

Summary of Opinion. *People v. Berkley*, No. 99PDJ073, 12/7/1999. Attorney Regulation. The Presiding Disciplinary Judge and Hearing Board reinstated Petitioner, Martin J. Berkley to the practice of law effective December 28, 1999.

SUPREME COURT, STATE OF COLORADO
CASE NO.: **99PDJ073**
ORIGINAL PROCEEDING IN DISCIPLINE
BEFORE THE PRESIDING DISCIPLINARY JUDGE

OPINION AND ORDER OF REINSTATEMENT

MARTIN J. BERKLEY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Opinion by Presiding Disciplinary Judge Roger L. Keithley and Hearing Board members Melissa M. Esquibel and J.D. Snodgrass.

This reinstatement proceeding was held on October 21, 1999, before the Presiding Disciplinary Judge ("PDJ") and two Hearing Board members, J.D. Snodgrass and Melissa M. Esquibel, both members of the bar, to determine whether Martin J. Berkley ("Berkley") is qualified to be reinstated to the practice of law. George S. Meyer represented respondent, and James C. Coyle, Assistant Attorney Regulation Counsel, represented the People of the State of Colorado (the "People"). The following witnesses testified on behalf of Berkley: Allen D. Butler, Russell Brown, and Martin J. Berkley. Berkley submitted Exhibits A through I, and Exhibits K through M, which were admitted into evidence.

The PDJ and Hearing Board considered the testimony and exhibits admitted, assessed the credibility of the witnesses, and made the following findings of fact which were established by clear and convincing evidence:

I. FINDINGS OF FACT

Martin J. Berkley was suspended from the practice of law for a period of one year and one day effective May 1, 1996, in *People v. Berkley*, 914 P.2d 338 (Colo. 1996). Berkley's 1996 suspension arose from his neglect of client matters and the resulting prejudice to the administration of justice involving several clients. Although his mandatory suspension from the practice of law expired in May 1997, Berkley did not seek reinstatement until May 20, 1999, when he filed a Petition for Reinstatement. On June 2, 1999, the People filed a response objecting to respondent's reinstatement.¹

The Supreme Court's 1996 suspension order required Berkley to pay restitution as a condition of reinstatement to one former client in the amount of \$400 plus statutory interest, and to pay costs of that disciplinary proceeding in the amount of \$104.75. Although Berkley has paid the restitution, he did not pay the assessed costs within thirty days of the order.

Before his suspension in 1996, Berkley became disenchanted with the law and decided to pursue other endeavors.² Disciplinary Counsel sent correspondence to him advising that he must pay the costs assessment within thirty days of the order and provide notice of his suspension to every jurisdiction in which he had been admitted to practice in accordance with C.R.C.P. 241.21. Berkley, having then decided not to reenter the field of law, did not read the letter, did not timely pay the costs assessment, and did not file the required affidavit with the Supreme Court, nor did he provide notice of his suspension to every jurisdiction in which he had been admitted to practice.

Less than a year after he decided to pursue a non-law career path, Berkley realized that his decision was not well-considered. In late 1996 or early 1997, Berkley obtained a position as a paralegal with Allen Butler, an Arizona lawyer specializing in bankruptcy. By April 1997, Berkley rediscovered his enthusiasm for the law and filed a motion with the Supreme Court seeking additional time within which to file the affidavit required by C.R.C.P. 241.21. The proposed affidavit was attached to the motion. The People objected to allowing additional time and by order dated May 6, 1997, the Supreme Court denied Berkley's request for additional time.

While working as a paralegal for Butler, Berkley was exposed to a well-organized law office which incorporated into its routine law office management several checks and balances on docketing, client communications and scheduling. Under Butler's supervision, Berkley actively participated in the scheduling and docketing of trial deadlines and dates, and the timely communication with clients. Although Berkley did not have direct responsibility for all docketing in Butler's organization, he became capable of

¹ At trial, the People withdrew their objection to reinstatement and requested that conditions be imposed upon Berkley's reinstatement.

² In August 1994, Berkley permanently relocated to Arizona and thereafter ceased practicing law.

maintaining the docketing system and has maintained it. Through the training provided to him under Butler's guidance, Berkley now understands the importance of proper calendaring and the maintenance of reliable and effective communication with clients. Berkley has adopted the checks and balances in routine law office management utilized by Butler to assist in the prevention of client neglect.

Berkley has attended numerous bankruptcy and bankruptcy- related seminars conducted under the auspices of the bankruptcy trustee in Arizona and has improved his professional competence. However, he has not completed continuing legal education in areas outside of the practice of bankruptcy law.

Berkley is involved with his family and has participated in his children's school activities, parent-teacher conferences and fund-raising events. He is active in his church and is well-settled in his community. Berkley intends, if reinstated to the bar of this state, to sit for the Arizona bar examination, and if successful, practice law in the state of Arizona with Butler. Berkley does not presently intend to resume an active law practice in the state of Colorado. Rather, Berkley seeks reinstatement to the bar of Colorado because he may not sit for the Arizona bar until he is reinstated in Colorado.

Berkley recognizes the deficiencies that existed in his previous practice, specifically the lack of organization that ultimately led to neglect of client matters, and has learned and intends to adopt procedures designed and proven to assist in the prevention of client neglect. Berkley experienced considerable difficulty in initially accepting the fact of his misconduct, however, he expressed genuine remorse for the injury his neglect inflicted upon his former clients.

In his work as a paralegal with Butler, Berkley has been meticulously careful to work within the limits of his paralegal responsibilities. His work as a paralegal has enhanced his proficiency in bankruptcy law. Berkley's experience with the United States Bankruptcy Court in Arizona confirms that he is trustworthy, has an admirable work ethic, consistently meets deadlines, is well-prepared, regularly communicates with clients, and engages in extensive follow-up with clients. Berkley demonstrates the qualities of perseverance, honesty, integrity and truthfulness that the legal profession holds in esteem and requires of its members.

II. CONCLUSIONS OF LAW

Martin J. Berkley is subject to the jurisdiction of this court pursuant to C.R.C.P. 251.1(b).

Consideration of the issue of rehabilitation requires the PDJ and Hearing Board to consider numerous factors bearing on the petitioner's state of mind and professional ability, including character, conduct since the imposition of the original discipline, professional competence, candor and sincerity, present business pursuits, personal and community service, and the petitioner's recognition of the seriousness of his previous misconduct. *People v Klein*, 756 P. 2d 1013, 1016 (Colo. 1988).

Under the factors set forth in *Klein*, 756 P.2d at 1016, the PDJ and Hearing Board found that Berkley established by clear and convincing evidence that he is rehabilitated, possesses the requisite ability and professional competence to practice law, and has conducted himself in a manner which comports with the requirements of the legal profession during the period of his suspension. Berkley was candid and sincere during the reinstatement proceedings.

The evidence presented established that Berkley not only fully comprehends the nature and extent of his prior misconduct, but has actively pursued proven methods to minimize the opportunity for such misconduct to recur. Moreover, he has implemented those methods in his daily routine. Berkley's involvement with his community, his family, and his interim paralegal responsibilities all reflect that he has conducted himself in a manner consistent with the requirements of the legal profession during the time of his suspension. Although Berkley established by the requisite proof that he possesses the professional competence to practice law as required by *Klein* and C.R.C.P. 251.29, the PDJ and Hearing Board members were concerned with the limited focus on bankruptcy law and procedure in continuing legal education courses he took during the period of suspension. Notwithstanding the limited scope of his continuing legal education courses, Berkley has satisfied the requirements of *Klein* and is fit to practice law in the State of Colorado.

Satisfaction of the *Klein* requirements, however, does not conclude our analysis. The Petition for Reinstatement and the evidence presented at the hearing disclosed that Berkley ultimately paid the costs assessment, attempted to submit the affidavit required by C.R.C.P. 241.21 and eventually notified other jurisdictions in which he had been admitted to practice. He did not, however, do so in a timely fashion.

C.R.C.P. 251.29(b) provides in part:

An attorney who has been suspended for a period longer than one year must file a petition with the Presiding Disciplinary Judge for reinstatement and must prove by clear and convincing evidence that the attorney has been rehabilitated, has complied with all applicable disciplinary orders and with all provisions of this chapter, and is fit to practice law (emphasis added).

C.R.C.P. 251.29(c)(4) requires that the Petition for Reinstatement set forth:

Evidence of compliance with all applicable disciplinary orders and with all provisions of this Chapter regarding actions required of suspended attorneys (emphasis added).

The question presented is whether Berkley's lack of timeliness in complying with the Supreme Court's disciplinary order and the rule requiring submission of the affidavit within ten (10) days of the effective date of the order of suspension rises to the level of non-compliance envisioned by C.R.C.P. 251.29 to preclude his reinstatement to the bar. C.R.C.P. 251 *et seq.* does not provide definitions for the terms "complied" or "compliance."

"Compliance" involves the act of conforming to formal or official requirements or norms, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 465 (3d ed. 1961); *see also* BLACK'S LAW DICTIONARY 258 (5th ed. 1979), and without further modification, connotes an element of degree. *Woodsmall v. Regional Transportation District*, 800 P.2d 63, 67 (Colo. 1990). Compliance, for example, may be absolute or strict, on the one hand, or somewhat less than absolute but nonetheless substantial, on the other. *Id.* In determining whether a particular . . . requirement has been satisfied, [the Supreme Court] has imposed a degree of compliance consistent with the objective sought to be achieved by the requirement under consideration. *Id.* (citations omitted).

Since the *Woodsmall* decision, the scope of this definition has been clarified in several subsequent decisions. *See Brock v. Nyland*, 955 P.2d 1037, 1041 (Colo. 1998); *Regional Transportation District v. Lopez*, 916 P.2d 1187, 1190 (Colo. 1996), *East Lakewood Sanitation District v. District Court*, 842 P.2d 233, 236 (Colo. 1992). These decisions suggest that when jurisdiction is at issue, the definition of compliance which must be used is one of absolute compliance. When jurisdiction is not at issue, such as in the *Woodsmall* case, where the content of a statutorily required notice was challenged, the "degree of compliance required must be consistent with the objective to be achieved by the requirement under consideration." 800 P.2d at 67. Compliance with

C.R.C.P. 241.21 was not a jurisdictional provision for attorney reinstatement proceedings. Jurisdiction over attorney reinstatement proceedings is conferred by C.R.C.P. 251.1 and C.R.C.P. 251.29. The Petition for Reinstatement at issue here was filed in accordance with C.R.C.P. 251.29 and jurisdiction is not in question. Consequently, whether Berkley is in “compliance” with the Supreme Court’s order of suspension and the provisions of C.R.C.P. 241.21 may be tested under a substantial compliance standard.³

An examination of C.R.C.P. 241.21 reveals that its primary objective was the protection of the public, the protection of the disciplined attorney’s clients, and the protection of opposing parties in pending litigation. This objective was met by the disciplined attorney giving written notice of his suspension to clients and opposing parties in pending litigation. Further protection was provided by the requirement that the disciplined attorney submit an affidavit to the Supreme Court that he had, in fact, provided the required notices and informed all jurisdictions in which he had been admitted to practice.

In this case, although Berkley did not practice law in either jurisdiction subsequent to his suspension, he failed to notify either the United States District Court for the District of Colorado or the United States District Court for the District of Arizona of his suspension. The evidence established that Berkley was not aware that these courts were separate jurisdictions for purposes of C.R.C.P. 241.21(d)(2) notification. Prior to filing his Petition for Reinstatement, Berkley notified both jurisdictions of his 1996 suspension.

At the time of Berkley’s suspension in 1996, he had no clients and he was not counsel to any party involved in litigation. Indeed, Berkley had stopped practicing law long before the Supreme Court entered its 1996 suspension order. Although Berkley should have filed an affidavit notifying the Supreme Court that he had no clients and was not involved in any pending litigation, under the facts of this case, no enhanced protection to the public, existing clients or opposing parties in pending litigation would have been provided by Berkley’s timely compliance with the provisions of C.R.C.P. 241.21.

Berkley also failed to pay the costs assessment in accordance with the 1996 order of suspension. The un rebutted evidence introduced at the hearing established that Berkley did not have the funds available to him at the time the costs assessment became due. Prior to the submission of the Petition for Reinstatement in this proceeding, however, Berkley had paid the costs assessment in full.

³ At the time Berkley sought additional time to file his C.R.C.P. 241.21 affidavit, the People opposed his request on the ground that “the respondent provide[d] no justification for why he did not file this affidavit in a timely fashion. This issue is relevant to the reinstatement proceeding.” The denial of Berkley’s request in light of the People’s argument suggests the reinstatement hearing board should consider the lack of timeliness as a factor to be considered and not a permanent bar to reinstatement.

Although his failure to timely give notice as required by the rule of procedure cannot and should not be overlooked and, in another case, under differing facts, might justify denial of the attorney's Petition for Reinstatement, Berkley's compliance with the provisions of C.R.C.P. 241.21, although late, is sufficient to satisfy the requirements of C.R.C.P. 251.29 allowing reinstatement.

The PDJ and Hearing Board are required to protect the public interest in allowing Berkley to resume the practice of law. In accordance with that responsibility, the PDJ and Hearing Board impose the following express conditions upon Berkley's resumption of the practice of law:

1. Berkley is required to complete thirty (30) hours of Continuing Legal Education within twelve (12) months of the date of this Order in areas of the law unrelated to bankruptcy. The thirty hours of Continuing Legal Education requirement is in addition to the requirements set forth in C.R.C.P. 260.2.
2. If Berkley returns to the practice of law within the State of Colorado in the next two (2) years:
 - a. Berkley is required to perform such practice within a legal environment where he can benefit from the free exchange of ideas and constructive feedback from other practicing attorneys. This environment must include adequate support staff to ensure Berkley's adherence to the well-organized practice of law, and;
 - b. Berkley must retain a practice monitor. Such monitor may work with him in the legal environment described above. Such monitor must have at least five (5) years' experience practicing law in Colorado. Within thirty (30) days of the placement of a practice monitor, Berkley shall inform the Office of Attorney Regulation Counsel of the identity, address and phone number of the practice monitor. The practice monitor shall submit a written report to the Office of Attorney Regulation Counsel on a quarterly basis disclosing the nature and frequency of the monitoring, Berkley's compliance with recommendations of the monitor and any areas of difficulty which may be experienced. Monitoring shall continue for a period of twelve months.

ORDER OF REINSTATEMENT

It is therefore ORDERED:

Upon the conditions set forth herein, MARTIN J. BERKLEY, attorney registration number 05065, is REINSTATED TO THE PRACTICE OF LAW pursuant to C.R.C.P. 251.29(b). The reinstatement shall be effective twenty-one days from the date of this Order.

DATED THIS 7th DAY OF DECEMBER, 1999.

(SIGNED)

ROGER L. KEITHLEY
PRESIDING DISCIPLINARY JUDGE

(SIGNED)

MELISSA M. ESQUIBEL
HEARING BOARD MEMBER

(SIGNED)

J.D. SNODGRASS
HEARING BOARD MEMBER