument that the payments are exempted from the notice requirement under comment 14 to the rule, which provides that "retirement plan and similar arrangements . . . do not constitute a sale . . . governed by this Rule." Still, the Panel concluded that Finnerty "has fulfilled in substance rule 1.17's notice requirement." Panel Report at 11 n. 4. Again, the Court defers to the Panel's finding.

Although Finnerty's mischaracterization is certainly a strike against granting his petition, it is not, in this Court's

view, a fatal blow. Based on Finnerty's own testimony and that of his supporters, the evidence of Finnerty's moral rehabilitation following his disbarment, and the Court's independent consideration of the issues that troubled the Board, the Court agrees with the Panel that Finnerty has demonstrated adequate rehabilitation and moral qualification for reinstatement.

Additionally, the Panel concluded -- and the Board did not oppose -- that Finnerty possesses the "competency and learning in the law required for admission to practice law in this Commonwealth." S.J.C. Rule 4:01, § 18(5). Panel Report at 12-14. Finnerty has continued to stay abreast of pertinent state and federal judicial opinions, and has attended webinars on a range of legal topics. Id. at 13. Finnerty also passed the MPRE with a high score. Id.

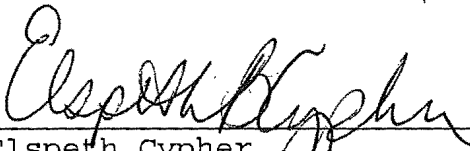
Finally, the Court concludes that the public interest prong of S.J.C. Rule 4:01, § 18(5) also is met. Despite the gravity of the events underlying Finnerty's disbarment -- and the seriousness of the charges that prompted that sanction -- Finnerty appears to have come to terms with what led him to this juncture in his professional life. In the Court's opinion, he has demonstrated an earnest and satisfactory commitment to making amends for his conduct. Upon reinstatement, the Court fully expects that Finnerty will continue his meaningful

volunteer and pro bono work, and will conduct himself, for the remainder of his professional life, in a manner becoming of a member of the Massachusetts bar.

Conclusion

Having found the requirements of S.J.C. Rule 4:01, § 18(5) satisfied, and mindful that a "fundamental precept of our system is that persons can be rehabilitated," Matter of Ellis, 457 Mass. 413, 414 (2010), the Court grants Thomas E. Finnerty reinstatement to the bar of the Commonwealth.

By the Court,


Elspeth Cypher
Associate Justice

Entered: May 1, 2018