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[3-Dec-1999]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re

ANDREW LICHTENBERG, ESQ.

HEARING PANEL DECISION NO. 1

P.R.B. Docket No. 2000.038

On Motion for Reinstatement

Andrew Lichtenberg, Esq. was suspended from the practice of law by the Vermont Supreme Court for six months, commencing on January 1, 1994. In re Andrew Lichtenberg, Esq., 161 Vt. 614 (1993). On September 7, 1999 he filed a petition for reinstatement with the Professional Responsibility Board pursuant to Administrative Order No. 9 (effective September 1, 1999), Rule 22(D). A Hearing Panel was designated to hear the motion pursuant to the Rule, consisting of Barry E. Griffith, Esq., Chair, Michael Filipiak, and Martha M. Smyrski, Esq. A hearing was duly scheduled and held at the

Vermont District Courthouse in Rutland on October 15, 1999. Petitioner was present, represented by Stephen L. Saltonstall, Esq. Also present was Deputy Disciplinary Counsel Michael Kennedy representing his Office.

Petitioner requested that his suspension in Vermont be lifted in order to permit him to sit for the Hawaii Bar Exam. Petitioner has practiced law before the Supreme Court of New Mexico since February of 1991, and has no present intention to return to Vermont. The Office of Disciplinary Counsel voiced no objection to Petitioner's request for reinstatement.

In making its decision, the Hearing Panel considered the background and original record concerning Petitioner's suspension, including the Hearing Panel report dated June 4, 1993, the Professional Conduct Board's September 10, 1993 final report, and the December 7, 1993 Order of the Vermont Supreme Court, all of which are reported in 4 Vt. Law Week at pages 363-366. Also considered was the subsequent related opinion and order entered by the Supreme Court of New Mexico In the Matter of Andrew L. Lichtenberg, 177 N.M. 325, 871 P.2d 981 (filed March 23, 1994). The Hearing Panel also considered evidence adduced at the October 15, 1999 hearing, including the testimony of Petitioner and other evidence more specifically identified below. Based upon that evidence, the Hearing Panel makes the following findings of fact, and reaches the following conclusions and recommendation.

FINDINGS OF FACT

1. Petitioner Andrew Lichtenberg (hereinafter Lichtenberg) is an attorney who was first admitted to the practice of law in Vermont in the fall of 1989. At that time, he was 43 years old, having previously worked in the engineering field. He was unable to locate employment with an established law firm, and established a solo law practice in Burlington.

2. The misconduct which gave rise to Lichtenberg's suspension occurred in 1990. Briefly, the misconduct involved a violation of the lawyer's duty to preserve the confidences and secrets of a client, as set out in Canon 4 of the Code of Professional Responsibility. The specific facts found by the Hearing Panel in 1993, as set out in 4 Vt. Law Week 364-366, are hereby adopted by reference.

3. A complaint relating to Lichtenberg's 1990 misconduct was made to the Professional Conduct Board in 1991. It was thereafter investigated, prosecuted and duly concluded in 1993 through the various decisions cited supra.

4. In the meantime, Lichtenberg applied for admission to the Bar of the Supreme Court of New Mexico, and was admitted to the practice of law in that State in February 1991. Lichtenberg moved to New Mexico in August 1991, and began practicing law in that State in September 1991. Lichtenberg has been practicing law in New Mexico from that time until the present.

5. The December 7, 1993 Order of the Vermont Supreme Court relating to Lichtenberg's 1990 misconduct provided that:

respondent Andrew Lichtenberg is suspended from the practice of law for six months, commencing on January 1, 1994. In addition, the respondent shall also be placed on probation for a term of one year, commencing on July 1, 1994. During that term of probation, respondent shall retake the Multistate Professional Responsibility Examination (MPRE) and achieve a passing grade under the prevailing Vermont standards.

161 Vt. 614 (1993).

6. The aforesaid suspension order by the Vermont Supreme Court precipitated a review by the Supreme Court of New Mexico as to Lichtenberg's status as a member of its Bar. For reasons explained in its opinion, on March 23, 1994 the Supreme Court of New Mexico also suspended Lichtenberg indefinitely from the practice of law for a minimum period of six months effective April 1, 1994 but deferred that suspension under specific terms and conditions. Those terms and conditions included:

"(1) That [Lichtenberg] meet with his probationary supervisor on a regular basis as directed by his supervisor

and accept counseling from said supervisor on the ethical responsibilities inherent in the attorney-client relationship and other responsibilities of an attorney to clients, opposing parties, and courts. Daniel A. McKinnon, III, is appointed to serve as Lichtenberg's supervisor during his period of probation;

(2) That [Lichtenberg] reimburse McKinnon at the hourly rate of \$75.00 plus gross receipts taxes for the time spent in counseling him;

(3) That [Lichtenberg] respond promptly to any requests for information by the office of disciplinary counsel regarding any complaint that may be filed against him;

(4) That [Lichtenberg] commit no violations of any of the Rules of Professional Conduct or the rules of any court before which he may practice; and

(5) That [Lichtenberg] take and receive a passing grade on the Multistate Professional Responsibility Examination."

The Order provided that Lichtenberg's failure to abide by any one of these terms and conditions would be grounds for a finding of contempt, and imposition of the full term of the original suspension. It further

provided that the suspension would be lifted automatically if Lichtenberg successfully completed and satisfied all of the terms of his probation. In the Matter of Andrew Lichtenberg, supra, 871 P.2d at 983.

7. Lichtenberg complied with the aforesaid probation conditions by retaking the Multistate Professional Responsibility Examination on August 12, 1994, achieving a scaled score of 113 thereon. A passing grade on the MPRE in New Mexico is 75. A passing score on the MPRE in Vermont is a scaled score of 80, Rules of Admission to the Bar of the Vermont Supreme Court § 6(a). Lichtenberg accordingly achieved a passing grade under both prevailing Vermont and New Mexico standards. (Exhibit D)

8. Lichtenberg also complied with the terms of his New Mexico probation by meeting and counseling with an attorney supervisor appointed by the New Mexico Supreme Court, Daniel A. McKinnon, III, Esq. of Albuquerque, New Mexico. Attorney McKinnon submitted an affidavit received in evidence in connection with the matter (Exhibit A), and also gave testimony via telephone, which the Hearing Panel finds to be credible.

9. Attorney McKinnon has been a practicing lawyer in the State of New Mexico since 1966. During his career in New Mexico he has served on the State Board of Bar Commissioners, the Supreme Court's Disciplinary Board, and the Supreme Court's Committee on the Code of Professional Conduct. Attorney McKinnon has also served as a special prosecutor for the

Disciplinary Board, and has chaired the City of Albuquerque Board of Ethics and Elections. While supervising Lichtenberg, Attorney McKinnon was engaged in general practice with a small firm. He subsequently served a term as a Justice on the New Mexico Supreme Court. His present practice is restricted to mediation, arbitration and consulting on appellate matters.

10. Attorney McKinnon advises that Lichtenberg was cooperative and diligent in meeting with him and successfully completed his probationary period in New Mexico. Attorney McKinnon found Lichtenberg "to be a thoroughly honest and honorable person who cared deeply about his clients and our legal system." Attorney McKinnon believes it is significant that at the time of Lichtenberg's 1990 misconduct leading to his suspension, he "was practicing alone and was 'very inexperienced.'" Attorney McKinnon "became convinced during the term of his mentoring of Lichtenberg, as was the Vermont panel [in 1993], that Lichtenberg had not 'acted with a bad heart.'" Based upon his supervision of Lichtenberg, Attorney McKinnon is of the opinion that if Lichtenberg had "commenced his legal career with an experienced law firm or mentor, he would not have acted as he did in the civil rights litigation [in 1990]. To my knowledge [Lichtenberg] has conducted himself in a professional and ethical manner since he was admitted to our bar in 1991."

11. The Hearing Panel also received testimony in the form of a letter from New Mexico District Court Judge Anne Kass, who presides over a specialized domestic relations court in which Lichtenberg has practiced

(Exhibit B). Based upon her knowledge of Lichtenberg, Judge Kass is of the opinion "that he is a competent, thoughtful and ethical lawyer." According to Judge Kass, Lichtenberg "was always well prepared as well as courteous to the Court and to the opposing lawyer and party. That is notable because courtesy between lawyers in domestic cases is frequently absent. Lawyers are vulnerable becoming overly emotionally entangled in these cases. Not so for Mr. Lichtenberg. He was able to maintain a commendable degree of detached compassion for the parties, and he was able to avoid becoming reactive to opposing counsel."

12. The Hearing Panel also received evidence in the form of an affidavit from New Mexico Attorney Allen M. Kerpan, who has known Lichtenberg since 1993 (Exhibit C). Attorney Kerpan reports that he has always found "Lichtenberg to conduct himself competently, professionally and ethically when representing clients. In all of my professional dealings with Mr. Lichtenberg, he has distinguished himself with his candor, forthright style and drive to work towards a fair compromise on any issues or dispute that has involved the both of us."

13. According to Lichtenberg's testimony, which Disciplinary Counsel does not dispute and which the Hearing Panel finds to be credible, there have been no ethical violations or complaints thereof relating to him in the years he has been practicing in New Mexico and since he was suspended by the Vermont Supreme Court.

14. Lichtenberg and his wife have plans to move to the State of Hawaii to live at the end of 1999. Lichtenberg hopes to be admitted to the Hawaii Bar, so that he may practice law there.

15. Lichtenberg applied to sit for the Hawaii Bar exam in July 1999. He was denied permission to take the examination by Hawaii's Board of Examiners because his license to practice law was under suspension in Vermont. Upon review, the Supreme Court of Hawaii in an opinion filed July 20, 1999 directed its Board of Examiners to hold Lichtenberg's application in abeyance for a period of six months, to give Lichtenberg time to commence and conclude the instant proceedings. If Lichtenberg's Vermont suspension is removed within this time, Lichtenberg may update his application for admission to Hawaii Bar, and its Board of Examiners are to reconsider whether Lichtenberg may sit for the next Bar examination. It is understood that this examination will be conducted in February 2000.

16. Although he cannot state that he will never return to Vermont, Lichtenberg has no present intention to resume residence or to practice law in Vermont. Lichtenberg is willing to accept a reinstatement to inactive status in Vermont, with conditions that he reeducate himself with respect to Vermont practice and procedures before ever resuming an active practice in this State.

CONCLUSIONS

17. Rule 22(D) provides that in a reinstatement proceeding:

the respondent-attorney shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency, and learning required for admission to practice law in the state, and the resumption the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest and that the respondent-attorney has been rehabilitated.

18. A leading treatise explains that in considering the question of rehabilitation this Panel should "examine the original offense and assess the extent to which the lawyer might now be able to resist similar temptations, and to do this by considering the lawyer's present attitudes and character, as illustrated by his or her activities during the period of suspension, in order to determine whether the ... causes of the original misconduct have been sufficiently ameliorated." Wolfram, *Modern Legal Ethics* § 3.5.5. In this case, the misconduct leading to Lichtenberg's suspension involved the improper disclosure and use of a client's secret or confidence. The Hearing Panel considering his conduct in 1993 concluded that Lichtenberg was not acting with a "bad heart," but rather that he "just didn't get it." The Supreme Courts of Vermont and New Mexico imposed conditions designed to insure that Lichtenberg received

remedial education with respect to a lawyer's ethical obligations.

Lichtenberg has fulfilled all of the imposed terms and conditions satisfactorily completing his term of probation imposed by both States.

Based upon the evidence we are satisfied that Lichtenberg has been rehabilitated, and that he has the requisite moral qualifications required for the practice of law.

19. Lichtenberg has been living and practicing law in New Mexico for more than eight years, and we are satisfied that he has the requisite competency and learning to do so. Similarly, if through study Lichtenberg has familiarized himself with the specifics of the law and practice and procedure in Hawaii, and demonstrates the same to the satisfaction of the Supreme Court of that State, we see no reason why Lichtenberg should not be admitted to practice in that State.

20. Lichtenberg does not contend that he has kept abreast of developments in Vermont law over the past eight years, or in connection with this petition for reinstatement. This is understandable, as Lichtenberg has no present plans to relocate or resume a practice in Vermont. However, the Hearing Panel believes that conditions should be placed upon Lichtenberg's reinstatement to insure that he is properly reoriented to and reeducated in Vermont law, practice and procedure before resuming an active practice in this State.

21. Two reported cases from other jurisdictions have been

considered, which have some factual parallels to this matter. In re Lindquist, 246 N.W.2d 35 (Minn. 1976) involved a petition for reinstatement by a non-practicing former attorney seeking to clear his name; he was granted reinstatement to inactive status. The Florida Bar (In re Kimball), 425 So.2d 531 (Fla. 1983) involved a petition for reinstatement to the Florida bar by an attorney who had been practicing law in New York State for about eight years; the Referee found that "petitioner's knowledge of Florida law and procedures has been eroded considerably by the passage of time and nonuse," and accordingly recommended that he retake that portion of the Bar Examination relating to Florida practice and procedure (but not the Multistate or Ethics portions) as a condition of his reinstatement. Id. at 534. (The Supreme Court of Florida required him to retake the full three-part exam, finding this to be required by the applicable Florida Rules.)

22. The Rules of Admission to the Bar of the Vermont Supreme Court generally allow attorneys who have been actively practicing law in another jurisdiction for the previous five years to be admitted to practice in Vermont without examination, but only after the completion of three months of study in the office and under the supervision of an attorney practicing in this State, § 7. Given the time since Lichtenberg last practiced in Vermont, and the knowledge that it could be many more years before he might resolve to return to this State, we conclude that it is appropriate to require Lichtenberg to undertake and complete such a clerkship before his resumption of an active practice in this State. We

similarly conclude that during that clerkship Lichtenberg should be required to complete ten hours of Continuing Legal Education in courses specifically relating to matters of Vermont law, practice and procedure with his practice interests, said courses to be selected in consultation with his supervising attorney.

RECOMMENDATION

Based on the above Findings and Conclusions and in accordance with the requirements of Rule 22(D), it is the recommendation of this Hearing Panel that Lichtenberg's Vermont suspension be lifted and that Lichtenberg be reinstated as a member of the Bar of the Vermont Supreme Court, upon the following terms and conditions:

- a. That within ten (10) days of the date of the Order lifting his suspension, Lichtenberg make application for inactive status before the Vermont Supreme Court, as set forth in Rule 5 of the Rules concerning the Licensing of Vermont Attorneys;
- b. That before Lichtenberg's license to practice law in Vermont is thereafter changed from inactive to active status, that Lichtenberg be required to complete a three (3) month clerkship under the supervision of an admitted attorney, as set forth in Rule 7 of the Rules concerning the

Licensing of Attorneys; and

c. That before Lichtenberg's license to practice law in Vermont is so changed from inactive to active status, that Lichtenberg be required to complete ten (10) hours of Continuing Legal Education in courses specifically related to Vermont law, practice and procedure consistent with his practice areas, and that such courses be selected in consultation with his supervising attorney.

Dated at Montpelier, Vermont this 3rd day of December, 1999.

/s/

Barry E. Griffith, Esq., Chair

/s/

Michael Filipiak

/s/

Martha M. Smyrski, Esq.

In re Lichtenberg (99-533)

[Filed 05-Jan-2000]

ENTRY ORDER

SUPREME COURT DOCKET NO. 99-533

JANUARY TERM, 2000

In re Andrew Lichtenberg, Esq. } Original Jurisdiction

 } From

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 } Professional Conduct Board

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 } DOCKET NO. 2000.038

The Professional Responsibility Board's recommendation that petitioner

be reinstated as a member of the Vermont Bar, upon conditions, is accepted. The suspension is lifted as of the date of this order.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice