

FILED
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Garyl Hollinger
Acting Clerk

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA**

IN RE: ANDREW J. OSTROWSKI : No. 10-MC-64

**PETITIONER'S POST-HEARING BRIEF IN SUPPORT OF MOTION TO
REOPEN/REINSTATE**

I. INTRODUCTION

A hearing in the referenced matter was held on August 27, 2013. This is Petitioner's post-hearing brief, as directed to be filed during said hearing.

Preliminarily, Petitioner raised only the reopening of his prior discipline, mitigation of his punishment, and reinstatement to the roll of attorneys based upon the medical evidence he now has, as the basis for his motion, and limited his evidence in chief at the hearing to those matters. The special disciplinary counsel, Mr. Gilroy, raised a host of matters at the hearing as reasons to oppose Petitioner's reinstatement. Mr. Gilroy simply introduced letters that Petitioner had written, and videos he posted on youtube, and did not make any articulation or offer any additional evidence to demonstrate how that evidence met any standard sufficient to keep the petitioner from returning to the roll of attorneys in the Middle District.

Specifically, subject to the motion for declaratory relief to be filed by Petitioner through Mr. Bailey, Mr. Gilroy wholly failed to offer any evidence to meet the standard of Rule 8.2 that Petitioner made any statements that were false, or were in reckless disregard of their truth or falsity. Petitioner, accordingly, only makes general reference to this evidence in this brief. Presuming that Mr. Gilroy nevertheless intends to articulate and argue how specifically the things that Petitioner has said will meet any applicable standard, Petitioner reserves the right to

file a reply to the brief that Mr. Gilroy files in order to fully and completely address these matters.

In addition, in a separate filing, Petitioner, through counsel, will be filing a motion for declaratory relief seeking to have the rules at issue in this proceeding, M.D.L.R. 83.26.3 and Pa. R.P.C. 8.2, as adopted by the Middle District per L.R. 83.26.2, declared unconstitutional, both as written, and specifically as applied to these proceedings. At or around the close of the August 27, 2013 hearing, the Court referred to the filing of the Petitioner as in the nature of an amicus curiae motion and brief, N.T. August 27, 2013, pp. 166 and 169. Petitioner notes, however, and intended to correct the record at the conclusion of the proceedings, that this is not a proper characterization. Mr. Bailey entered a limited appearance for the Petitioner for the express purpose of filing the referenced motion, and it is a fully counseled motion to be filed by Mr. Bailey as counsel for the Petitioner in this proceeding as if Petitioner filed it himself. To be clear, it is not an amicus curiae filing, but is a filing of Mr. Bailey as attorney for the Petitioner.

II. ISSUE

Should Petitioner's prior discipline be reopened, his prior penalty mitigated, and Petitioner returned to the active roll of attorneys in the Middle District?

Suggested Answer Yes

III. ARGUMENT

Petitioner's motion is based primarily upon the evidence of medical mistreatment that both caused the Petitioner to experience the difficulties that led to his discipline, and deprived him of the opportunity to present evidence in mitigation of his February 2010 discipline. Petitioner's motion, with attached sworn statement, requested that this Court open the prior discipline, consider the evidence in mitigation offered by the Petitioner, and return him to the roll

of active attorneys. In consideration of the motion, a hearing was scheduled, and Petitioner put on the evidence referenced in his motion, all of which was un-refuted and un-impeached. As such, Petitioner should be immediately returned to the roll of active attorneys.

Petitioner moved for relief under the Court's inherent power to control the judgments and orders on its docket. While the Federal Rules of Civil Procedure are not specifically made applicable to attorney disciplinary proceedings, the framework for allowing that relief in this proceeding is set forth in Fed. R. Civ. P. 60, which governs opening of judgments. This Rule, however, only reflects the ancient, inherent equitable powers that courts have, and the varying kinds of relief that those powers afford. Wright and Miller, Federal Practice and Procedure, § 2851. The primary principles in mitigation of the decision to open a prior judgment are the interest in finality and the prejudice of persons who have changed their position in reliance on a court's judgment, Wright and Miller, § 2857, and those principles simply have no applicability in this situation where the Petitioner remains under the continuing supervisory jurisdiction of this Court.

Petitioner's March 2010 discipline was undertaken and implemented pursuant to M.D.L.R. 83.21.4, governing reciprocal discipline and the procedures related thereto. Under that Rule, the identical discipline was not required, and this Court can and could have deviated from that discipline, and Petitioner submits that the record of the proceedings, which has been reopened per Petitioner's motion, establishes that a different discipline could have been, and should have been warranted. The evidence that Petitioner has offered, all of which was un-impeached and un-refuted, clearly demonstrates that the discipline that he has received was clearly excessive under all the circumstances, and should be mitigated. Attached hereto as Exhibit A is a chart that Petitioner had prepared of comparative disciplines, and Petitioner's

discipline, particularly in light of the medical evidence of has offered, is clearly excessive in comparison to the discipline meted out to the comparators.

The evidence that the disciplinary counsel intends to rely upon to defeat Petitioner's readmission comes entirely from things that Petitioner has said in correspondence to Judges and others, and in videos and other postings on the internet through the Pennsylvania Civil rights Law Network. As set forth in the motion in limine that the Petitioner filed, and as further argued in the motion for continuance and related relief he later filed, and to be addressed and argued in the motion of his counsel, Petitioner believes that there are some very serious First Amendment implications of the entire defense of these proceedings. Petitioner believes that these matters should have been addressed during the prehearing proceedings, and Petitioner has, to some degree, been prejudiced, though the full extent of the prejudice will not be known, and is not knowable, until it is determined how the Court addresses the matter. For example, depending upon how the Court chooses to view the evidence, the subpoena of Paul Killion would have been and should have been highly appropriate, as all of the comments that Petitioner has made have related to matters revealed through the Bailey discipline proceedings, and this Court, through the absence of any pre-hearing discussions or proceedings related to these issues, including not even allowing the Petitioner to respond to the motion to quash, completely cut off any opportunity to provide any articulation or context to these issues in this proceeding.

The disciplinary counsel has invoked Pa. R.P.C. 8.2, as adopted by this Court in L.R. 83.26.2, which carries with it the burden to establish falsity or reckless disregard of the truth as the state of mind requirement, and all disciplinary counsel did was rely upon the mere fact that certain unspecified statements were made. Petitioner believes that, as a matter of law, disciplinary counsel cannot, on this record, meet that burden without simply arguing that the

mere fact that Petitioner said certain things about the system of justice negates his return to practice; however, Petitioner believes that the disciplinary counsel will persist in this argument, and that the Court will indulge it, and, in a worse-case-scenario, this Court will credit these arguments. Unfortunately, it will be only then that the Petitioner will be able to articulate the full extent of the prejudice he has suffered. Petitioner has, however, protected the record to the best of his abilities on these issues, and, again, will address them further in his reply to the arguments of disciplinary counsel.

As to the substance of the statements made by the Petitioner, Petitioner, as he did at the hearing, concedes that the words presented in the various materials entered into evidence are, indeed, his words. Again, the disciplinary counsel did not present any evidence to demonstrate that the things the Petitioner said were false, or were in reckless disregard of the truth, and did not even point to the statements that allegedly offended the Rule 8.2 standard. Petitioner did not, accordingly, then put on a rebuttal case because there was nothing to rebut, and will make what further argument is necessary and proper in his reply brief. Nevertheless, Petitioner does comment generally on the nature and tenor of the various remarks he made.

Petitioner refers first to Defendant's Exhibit 1, the January 25, 2011 correspondence he wrote and sent to Mr. Gilroy, and all of the judges of the Middle District. Petitioner had that correspondence marked as an Exhibit himself, and almost provided it to this Court prior to the hearing. That correspondence categorically demonstrates Petitioner's good faith, reasonableness, rationality, and respect in all of his dealing with the courts. That correspondence addressed the then-nascent stage of the disciplinary proceedings against Don Bailey, and the implications of what those proceedings represented. This Court is invited to read that entire correspondence, and Petitioner stands behind every word of it. It was all said in good faith, and was entirely true,

including the statement of Petitioner's belief that the Bailey disciplinary proceeding had improper motives and political agendas at its origins.

Petitioner did not, despite this Court's errant accusation to the contrary, interject the Bailey disciplinary proceedings into these proceedings, and the fact that this Court made that accusation demonstrates the thinking of the Middle District bench that is behind what Petitioner referenced in his January 25, 2011 correspondence. The fact is, however, that the Bailey disciplinary proceedings provided much of the context for every comment that the Petitioner has made that is now being used to oppose his reinstatement, and every such comment was preceded by a history of both Mr. Bailey, and the Petitioner, making suggestions in pleadings, briefs, and other filings that they, and more importantly, their clients, were not being treated completely fairly by the courts of the Middle District. Surely there was nothing wrong with any of this, because neither Petitioner, nor Mr. Bailey, as far as Petitioner knows, ever heard a word about any of it, and lawyers are supposed to be free to criticize judges and courts.

Petitioner later represented Mr. Bailey and one of his former clients, Thom Lewis, in sanctions proceedings before the Third Circuit, and those proceedings revealed what, in Petitioner's honest opinion, was evidence that there was a vindictive agenda to hurt and harm Mr. Bailey because of the nature of the cases he files, the identity of the persons he sues, and the people he represents. It was during the course of these proceedings that Petitioner was disciplined. Thereafter, the disciplinary proceedings against Mr. Bailey proceeded, and Petitioner never received any response to his January 25, 2011 correspondence, nor was there any evidence revealed that caused Petitioner to change his honestly expressed opinion that the proceedings against Mr. Bailey had improper motivations and agendas at their origins. This is the entire context for all of the Petitioner's subsequent comments, all of which were made in

good faith, and with a reasonable belief in their truthfulness. The entire transcript of the hearing on August 11 and 12, 2011, at which both Judges Conner and Jones testified, is in evidence in these proceedings. Specific reference to those transcripts will be made, if necessary, in reply to the arguments made by disciplinary counsel in opposition to this brief, and the motion to be filed by Mr. Bailey.

Petitioner understands that, perhaps, some of the hyperbole and/or rhetoric he used in his videos and other materials are not the most comfortable or convenient things for this Court to hear about the other judges of this Court, and his views of the system of justice, and the Middle District Courts, and no one is sorrier than Petitioner for having said, and felt the need to say, these things, but, again, they are all true and/or were made in good faith and with a reasonable belief of their truthfulness. Retired Justice Sandra Day O'Connor recently pointed out that Judges are fair game and must be open to criticism. The complement to criticism, of course, is to acknowledge and act on the criticisms in some open and honest form or fashion. All of this began with honest criticisms of members of the judiciary, mostly in the Middle District, and none of it was ever addressed. When Petitioner made these criticisms as a lawyer, they were not addressed, when he directed correspondence to the court as a non-lawyer, they were not addressed, and the failure and refusal to address honest and good faith criticism naturally only leaves one to assume that those criticisms are accurate and true. This is why they continued to be made, and even had taken on a more aggressive, and less objectively respectful, character, but none of it changes the fact that the Petitioner reasonably believed and believes the truthfulness of every word he has ever uttered, and all were made in good faith. For these reasons, there is no proper basis upon which to deny Petitioner reinstatement to the roll of attorneys in this Court.

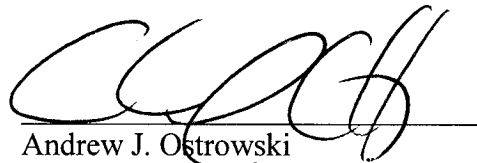
Petitioner concludes, however, by expressly and sincerely apologizing for any feelings of animosity and disrespect his comments engendered. There is not one word that Petitioner has uttered about any judge or practitioner that will create any lasting problems respecting the authority of even those as to whom the comments have been directed, and there is now, and never has been, any agenda of the Petitioner to do anything other than to appear before the Courts of the United States of America and to represent persons who have been hurt and harmed, and are in need of representation by competent legal counsel, and to practice his profession, and make his living in doing so.

This Court pointed out during the August 27, 2013 hearing, it was up to Petitioner to persuade the Court that he was fit to return to the active roll of attorneys in the Middle District. Petitioner submits that has been done.

CONCLUSION

In consideration of all of the foregoing, Petitioner respectfully requests his immediate return to the roll of active attorneys in the Middle District.

Respectfully submitted,

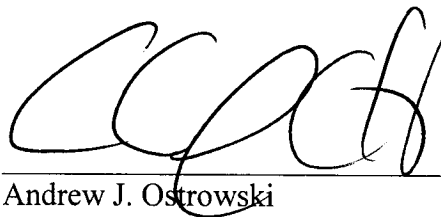


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Dated: October 4, 2013

CERTIFICATE OF SERVICE

Petitioner hereby certifies that service upon special disciplinary counsel will be made upon him in the normal course through the electronic filing system in accordance with local rules of court.



Andrew J. Ostrowski

Dated: October 4, 2013