

PUBLIC MATTER

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THE STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

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In the Matter of
MALCOLM B. WITTENBERG,
Member No. 73842,
A Member of the State Bar.

) Case No. 05-V-03608-PEM
)
) **DECISION**



INTRODUCTION

The issue in this case is whether Petitioner Malcolm B. Wittenberg has demonstrated, to the satisfaction of this court and by a preponderance of the evidence, his rehabilitation, present fitness to practice, and present learning and ability in the general law so that he may be relieved from his actual suspension from the practice of law pursuant to Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(11)¹.

For the reasons stated below, this court finds that Petitioner has shown, by a preponderance of the evidence, that he has satisfied the requirements of standard 1.4(c)(ii). The court therefore grants Petitioner's petition to be relieved from his actual suspension from the practice of law upon payment of all fees and costs that may be due.

SIGNIFICANT PROCEDURAL HISTORY

On August 5, 2005, Petitioner filed a verified petition for relief from actual suspension, seeking the termination of his actual suspension on the ground that he has satisfied the requirements of standard 1.4(c)(ii).

¹All further references to standards are to this source.

1 On September 20, 2005, the Office of the Chief Trial Counsel of the State Bar of
2 California (State Bar) filed a response to the petition, stating that it did not oppose Petitioner's
3 request for relief from actual suspension.

4 On September 27, 2005, the court requested a supplemental declaration addressing the
5 issue of rehabilitation from the Petitioner. On October 6, 2005, the court received that
6 supplemental petition.

7 Petitioner is represented by Attorney Doron Weinberg. The State Bar is represented by
8 Deputy Trial Counsel Manuel Jimenez. The parties waived their right to a hearing and the
9 proceeding was taken under submission for decision on October 7, 2005.

10 JURISDICTION

11 Petitioner was admitted to the practice of law in California on April 6, 1977, and has been
12 a member of the State Bar of California at all times mentioned herein.

13 FINDINGS OF FACT AND CONCLUSIONS OF LAW

14 A. Petitioner's Underlying Disciplinary Proceeding

15 1. Discipline Imposed in Supreme Court Case No. 130169

16 By minute order filed October 23, 2001, the State Bar Court Review Department
17 classified Petitioner's felony convictions for insider trading in violation of 15 United States Code
18 Sections 78j(b) and 78ff, and 17 Code of Federal Regulations section 240.10b-5 (insider trading
19 violations) as crimes which may or may not involve moral turpitude. Pursuant to the California
20 Rules of Court, rule 951(a), and Business and Professions Code section 6102, the Review
21 Department ordered that Petitioner be suspended from the practice of law pending the final
22 disposition of the proceedings.

23 On May 14, 2002, following receipt of evidence that Petitioner's conviction had become
24 final, the Review Department referred the disciplinary proceeding to the Hearing Department for
25 a hearing and decision regarding whether the facts and circumstances surrounding the crimes of
26 which Petitioner was convicted involved moral turpitude or other misconduct warranting
27 discipline and if so, for a recommendation as to the discipline that should be imposed.

28 On June 19, 2003, the Hearing Department found that Petitioner's commission of those

1 offenses involved moral turpitude. The Review Department upheld the Hearing Department's
2 finding.

3 On June 15, 2005, the Supreme Court issued an order in Supreme Court case No.
4 S130169 (State Bar Court case No. 01-C-01358) suspending Petitioner from the practice of law
5 for five years, staying execution of said suspension; and placing Petitioner on probation for five
6 years on condition that he be actually suspended for three years and until he demonstrated proof
7 satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability
8 in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for
9 Professional Misconduct. Credit towards the three-year period of actual suspension was given
10 for the period of Petitioner's interim suspension which began on November 30, 2001. Petitioner
11 was also ordered to take and pass the Multistate Professional Responsibility Examination
12 (MPRE) within the period of his actual suspension or one year after the effective date of its order,
13 whichever is longer.

14 **2. Nature of the Underlying Misconduct (Case No. 01-C-01358)**

15 Pursuant to a two-count Indictment filed April 16, 2001, in *United States of America v.*
16 *Malcolm B. Wittenberg*, U.S. Dist. Ct. (N.D. Cal.) case No. CR 01-0157 WHA (*U.S. v.*
17 *Wittenberg*), Respondent was charged with insider trading violations.

18 On September 4, 2001, Petitioner and the U.S. Attorney's Office entered into a written
19 plea agreement pursuant to rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure. In that
20 plea agreement, Petitioner agreed to plead guilty to the charged insider trading violation.

21 Petitioner also specifically agreed that the elements of the offense of insider trading are
22 that (1) Petitioner was a corporate insider; (2) Petitioner possessed material, non-public
23 information regarding the corporation; (3) Petitioner used the material, non-public information to
24 purchase or sell securities through a national exchange or in interstate commerce; and (4)
25 Petitioner acted with reckless, deliberate indifference.

26 Thereafter, on December 14, 2001, Petitioner pleaded guilty to count two of the
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1 Indictment² in *U.S. v. Wittenberg* and was sentenced to three years supervised probation,
2 including residence in a halfway house for a period of one month and participation in home
3 confinement with electronic monitoring for a period of three months. The U.S. District Court
4 also: (a) imposed a fine of \$10,000; (b) ordered Petitioner to forfeit the sum of \$14,000 (which
5 equals the amount of profit Petitioner realized from his insider trading); (c) ordered Petitioner to
6 submit to random chemical/alcohol testing; and (d) required Petitioner within a period of one
7 year, to speak to a minimum of 300 attorneys about his offense and about the consequences of his
8 actions.

9 **B. Petitioner's Present Learning and Ability in the General Law**

10 Since November 2001, Petitioner has been employed at the law firm of Dergosits &
11 Noah, LLP, as a suspended lawyer. In his capacity as a suspended lawyer, Petitioner has
12 conducted legal research and drafted legal memorandums. Petitioner has also dealt with the U.S.
13 Patent and Trademark office in preparing responses to official actions generated by Patent
14 Examiners. Petitioner has regularly participated in Minimum Continuing Legal Education
15 programs. In addition, on August 13, 2004, Petitioner took and passed the Multistate
16 Professional Responsibility Examination. The State Bar does not contest that Petitioner has
17 demonstrated present learning and ability in the general law.

18 Based upon the record as a whole, the court finds that Petitioner has demonstrated, by a
19 preponderance of the evidence, that he has present learning and ability in the general law.

20 **C. Petitioner's Rehabilitation and Present Fitness to Practice Law**

21 Petitioner submitted, and the court found credible, three letters in support of Petitioner's
22 relief from actual suspension from attorneys David H.S. Commins, Kenneth M. Kaslow, and
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26 ²Count Two of the Indictment charged Petitioner with insider trading in his purchase of
27 1,000 share of Forte stock on August 20, 1999. Count One of the Indictment, which was
28 dismissed following the acceptance of Petitioner's guilty plea to Count Two, charged Petitioner
with insider trading in his earlier purchase of 1,000 shares of Forte stock on August 16, 1999.

1 Charles H. Seaman.³ These attorneys all attest to Petitioner's sincere regret over his prior
2 misconduct and his firm resolve to abide by all ethical obligations of an attorney. Furthermore,
3 Petitioner's wife, wrote a letter to this court, detailing Petitioner's generosity and support to his
4 family. Finally, Petitioner submitted a declaration to the court, expressing recognition of and
5 remorse for his misconduct.

6 Based upon the evidence, the court finds that Petitioner has demonstrated, by a
7 preponderance of the evidence, that he is rehabilitated and that he is presently fit to practice law.

8 DISCUSSION

9 In order to be relieved from his actual suspension pursuant to standard 1.4(c)(ii),
10 Petitioner has the burden of proving in this proceeding, by a preponderance of the evidence, that
11 he is rehabilitated, is presently fit to practice law and has present learning and ability in the
12 general law. (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289; 293
13 Rules Proc. of State Bar 634).

14 As previously indicated, the State Bar does not challenge Petitioner's present learning and
15 ability in the general law or oppose the petition. Based upon evidence presented in this
16 proceeding and upon the findings of fact set forth above, this court concludes that Petitioner
17 possesses present learning and ability in the general law.

18 In determining whether a petitioner has established his or her rehabilitation, the court
19 must first consider the misconduct from which the petitioner seeks to show rehabilitation. The
20 amount of evidence necessary to demonstrate such rehabilitation varies according to the
21 seriousness and extent of the misconduct at issue.

22 Secondly, the court must examine the Petitioner's actions since the imposition of
23 discipline in order to determine whether those actions, in light of the prior misconduct,
24 sufficiently demonstrate rehabilitation by a preponderance of the evidence. (*In the Matter of*
25 *Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 581.) The petitioner must show
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28 ³There were other lawyers who wrote in support of Petitioner's petition. However, those attorneys only addressed the issue of Petitioner's legal skills.

1 strict compliance with the terms of his or her probation in the underlying disciplinary matter,
2 exemplary conduct from the time of the imposition of the prior discipline, and must demonstrate
3 “that the conduct evidencing rehabilitation is such that the court may make a determination that
4 the conduct leading to the discipline is not likely to be repeated.” (*Ibid.*)

5 As the Review Department noted, “In weighing such a determination, the court should
6 look to the nature of the underlying offense, or offenses; any aggravation, other misconduct or
7 mitigation that may have been considered; and any evidence adduced that bears on whether the
8 cause or causes of such misconduct have been eliminated.” (*Id.* at p. 581.)

9 Accordingly, the misconduct that gave rise to Petitioner’s suspension was his felony
10 conviction for insider trading. Since his suspension, Petitioner has accepted full responsibility
11 for his misconduct. He has spoken and reached out to at least 300 lawyers on the subject of
12 insider trading and its harmful impact on the profession and society.

13 In addition, Petitioner’s current employer and colleagues provided strong statements in
14 support of Petitioner’s request to be relieved from his actual suspension and attesting to his
15 rehabilitation and his legal ability.

16 The court finds no evidence to suggest that the misconduct that led to Petitioner’s
17 disciplinary suspension is likely to recur.

18 Therefore, based upon the above, the court finds that Petitioner has demonstrated, by a
19 preponderance of the evidence, that he is rehabilitated and that he is presently fit to practice law.

20 CONCLUSION

21 The court finds that Petitioner **MALCOLM B. WITTENBERG** has satisfied the
22 requirements of standard 1.4(c)(ii) and that he has demonstrated, by a preponderance of the
23 evidence and to the satisfaction of this court, that he is rehabilitated, that he is presently fit to
24 practice law and that he possesses present learning and ability in the general law.

25 Accordingly, Petitioner’s application to be relieved from his actual suspension from the
26 practice of law is hereby **GRANTED**. Upon the finality of this Decision, Petitioner will be

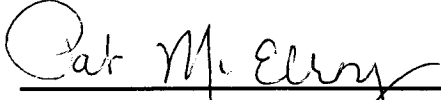
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1 entitled to resume the practice of law in California upon his payment of all applicable State Bar
2 fees and previously assessed costs.

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Dated: October 12, 2005



PAT McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 630(b), Rules Proc. of State Bar; Code Civ. Proc., §§ 1011, 1013]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Following standard court practices, in the City and County of San Francisco, I served a true copy of the following document(s):

DECISION

as follows:

- [X] By PERSONAL SERVICE by delivering the documents in a sealed envelope or package clearly labeled to identify the attorney being served, addressed as follows:

**DORON WEINBERG
180 HOWARD STREET, 6TH FLOOR
SAN FRANCISCO, CA 94105**

- [X] By PERSONAL SERVICE by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

**MANUEL JIMENEZ
STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
180 HOWARD STREET
SAN FRANCISCO, CA 94105**

I hereby certify that the foregoing is true and correct. Executed at San Francisco, California, on **October 12, 2005**.



Laretta Cramer
Case Administrator
State Bar Court