

Do Disbarred Lawyers Have Constitutional Rights

BY HAL R. LIEBERMAN

In 1987, mired in debt, Nassau County attorney Peter Citrin became involved in a fraudulent mortgage scheme, devised by others, so he could generate “income” to pay off gambling obligations. Citrin was eventually arrested, prosecuted, and, on May 29, 1989, pled guilty to Conspiracy in the Fifth Degree, a Class “A” misdemeanor. Citrin avoided jail in part because he agreed, as part of his plea bargain, to resign from the Bar. He did so on October 10, 1989. *Matter of Citrin*, 151 A.D.2d 16, 547 N.Y.S.2d 232 (2d Dept. 1989).

As a condition to reinstatement, an applicant who has been disbarred (or who has resigned) must wait 7 years before submitting his application. He must present “clear and convincing” evidence that he (1) has fully complied with the order of disbarment, (2) has passed the Multistate Professional Responsibility Exam (MPRE), and (3) has the requisite “character and fitness” to resume practice. New York Judiciary Law, Section 90(5)(b).

Seven years after his resignation, on July 15, 1997, Citrin applied for reinstatement. The petition contained proof that Citrin had been successfully treated for his gambling addiction, had completed his term of probation, had fully complied with the disbarment order, had paid in full the \$15,000 he owed in restitution, had taken and passed the MPRE, and was continuously and productively employed by an insurance company from the date of the disbarment order.

First Step: Hearing By Character Committee

The primary procedural step in New York’s reinstatement scheme is a hearing. At such time, assuming the other *prima facie* criteria are satisfied, the applicant has the burden of demonstrating his current character and fitness to practice law by “clear and convincing” evidence. In the Second Department, where Citrin applied for reinstatement, that hearing takes place before a subcommittee of the Character and Fitness Committee, the agency designated to hear admissions and reinstatement cases in the first instance. The subcommittee duly held a hearing in Citrin’s case, wrote a report and transmitted it to the full Committee, and the Committee in turn forwarded the subcommittee’s report, along with the full Committee’s recommendation (collectively, the “Report”), to the Court.

Here the plot thickens. The Committee, under its then standard policy, did *not* serve a copy of its Report on Citrin or his counsel. Thereafter, in an order dated March 18, 1998, the Second Department summarily denied Citrin’s petition for reinstatement without explanation. On January 27, 1999, Citrin filed a second, updated petition, which included a 12-page memorandum of law and a separate volume of 7 exhibits. But the result was the same, again without explanation by the Court. Furthermore, the Second Department explicitly refused to provide Citrin’s new lawyers with access to the Report of the Committee on which the Court presumably relied in denying Citrin’s two petitions for reinstatement.

On review by the Court of Appeals, Citrin made the following arguments: (1) that even disbarred lawyers have “property interests” in regaining their law licenses once a *prima facie* case is made out and, as such, must be accorded “due process” on their applications for reinstatement; (2) that the Second Department, by withholding access to the Committee’s Report, deprived Citrin of “due process”; (3) that the Second Department’s reinstatement procedures discriminate against applicants seeking reinstatement when compared with the procedural rights accorded to applicants in other Departments within New York’s unified court system; and, (4) that the decisions to deny Citrin’s reinstatement applications were “arbitrary and capricious” in view of the treatment of other similarly situated disbarred lawyers whom the Second Department had reinstated.

The Attorney General, representing the Second Department, argued in essence that disbarred or suspended attorneys have no “due process” rights and that, in any case, the Second Department did not deny equal protection to Citrin because it had a legitimate (albeit unexplained) basis for the rejection of his petitions.

Applicant Is Entitled To Committee’s Report

In a *per curiam* decision dated March 30, 2000, the Court of Appeals reversed the Second Department’s orders and remanded. But the Court carefully limited its holding to the central procedural question — access to the Report of the designated Committee — without taking any position on the merits of Citrin’s petitions or the more global constitutional issues. After carefully reviewing the procedures for reinstatement set forth in 22 N.Y.C.R.R. § 690.16 and 691.11 of the Rules of the Second Department, the Court of Appeals agreed with Citrin that the lower court’s refusal to provide him a copy of the Report before denying his reinstatement applications was “arbitrary.” *Matter of Citrin*, 94 N.Y.2d 459,464; 706 N.Y.S.2d 72 (2000). It went on to note that without access to the Report “petitioner did not have the opportunity contemplated by section 690.16 of the [Second] Department’s own rules to correct any errors in the Report or to address the Committee’s concerns about his reinstatement.” As a consequence: “[Citrin] was denied the opportunity to satisfy his burden of demonstrating that he possessed the requisite character and fitness to practice law, as he was not permitted to know of or rebut any evidence to the contrary contained in the Report.

Court Avoids Constitutional Issue

The principle that an applicant for reinstatement must be permitted to respond to a Committee’s report and recommendation, whether or not the recommendation is for approval or disapproval, *before* review by the ultimate decision-maker, is so fundamental that it seems obvious. How else can an applicant correct an error in the record or a misreading of the application? But in ruling for Citrin, the Court of Appeals nonetheless assiduously avoided addressing the larger constitutional issues explicitly raised. Also, by refusing to consider the merits of the application, the Court tread lightly so as not to usurp the traditional authority of the Appellate Divisions with respect to regulation of the Bar. Thus, the Court of Appeals did not order Citrin’s reinstatement; nor did it even instruct the lower court to provide a more detailed statement of reasons for rejection. Citrin had requested both of these remedies.

Notwithstanding the Court’s decidedly narrow holding in *Citrin*, it performed a valuable service to the Bar and to New York’s system of attorney regulation. As in several prior rulings involving procedural rights in the disciplinary context, the Court of Appeals confirmed and reinforced its traditional emphasis

on "due process." Without elevating the *Citrin* case to constitutional-issue status, the Court's message was plain: disbarred or suspended lawyers have a cognizable "interest" in regaining their law licenses. Therefore, the lower courts in New York which administer our admissions and disciplinary systems must treat applicants for reinstatement fairly and with careful regard for their procedural rights.

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