

**State Bar Court
Review Department**

In the Matter of

TIMOTHY JOHN MACKENZIE

A Member of the State Bar

No. 16-R-17485

Filed November 6, 2017

SUMMARY

Petitioner resigned after charges of misappropriation had resulted in a recommendation that he be disbarred. The Client Security Fund then paid two claimants as a result of petitioner's misconduct. Petitioner filed a petition for reinstatement without providing proof that he had first reimbursed the Client Security Fund as required by statute and by the State Bar Rules of Procedure. A hearing judge dismissed the petition as a matter of discretion, and petitioner sought review.

The Review Department interpreted the applicable statutes and rules to require that a former attorney seeking reinstatement must fully reimburse the Client Security Fund before filing a petition for reinstatement. It also determined that due process does not require the State Bar Court to provide a reinstatement petitioner with an evidentiary hearing if the prefiling requirements for a reinstatement petition have not been met. Accordingly, it affirmed the dismissal of the petition, concluding that such dismissal was mandatory, not discretionary.

COUNSEL FOR PARTIES

For State Bar of California: Brandon Keith Tady, Esq.

For Petitioner: Timothy John MacKenzie

HEADNOTES

- [1] **130 Procedure on Review (rules 5.150-5.160)**
199 Miscellaneous General Issues—Other Miscellaneous General Issues
 Where Supreme Court has not published decision interpreting State Bar Act provision or related provision of Rules of Procedure of State Bar, State Bar Court itself interprets statute and rule as written.
- [2 a-c] **2504 Issues in Reinstatement Proceedings—Special Procedural Issues — Burden of Proof/Showing Required for Reinstatement**
2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in Reinstatement Proceedings
 By statute, as a condition of reinstatement, disbarred attorneys must reimburse Client Security Fund (CSF) for moneys paid out as result of attorney’s misconduct. Under this statute, former attorney must repay CSF in full prior to obtaining reinstatement. Even though Supreme Court has not foreclosed possibility that it could grant conditional reinstatement under some circumstances, State Bar Court lacks authority to recommend reinstatement where payment in full to CSF has not been made, and does not have discretion to grant relief from requirement of CSF reimbursement.
- [3] **135.09 Amendments to Rules of Procedure—Other issues**
135.87 Amendments to Rules of Procedure—Reinstatement after Disbarment
2504 Issues in Reinstatement Proceedings—Special Procedural Issues — Burden of Proof/Showing Required for Reinstatement
2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in Reinstatement Proceedings
 Rule 5.441(B)(2) of Rules of Procedure of State Bar establishes that reimbursement of Client Security Fund for moneys paid out as result of disbarred attorney’s misconduct is a mandatory prefiling requirement for petitions for reinstatement. Where State Bar Act provision requires such payment, State Bar Board of Governors acted within its authority, and not in conflict with statute, in adopting rule regulating timing of payment by requiring that it be made before petition for reinstatement is filed. Interpreting rule to require prefiling payment supports policy goals of maintaining solvency of Client Security Fund, and preserving judicial resources by avoiding lengthy reinstatement proceedings when petitioner has no prospects for payment.
- [4] **135.09 Amendments to Rules of Procedure—Other issues**
146 Evidentiary Issues—Judicial Notice
 In case involving interpretation of State Bar Rules of Procedure, Review Department took judicial notice of Board of Governors agenda item, State Bar Rules, and relevant state legislation.

- [5] **119 Procedural Issues—Other Pretrial Matters**
 **192 Miscellaneous General Issues—Constitutional Issues—Due Process/
 Procedural Rights**
 **2504 Issues in Reinstatement Proceedings—Special Procedural Issues —
 Burden of Proof/Showing Required for Reinstatement**
 **2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in
 Reinstatement Proceedings**

Due process does not require that petitioner for reinstatement be allowed to present evidence of rehabilitation at evidentiary hearing, where applicable provision of State Bar Rules of Procedure expressly provides for dismissal of petition for failure to comply with prefiling requirements, including reimbursement of Client Security Fund.

- [6] **199 Miscellaneous General Issues—Other Miscellaneous General Issues**
 **2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in
 Reinstatement Proceedings**

State Bar Court's review of petition for reinstatement, resulting in determination that petition should be dismissed for failure to satisfy a prefiling requirement, constituted hearing of petition in first instance by State Bar Court, as required under California Rules of Court.

ADDITIONAL ANALYSIS

[None.]

OPINION

THE COURT.*

Rule 5.441(B)(2) of the Rules of Procedure of the State Bar¹ requires that a petitioner seeking reinstatement to membership of the State Bar reimburse, prior to filing a petition, the Client Security Fund (CSF) for payments it made as a result of the petitioner's misconduct. Timothy John MacKenzie filed a petition for reinstatement (petition) without complying with the rule, and a hearing judge exercised her discretion and dismissed the petition because she found MacKenzie had little or no prospect of reimbursing CSF before reinstatement.

MacKenzie appeals and argues that the rule conflicts with Business and Professions Code section 6140.5, subdivision (c),² which states that CSF reimbursement "shall be paid as a condition of reinstatement of membership." He contends the statute does not require reimbursement prior to filing a petition for reinstatement or even prior to reinstatement. Instead, he argues reimbursement may be made after reinstatement. He also argues the dismissal deprived him of his right to present all evidence related to his rehabilitation, moral qualification for reinstatement, and present ability and learning in the general law. He requests that the dismissal be set aside and that this matter be remanded for further reinstatement proceedings. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal. It requests affirmance of the dismissal, but asks that we find the dismissal was mandatory rather than discretionary.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm the dismissal. We clarify that, pursuant to section 6140.5, subdivision (c), and rule 5.441 (B)(2), CSF reimbursement is a mandatory prefiling requirement.

Where, as here, a petitioner has not reimbursed CSF prior to filing a petition for reinstatement, dismissal is mandatory, not discretionary.

I. DISMISSAL OF PETITION REQUIRED

Rule 5.441(B)(2) requires that "[p]rior to filing" a petition for reinstatement after resignation, with or without charges pending, or after disbarment, a petitioner must have "reimbursed all payments made by [CSF] as a result of the petitioner's conduct, plus applicable interest and costs, under [section 6140.5, subdivision (c)]." Further, the rule also requires that a petitioner attach to the petition proof of compliance with this requirement.

The facts and procedural history are not in dispute on review. After the Hearing Department recommended that MacKenzie be disbarred due to his dishonest misappropriation of \$162,400, he resigned with charges pending in 2000. By June 2009, CSF had paid \$52,757.17 to two claimants as a result of MacKenzie's misconduct. On November 17, 2016, MacKenzie filed a petition for reinstatement without reimbursing CSF. As of December 2, 2016, the outstanding amount totaled \$96,121.13, including principal, accrued interest, and processing costs.³ OCTC moved to dismiss the petition on the grounds that, *inter alia*, MacKenzie failed to satisfy rule 5.441(B)(2). In opposition, MacKenzie asserted that at no time did he have the ability to reimburse CSF in a lump sum or to make meaningful payments. He also stated that his ability to reimburse CSF would be greatly enhanced by reinstatement and submitted a declaration from his current employer in support. On February 3, 2017, the hearing judge dismissed the petition because "while rule 5.441(B)(2) is not mandatory, it is within this court's discretion to dismiss the petition for failure to comply with this requirement when the petitioner has little or no prospect of satisfying an unpaid CSF obligation before reinstatement."

*Before Purcell, P. J., Honn, J., and McGill, J.

1. All further references to rules are to the Rules of Procedure of the State Bar unless noted.

2. All further references to sections are to the Business and Professions Code unless noted.

3. MacKenzie has not made any voluntary reimbursement payments to CSF. The sole payment received by CSF was \$613 tendered to the State Bar by the Franchise Tax Board from an intercept of a tax refund owed to MacKenzie.

A. CSF Reimbursement Is a Mandatory Prefiling Requirement

MacKenzie does not contend that he complied with the rule. Instead, he maintains that section 6140.5, subdivision (c), allows him to be reinstated with the condition that he reimburse CSF after he returns to the practice of law and that he is “otherwise qualified to seek reinstatement.” He argues that rule 5.441(B)(2) improperly conflicts with section 6140.5, subdivision (c), because the rule requires CSF reimbursement prior to filing a petition for reinstatement. We disagree.

[1] The Supreme Court has not published a decision interpreting section 6140.5, subdivision (c), or rule 5.441(B)(2). Absent this guidance, we interpret the statute and rule as written. (§§ 6086.5 [“The board of trustees shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings . . . to the extent provided by rules adopted by the board of trustees pursuant to this chapter”], 6025, 6086, 6087; *Obrien v. Jones* (2000) 23 Cal.4th 40, 49–50 [Supreme Court has “chosen to utilize the assistance of the State Bar Court in deciding admission and discipline matters” and also has “prescribed . . . procedural rules for the State Bar Court itself”].)

[2a] Section 6140.5, subdivision (c), provides that “Any attorney whose actions have caused the payment of funds to a claimant from [CSF] shall reimburse the fund for all moneys paid out as a result of his or her conduct with interest For a member who resigns with disciplinary charges pending or a member who is suspended or disbarred, the reimbursed amount, plus applicable interest and costs, shall be paid as a condition of reinstatement of membership.” We find that the statute establishes a requirement that a petitioner must reimburse CSF in full prior to reinstatement, and, under the statute, the State Bar Court lacks authority to recommend reinstatement where a petitioner has not reimbursed CSF in full.

Our interpretation is consistent with *Hippard v. State Bar* (1989) 49 Cal.3d 1084 (*Hippard*). There, where a petitioner sought to be reinstated on the condition that he repay CSF within a two-year period after reinstatement, the Court held,

While we need not and do not decide in this case that reinstatement may never be granted subject to appropriate conditions [citation], we do conclude that the condition suggested by petitioner is inconsistent with the basic purpose underlying reinstatement. An applicant seeking reinstatement must show rehabilitation. [Citation.] As noted earlier, the burden on the applicant is heavy. Where, as here, evidence of the efforts, if any, to make restitution to those seriously harmed by the applicant’s previous misconduct is a central consideration, allowing restitution as a subsequent condition would negate the requisite showing and effectively undermine the well-established burden of proof. The applicant must establish his or her case before, not after, reinstatement. . . . Accordingly, we conclude that in this case it would be improper to grant reinstatement subject to petitioner thereafter making the requisite showing of restitution.

(*Id.* at p. 1098.)⁴

[3] We also find that, as worded, rule 5.441(B)(2) establishes that CSF reimbursement is a mandatory prefiling requirement. Contrary to MacKenzie’s claim, this requirement does not conflict with section 6140.5, subdivision (c), or change its scope as worded by the Legislature. The statute, not the rule, establishes the basic condition that CSF must be reimbursed prior to reinstatement. The rule only clarifies the *timing* for compliance with the condition—i.e., *before* a petitioner files a petition for reinstatement. The Board of Governors (later renamed Board of Trustees) clearly had the authority to set the timing

4. [2b] The Supreme Court did not foreclose the possibility that, in an exercise of its inherent authority over admissions, it might grant conditional reinstatement under other circumstances. Such a conclusion, however, does not authorize this court to recommend reinstatement as MacKenzie requests.

for reimbursement because it has the authority to adopt rules to carry out the State Bar Act. (§ 6025 [“Subject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out of this chapter”].) Indeed, the Board expressly acted within that authority in adopting the predecessor rule to rule 5.441(B)⁵ “to ‘implement the statutory authority to enforce orders regarding disciplinary costs and CSF reimbursements as money judgments.’ “ (*In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56, 63 (*MacKenzie I*), quoting Board of Governors Agenda Item 122, July 9, 2004, p. 3.)⁶

Several strong policy reasons support our analysis. CSF is a victim compensation fund supported by attorney membership fees, which allows clients who have suffered losses due to members’ dishonest misconduct to be repaid. (§§ 6140.5, subd. (a), 6140.55 [board authorized to include amount to fund CSF and related administration costs as part of annual membership fees]; State Bar Rule 3.420 et seq.) Thus, it follows that requiring a petitioner to repay CSF prior to filing a petition for reinstatement aids in maintaining the fund’s solvency. (See *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 558 [discussing CSF’s origin and purpose; noting State Bar “sought legislative authorization for the CSF in order to create a remedy *in addition* to disciplinary measures and civil actions to reimburse clients for losses caused by the wrongful conduct of attorneys”].) Making CSF repayment a prefiling requirement also serves the rational goal of “preserv[ing] judicial resources by avoiding lengthy proceedings when a petitioner ‘has no prospects for’ “ repaying CSF. (*MacKenzie I, supra*, 5 Cal. State Bar Ct. Rptr. at p. 65, quoting Board of Governors Agenda Item 122, *supra*, at p. 8.)⁷

Like *Hippard*, the other cases *MacKenzie* cites do not support his contentions. *In re Gaffney* (1946) 28 Cal.2d 761 and *Galardi v. State Bar* (1987) 43 Cal.3d 683 were both decided before section 6140.5, subdivision (c), was enacted and thus did not consider whether a petitioner could be reinstated conditioned on subsequent CSF reimbursement. We acknowledge that in *MacKenzie I* we held that the prefiling requirement that a petitioner repay disciplinary costs was directory, not mandatory. (*MacKenzie I, supra*, 5 Cal. State Bar Ct. Rptr. at p. 61.) But our holding was based on the State Bar Court’s expressly delegated discretion to grant requests for relief from disciplinary costs. (*Ibid.*; see also §§ 6086.10, subd. (c), 6140.7; rule 5.130(B).) [2c] In contrast, the State Bar Court does not have discretion to grant relief from CSF obligations. (See § 6140.5; rule 5.136.) Finally, in *In the Matter of Jaurequi* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56 (*Jaurequi*), we held that CSF reimbursement was not a “condition precedent” to the filing of a petition for reinstatement. But this case was decided *before* the Board adopted the rule making CSF reimbursement a prefiling requirement. (*Id.* at p. 59.)

B. No Due Process Violation

[5] We also reject *MacKenzie*’s argument that due process requires that he be allowed to present all evidence of his rehabilitation at an evidentiary hearing. To the contrary, rule 5.441(E) expressly states that “[f]ailure to comply with any of the requirements of [rule 5.441] will be grounds to dismiss the petition.” (See *MacKenzie, supra*, 5 Cal. State Bar Ct. Rptr. at p. 66 [hearing judge has discretion to dismiss reinstatement proceeding if petitioner fails to pay disciplinary costs prior to filing petition rather than undertake lengthy trial].)

5. Former rule 662(c) provided, in pertinent part, “No petition for reinstatement shall be filed unless and until the petitioner has provided satisfactory proof to the State Bar Court that he or she has paid . . . all reimbursement for payments made by the Client Security Fund as a result of the petitioner’s conduct, plus applicable interest and costs, pursuant to Business and Professions Code section 6140.5(c).”

6. [4] On July 27, 2017, based on OCTC’s unopposed request and pursuant to rule 5.156 and Evidence Code section 452, we took judicial notice of: (1) Board of Governors Agenda Item 122, July 9, 2004; (2) State Bar Rules, Title 3, Division 4, Chapter 1, Articles 1 through 5; and (3) Senate Bill No. 1498 (1987–1988 Reg. Sess.).

7. Notably, no statute or rule establishes a process whereby we could recommend that a membership be cancelled if a petitioner failed to fully reimburse CSF after reinstatement.

MacKenzie points to our holding in *Jaurequi* that a petitioner's "right to be reinstated can only be determined following a hearing," citing to rule 951(f) (renumbered 9.10(f)) of the California Rules of Court.⁸ (See *Jaurequi, supra*, 4 Cal. State Bar Ct. Rptr. at p. 59.) Again, *Jaurequi* was decided before CSF reimbursement was made a prefiling requirement for reinstatement and a ground for dismissal when not satisfied.

[6] In light of the express language of rule 5.441, we find that a petitioner who has not reimbursed CSF does not have a right to a hearing or to otherwise present all evidence related to his or her rehabilitation in seeking reinstatement to the practice of law. We further find that in reviewing the petition and determining that MacKenzie failed to satisfy a prefiling requirement, the State Bar Court has "heard" the petition "in the first instance," as required by rule 9.10(f) of the California Rules of Court.

II. CONCLUSION

Because CSF reimbursement is a mandatory prefiling requirement, failure to satisfy the requirement must result in dismissal. We affirm the dismissal since MacKenzie did not reimburse CSF prior to filing the petition.

8. The rule provides that reinstatement petitions "must, in the first instance, be filed and heard by the State Bar Court."