STATE OF MAINE

SUPREME JUDICIAL COURT DOCKET NO: Bar-12-14

F. LEE BAILEY

v.

FINDINGS, CONCLUSIONS, AND ORDER

BOARD OF BAR EXAMINERS

This matter is before the Court on the petition of F. Lee Bailey for admission to the Maine bar. The petition is brought pursuant to Rule 9(d)(6) of the Maine Bar Admission Rules following a decision by the Maine Board of Bar Examiners that Bailey had failed to demonstrate, to the clear and convincing evidence standard, that he had sufficient present good character and fitness to qualify for admission to the Maine bar.[1]

The Court heard the matter on March 6 and 7, 2013. Following briefing by Bailey and the Board of Bar Examiners, the matter is now before the Court for decision. The record for decision includes the record before the Board of Bar Examiners, the additional testimony and exhibits presented in the two days of hearings before this Court, and many reported decisions of state and federal courts

[1] The Board of Bar Examiners decision indicated that five Board members had determined that Bailey had failed to demonstrate, to the clear and convincing evidence standard, that he had sufficient present good character and fitness to qualify for admission to the Maine bar, and that four Board members had determined that Bailey had demonstrated sufficient present good character and fitness to qualify for admission to the Maine Bar.

that have addressed matters related to Bailey's conduct that are relevant to his character and fitness to be a member of the bar. All of the exhibits and records at issue were admitted either by agreement or without objection.[2] The parties also agreed that the Court could consider the reported decisions regarding the issues in this matter, although some of the fact-findings and conclusions in those decisions are contested.

I. INTRODUCTION

Before the litigation that led to the character and fitness issues now in contest arose, Bailey had what the Board of Bar Examiners characterized as a "long and brilliant legal career," although he had been subject to disciplinary actions in Massachusetts in 1964, Florida in 1967, and New Jersey in 1968, all involving efforts to generate pretrial publicity of his point of view representing defendants in criminal cases. *See In re Bailey*, 273 A.2d 563, 564-65 (N.J. 1971); *In re Bailey*, No. 69934, Single Justice Order (Mass. Sept. 16, 1970) (*Kirk, J.*) (unreported).[3] Bailey maintained a nationwide law practice and was a defense

[2] Some paper exhibits filed with the court included a few tabs and some marks or notes on the exhibits. The Court added no tabs and made no marks on the exhibits, except that the Court marked out references to social security numbers in the exhibits.

[3] Most states have ethical rules similar to M.R. Professional Conduct 3.6 prohibiting attorneys from making or participating in "any extra-judicial statement which poses a substantial danger of interference with the administration of justice." However, there has continued a robust debate regarding the extent to which criminal defense counsel may promote pretrial publicity regarding the defense view of a case in response to the pretrial publicity opportunities for the prosecution inherent in the investigation, arrest, charging, arraignment, and bail setting processes during which prosecutors can publicly assert their view of a case. *See* Monroe H. Friedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 Washburn L. J. 1, 19-21 (2012); Suzanne F. Day, Note: *The Supreme Court's*

attorney in many high profile criminal cases.[4] He has published many books and articles related to trial practice and criminal defense, regularly taught and lectured at lawyer and law enforcement officer training programs, and has been involved in efforts to promote greater use of lie detector testing and to aid prisoners in transitions from prison life to the community.

Bailey attended Harvard College for two years, served for more than four years as a naval aviator, returned to college briefly, and then was admitted to Boston University Law School, graduating in 1960. He took and passed the Massachusetts bar exam, was admitted to the Massachusetts bar the same year and began practicing law, primarily focusing on criminal defense. In the mid-1980s, he shifted the home base of his practice from Massachusetts to Florida, took and passed the Florida bar exam at age fifty-five, and was admitted to the Florida bar in 1989.

Bailey became involved in a bar discipline proceeding stemming from his representation of a client in a drug prosecution and related asset forfeiture

---

Attack on Attorneys Freedom of Expression: The Gentles v. State Bar of Nevada *Decision*, 43 Case W. Res. L. Rev. 1347 (1993); Monroe H. Freedman and Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607 (1977).

[4] An opinion of the United States Tax Court, *Bailey v. Commissioner of Internal Revenue*, T.C. Memo, 2012-96, outlined Bailey's professional history as follows: "During the tax years at issue [1993-2001], Mr. Bailey was an attorney who was well known for his defense of high-stakes, high-profile criminal cases. Mr. Bailey tried cases in almost every State and in five foreign countries. He was also a speaker and author. During the years at issue Mr. Bailey's average gross income from those activities exceeded $1 million a year." *Id*. at 4-5. The pin cite references to this T.C. Memo, 2012-96 will use LEXIS page numbering. The Westlaw page numbering is different.

proceeding, which led to his disbarment in Florida in 2001, with an opportunity to apply for readmission in five years. *The Florida Bar v. Bailey*, 803 So.2d 683, 695 (2001). The Florida Supreme Court's order, addressing the terms of Bailey's disbarment, stated:

> By this disbarment, Bailey's status as a member of The Florida Bar shall be terminated and he may not reapply for readmission for a period of five years, and then he may "only be admitted again upon full compliance with the rules and regulations governing admission to the bar." R. Regulating Fla. Bar 3-5.1(f). This includes retaking the Florida bar examination, complying with the rigorous background and character examination, and demonstrating knowledge of the rules of professional conduct required of all new admittees.

Id. at 695.[5]

Bailey was then reciprocally disbarred in Massachusetts, *In re Bailey*, 786 N.E.2d 337 (Mass. 2003), and in the federal courts with jurisdiction in Massachusetts. *In re Bailey*, 450 F.3d 71 (1st Cir. 2006). The disbarment proceedings will be discussed in greater detail later in this order.

After his disbarment, Bailey resided in Massachusetts and Florida, and then began residing in Maine in 2010. In February 2012, at age seventy-eight, he took and passed the Maine bar exam. He then applied for admission to the bar. The Maine Board of Bar Examiners, after a hearing, concluded that, because of his disbarments in Florida and Massachusetts, his failure to acknowledge the

[5] Maine Bar Rule 7.3(j)(1) permits disbarred attorneys to petition for reinstatement at any time after five years from the date of the disbarment order, but without a requirement that a reinstatement applicant retake the bar exam.

wrongfulness of his past misconduct, conflicting statements he had given regarding his state of residence between 2002 and 2010, concern about his possible avoidance of state and federal income taxes in the years before and after his disbarment, and incomplete answers on his bar admission application regarding past disciplinary actions, past and pending civil litigation, corporations in which he held an interest and defaults on debts, Bailey had not demonstrated sufficient good character and fitness to qualify for admission to the Maine bar.

As authorized by M. Bar Admission R. 9(d)(6), Bailey has petitioned this Court for a finding of good character and fitness to allow him to be admitted to the Maine bar.

In Maine, an individual may be admitted to the practice of law, if the individual otherwise qualifies for admission, even if the individual has been disbarred in another state and that disbarment remains in effect. *In re Hughes*, 594 A.2d 1098, 1099 (Me. 1991). *Contra Fla. Bd. of Bar Exam'rs re Webster*, 3 So. 3d 1058 (Fla. 2009); *Fla. Bd. of Bar Exam'rs re Higgins*, 772 So. 2d 486, 487 (Fla. 2000) (an attorney disbarred in the state in which the professional misconduct occurred must first be readmitted in that jurisdiction before becoming eligible for readmission in Florida). *See also* M. Bar Admission R. 9A(a) (an applicant who is disbarred or suspended from practice in another jurisdiction is not eligible for conditional admission in Maine).

The criteria for admission to practice of an individual who has been disbarred in another state are the same as the criteria for reinstatement to active practice of an individual who has been disbarred in the State of Maine. *In re Hughes*, 594 A.2d at 1100-1101. *See also Bd. of Overseers of the Bar v. Campbell*, 663 A.2d 11, 13 (Me. 1995).

> "[B]ecause a disbarred lawyer seeking reinstatement has once proved unworthy of membership in the legal profession, Maine Bar Rule 7(o) imposes a much greater burden on that candidate for reinstatement than upon a person seeking admission as an original matter. To be restored to membership in the bar after having been disqualified, the petitioner . . . shall have the burden of demonstrating the moral qualifications, competency and learning in law required for admission to practice law in this State, *and that reinstatement will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest.*

In re Hughes, 594 A.2d at 1101 (citing M. Bar R. 7(o)(5) [Rule 7(o)(5) was replaced by M. Bar. R. 7.3(j)(5) in 1992]) (emphasis in original).[6]

To qualify for admission or reinstatement, an individual who has been disbarred must demonstrate, to the clear and convincing evidence standard, that the

[6] In *In re Hughes*, 594 A.2d 1098, 1101 (Me. 1991), the Court referred to the standard for admission as "demonstrating the moral qualifications, competency, and learning in law" required for admission to the practice of law. That is the standard then applied in Maine Bar Rule 7(o)(5) and now applied to reinstatement applications in Maine Bar Rule 7.3(j)(5). *Bd. of Overseers of the Bar v. Campbell*, 663 A.2d 11, 12 (Me. 1995). *Campbell* clarified that the clear and convincing evidence burden of proof applies to all of the criteria stated in Rule 7.3(j)(5). *Id*. at 12-13. Bailey's application for admission by exam is presented pursuant Maine Bar Admission Rule 9(d). In 2011, the Supreme Judicial Court amended the rules regarding the standards for admission in the Maine Bar Admission Rules to substitute "good character and fitness to practice law" for the good moral character standard or the standard applicable to reinstatement petitions pursuant to Maine Bar Rule 7.3(j)(5). Thus, the terminology used in this order is different than the terminology used in *Hughes* or in Maine Bar Rule 7.3(j)(5), but the substantive standard for admission or reinstatement remains essentially the same.

criteria established by the Court have been met. *Campbell*, 663 A.2d at 12-13; *In re Hughes*, 594 A.2d at 1101.

> By the clear and convincing standard, petitioner is required to prove to a high probability, rather than by a mere preponderance, that her reinstatement in the legal profession despite her past misconduct will not be detrimental to the public interest in the future.

Id.

When the Board of Bar Examiners, for a person disbarred in another state and not previously admitted to practice in Maine, or the Board of Overseers of the Bar, for a person disbarred in Maine, has determined that the individual has failed to demonstrate sufficient good character and fitness to be admitted or reinstated to the practice of law, the individual seeking admission or reinstatement may petition to the Supreme Judicial Court to be admitted or reinstated. Pursuant to M. Bar Admission R. 9(d)(6)(C) or M. Bar R. 7.2(b)(3), the matter is then assigned to a single justice of the Supreme Judicial Court to hear and decide de novo the question of qualification and good character and fitness to be admitted to the practice of law. In the proceeding before the single justice, the Court can consider the record developed before the Board of Bar Examiners, M. Bar Admission R. 9(d)(6)(C)(ii), and additional evidence presented at the hearing in reaching its decision.

This matter is now before the Court to decide whether Bailey has proved, by clear and convincing evidence, that he has the present good character and fitness to

be admitted to the practice of law and that his admission to practice will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest according to the standards discussed above.

II. CASE HISTORY

In stating the history of this case, and in making its findings, it is the Court's intent to give full faith and credit to the judgments of courts of other jurisdictions that have addressed the issues relevant to this proceeding, often after much more extensive hearings than have occurred in this bar admission proceeding. The goal to give full faith and credit to the judgments of courts in other jurisdictions may appear to be imperfectly achieved because of the many judgments that must be considered, their sometimes differing emphasis and results, and the necessity that the findings here must be briefer than a recitation of the findings and conclusions of those other judgments. Following is a list of the opinions, organized by date, earliest to latest, that this Court has attempted to synthesize in that portion of the relevant history of this matter that was addressed by judgments in other jurisdictions:

> *In re Bailey*, No. 69934, Mass. S.J.C. Single Justice Order (*Kirk, J.*) (Sept. 16, 1970) (unreported, Bd. Exhibit 24);
> *In re Bailey*, 273 A.2d 563 (N.J. 1971);
> *Bailey v. United States*, 40 Fed. Cl. 449 (1998);
> *United States v. Bailey*, 175 F.3d 966 (11th Cir. 1999);
> *Bailey v. United States*, 46 Fed. Cl. 187 (2000);
> *United States v. McCorkle*, 143 F.Supp. 2d 1311, 2000 U.S. Dist. LEXIS 20673 (M.D. Fla. (M.J.) 2000);

The Florida Bar v. Bailey, No. SC96767, Referee Report, Florida Supreme Court (July 24, 2000) (unreported, Bd. Exhibit 21);
United States v. McCorkle, 143 F.Supp. 2d 1311 (M.D. Fla. 2001);
The Florida Bar v. Bailey, 803 So.2d 683 (Fla. 2001);
United States v. Venske, 296 F.3d 1284 (11th Cir. 2002);
Bailey v. United States, 54 Fed. Cl. 459 (2002);
United States v. McCorkle, 321 F.3d 1292 (11th Cir. 2003);
In re Bailey, 786 N.E.2d 337 (Mass. 2003);
United States v. Bailey, 288 F.Supp. 2d 1261 (M.D. Fla. 2003);
Bailey v. United States, 94 Fed. Appx. 828 (Fed. Cir. 2004);
United States v. Bailey, 419 F.3d 1208 (11th Cir. 2005);
In re Bailey, 2005 U.S. Dist. LEXIS 26528 (D. Mass. 2005);
In re Bailey, 450 F.3d 71 (1st Cir. 2006);
Bailey v. Commissioner of Internal Revenue, T.C. Memo 2012-96 (2012);
Bailey v. Commissioner of Internal Revenue, Nos. 3080-08, 3081-08, U.S. Tax Court (Jan. 11, 2013) (unreported, Bd. Exhibit 56 A & B).

Because of the many similarly-titled opinions, the Court must use full citations, rather than short citations, in referencing most of these opinions. The factual history addressed in this opinion will be separated into five categories:

1. The *Duboc* case and Bailey's subsequent disbarment in Florida and Massachusetts;
2. The *McCorkle* case;
3. Bailey's residence and state income tax filings subsequent to his disbarment;
4. Other inconsistencies in Bailey's history and application that were of concern to the Board of Bar Examiners.
5. The United States Tax Court decisions; and
6. Bailey's professional and community activities since disbarment.

1. The *Duboc* Case and Disbarment

Early in 1994, Claude Duboc was indicted by a Federal grand jury in the Northern District of Florida on charges alleging drug smuggling and money

laundering. The government also sought forfeiture of all proceeds of Duboc's alleged drug trade, essentially all of his assets.

Duboc originally retained Bailey, Robert Shapiro, and a third attorney, for a proposed $1 million each ($3 million total) to defend him. After Shapiro, Bailey, and other attorneys became engaged in preparing the defense of the O. J. Simpson case that began in June of 1994, Bailey became Duboc's principal defense attorney.

At initial meetings with the United States Attorney's Office in April 1994, Bailey determined that the government had a very strong case against Duboc. He also learned that the assets the government sought to forfeit were vast, including cash and securities held in accounts in different countries, a collection of classic automobiles, yachts, artwork, houses in Canada, and two estates in France. Everything Duboc owned was the product of his drug business, and all of it was therefore subject to the forfeiture proceeding.

Recognizing that the government would, despite the strength of its case, have difficulty in locating and forfeiting the full array of Duboc's assets in various foreign countries, Bailey pursued a strategy of pledging Duboc's cooperation with those forfeitures in the hope that such cooperation would be favorably considered in sentencing following pleas of guilty.

In discussions with the prosecutors regarding the planned voluntary forfeiture of assets, problems with particular assets emerged. One problem was that the two French estates required substantial infusions of cash for maintenance pending their liquidation, but the United States Marshals Service could not undertake to perform such property maintenance tasks in a foreign country. Bailey agreed with the prosecutors that he would maintain those estates, arrange for their sale, and turn the proceeds over to the government for forfeiture. To provide Bailey with a source of funds for the upkeep of the properties, and a source for his own fees, the prosecutors initially proposed that, in lieu of forfeiting one of Duboc's cash accounts, which then contained approximately $3.5 million, the cash account would be transferred to Bailey.

At the time, Bailey expressed concern about another of Duboc's assets, his 602,000 shares of stock in a pharmaceutical company named Biochem Pharma. Biochem was apparently engaged in research on a cure for AIDS. Bailey believed that the Biochem stock would appreciate in value and that immediate liquidation of a substantial block of Biochem shares would substantially depress the value of the stock. Accordingly, Bailey and the Federal prosecutors agreed that, instead of the $3.5 million cash account, the Biochem stock would be transferred to Bailey to be used for the purpose of paying the upkeep on the French estates. It was also understood that Bailey could look to the Biochem stock as the source from which

to recover his attorney fees. It was further understood that any attorney fees to be taken from that asset would require judicial approval, and there was no guarantee as to whether or in what amount the judge would allow any attorney fees to be paid from a forfeitable asset.[7]

An Assistant United States Attorney warned Bailey that, in accepting the Biochem stock instead of the $3.5 million cash account, the risk that the stock would decrease in value was being borne by Bailey—and that the stock would be the sole source from which to pay for the maintenance of the estates that Bailey had undertaken to provide, and the sole source from which any attorney fees could possibly be recovered.[8] In accordance with this understanding, the Biochem stock was transferred to Bailey's account in a Swiss bank on April 26, 1994. At that time, the 602,000 Biochem shares were valued at $5,891,352.

The agreements or understandings with the U. S. Attorney's office regarding transfer of the Biochem stock to Bailey, the uses to which the stock and proceeds of its sale could be put, and the extent of approval and accounting for uses of the

[7] In proceedings in the U.S. District Court and the U.S. Court of Claims, Bailey contended that the Biochem stock was transferred to him in fee to use to maintain the Duboc properties until sale and to cover his attorney fees. Because the stock was transferred to him in fee, Bailey contended that he was entitled to use it as he wished and to retain any appreciation in the value of the stock. The courts all found to the contrary, determining that Bailey held the stock in trust for the government to spend proceeds to maintain the Duboc properties with an accounting to be approved by the court, and with the amount of Bailey's attorney fees to be taken from the stock proceeds ultimately to be decided by the court.

[8] At hearing, Bailey testified that he believed that the Biochem shares had been transferred to him in fee and unconditionally because if he was accepting the downside risk, he should benefit from any upside gain.

funds that would be required were not reduced to writing. The law then, as now, indicated that a defense attorney could not expect to collect attorney fees from assets that are subject to forfeiture. *See United States v. Monsanto,* 491 U.S. 600, 606-614 (1989). However, in practice at the time, some United States Attorney offices informally allowed defense attorneys to take or receive attorney fees from assets that might be subject to forfeiture. *See United States v. Saccoccia*, 433 F.3d 19, 22-23, 29-30 (1st Cir. 2005) (addressing an indictment and $140 million forfeiture proceeding commenced in 1991-1992, a 1993 trial, informal agreements between government prosecutors and defense attorneys to allow the attorneys to receive payments from client assets, attorney fee payments of $914,985, much of it in cash, and an ultimately unsuccessful government effort, commenced in 1998, to recover the attorney fees as assets subject to forfeiture).

On May 17, 1994, Judge Maurice Paul, the United States District Court judge presiding over Duboc's case, conducted a conference in his chambers preparatory to taking Duboc's change of plea. At that conference, the parties explained and apparently received approval for their arrangement with respect to the Biochem stock. However, the chambers conference was not recorded, and later accounts differed as to what was said.

Duboc's written plea agreement, signed by Duboc and Bailey, committed Duboc to forfeit "all drug related assets," and stated that there were "no other

agreements" between Duboc and the United States Attorney. The agreements between Bailey and the prosecutors, which the United States Tax Court later characterized as "a vague and unusual agreement," *Bailey v. Commissioner of Internal Revenue*, T.C. Memo, 2012-96, 6, were not addressed in the plea agreement. Bailey now states that it was a mistake not to have the agreements with the prosecutors in writing.

After the chambers conference, Duboc pleaded guilty to two counts of the indictment and pledged his complete cooperation with the government in the marshaling and ultimate forfeiture of all his assets.

From April 1994 until late 1995, Bailey did substantial work on the *Duboc* matter. He made frequent trips to Europe, maintained and sold Duboc's properties, paid European creditors with claims against the properties, dealt with complications of foreign law, negotiated with foreign prosecutors and customs officials who had their own interest in Duboc's assets, dealt with a French magistrate who froze certain of the assets, did most of the work in a joint effort with government counsel to obtain a necessary order from the District Court, and visited regularly with Duboc, who remained incarcerated. An Assistant United States Attorney involved with the matter acknowledged that Bailey's work on the recovery of Duboc's assets was very good and the Court of Claims found that

Bailey's work was "far more than usual for a defense attorney." *Bailey v. United States*, 54 Fed. Cl. 459, 484 (2002).

After the shares of Biochem stock had been transferred to Bailey's Credit Suisse investment account, Bailey borrowed against the shares, garnering over $4 million in proceeds. He transferred over $3.5 million of those proceeds to his money market account, and later transferred all but $350,000 from that account to his personal checking account. Drawing on those proceeds, Bailey wrote checks, totaling $2,297,696, to his private business enterprises, spent $1,277,433 for expenses and purchases, which may have been for forfeiture asset preservation and recovery, and spent another $138,946 toward the purchase of a personal residence. The commingling of the Biochem stock proceeds with Bailey's personal funds, and his expenditure of the stock loan funds for his own purposes, comprise the comingling and misappropriation of funds found in the later disbarment proceeding.

Separate from the Biochem shares, other stock to be forfeited was liquidated by Bailey on or about July 6, 1994. Instead of transmitting the $730,000 in proceeds directly to the United States Marshals, Bailey transferred the funds to his money market account, where they were commingled with personal funds. Bailey did not turn over the $730,000 to the United States Marshals until six weeks later.

By late 1995, Duboc had become dissatisfied with Bailey's representation and expressed his intention to replace Bailey with substitute counsel. Duboc requested that Bailey transfer all the funds and assets to his new counsel, two lawyers with the law firm Coudert Brothers. As of the end of that year, Bailey had not made that requested transfer. A motion to substitute counsel was scheduled for hearing before Judge Paul on January 9, 1996.

Five days before that scheduled hearing, Bailey sent Judge Paul a letter, without copying the prosecutors, his client, or his client's new counsel. In the letter, Bailey asserted that the lawyers seeking to represent Duboc were not qualified to represent him, that they were giving Duboc bad advice, and that they had a conflict of interest. He claimed that new counsel were urging Duboc to renege on his promise of cooperation, and that Duboc had violated the plea agreement in following that advice, whereas Bailey's strategy of utmost cooperation would have put Duboc "in his best light when it came to the day of final judgment" and "would have caused his release at the earliest possible date." The letter closed with Bailey's express acknowledgment that it had been sent ex parte. "I have sent no copies of this letter to anyone, since I believe its distribution is within Your Honor's sound discretion."

Judge Paul had a policy of not reading letters sent from counsel representing a party in a case before him, and apparently did not read Bailey's letter. On

January 12, 1996, Judge Paul issued an order relieving Bailey as counsel and substituting the lawyers from Coudert Brothers as Duboc's new counsel. The order required Bailey to submit within ten days an accounting of "the monies and properties held in trust by him for the United States of America." The accounting was to include "all monies, real and personal property and other assets obtained by him from, or for the benefit of, the defendant Duboc as well as all disbursements, liens or other payments made by him on account of or for the benefit of Claude Duboc or the United States," and expressly referenced an accounting of the Biochem stock "that was delivered to Bailey to be held in trust for the United States."

Judge Paul ordered that all of Duboc's assets held by Bailey were to be "frozen as of the date of this order and no further disbursement of any of these funds shall be made unless authorized by this Court." Despite knowledge of that order,[9] Bailey spent another $309,861 of the funds in his account that he had borrowed against the Biochem stock, and he submitted no accounting.

On January 21, the day before the accounting was due, Bailey wrote again to Judge Paul, copying an Assistant United States Attorney. In that letter, Bailey contended that he had agreed with the government that he would be accountable for only the original $5.9 million value of the Biochem stock at the time it was

[9] Bailey contested the extent and timing of his knowledge of this order. As with other contested findings, this Court accepts the findings entered by the federal or state courts addressing Bailey's conduct.

transferred to him, and that Bailey was entitled to keep as his own any appreciation in the value of the stock that had occurred since that transfer. The letter relayed Bailey's claim that Duboc himself had now expressed a different view, namely, that any appreciation should go to the government "so that [Duboc] would get more 'credit' at the time of sentencing." Bailey asserted that, to "protect" himself, his client's contrary assertion as to the status of the appreciation of the Biochem stock would allow Bailey to "invade" the attorney-client privilege.

The government then filed an emergency motion, seeking an order that Bailey surrender all property that he held on behalf of Duboc. On January 25, Judge Paul issued such an order, requiring that Bailey appear on February 1 and bring with him all shares of the Biochem stock. If the stock had been "replaced by any other form of asset," that replacement asset was to be brought to court. Bailey was also ordered to produce all documents pertaining to the funds and assets he held for Duboc and to "be prepared to make a full accounting" with respect to those assets. A copy of the order was served on Bailey by facsimile, by mail, and by the United States Marshals.

On receipt of the January 25 order, Bailey advised the Swiss government that the 400,000 Biochem shares and proceeds still in his Swiss bank account were the fruits of drug trafficking, which resulted in the freezing of the account for a

brief period of time. Bailey therefore did not produce the stock or any proceeds as ordered by the court.

Judge Paul held a contempt hearing on February 2, at which Bailey testified, under oath, that he had not seen either the January 12 or the January 25 order until the morning of February 2. Considering evidence that Bailey had received both orders well prior to that date, the referee in the Florida disbarment proceeding concluded that Bailey's testimony before Judge Paul, and his identical testimony during the bar discipline hearing, was false.

Bailey was held in contempt for his failure to produce the stock or its substitute proceeds. He was incarcerated for forty-four days until he paid $2.3 million to the court. Ultimately, the court approved $1.2 million as the expenses incurred by Bailey in managing Duboc's assets. An additional $423,738 in claimed expenses was disallowed, and Bailey was ordered to return that additional amount to the court. *See United States v. Bailey*, 175 F.3d 966, 968 (11th Cir. 1999). Bailey never made an application for attorney fees to Judge Paul.

Bailey appealed the District Court's order on reimbursable costs. On appeal, Bailey abandoned his claim made in the District Court to ownership of the stock and instead contested the District Court's action in denying certain expenses claimed in connection with the *Duboc* case. Except for allowing an expense for a suit of clothing for Duboc, the Eleventh Circuit affirmed the District Court's award

of costs and a 1998 Court of Claims judgment, discussed below. *United States v. Bailey*, 175 F.3d 966, 969 (11th Cir. 1999).

After ultimately paying the funds to the District Court as ordered, in October 1996, Bailey had filed a complaint in the Court of Claims alleging that the United States had entered into an oral contract with him to transfer the Biochem stock to him. The complaint asserted that the stock was transferred "unconditionally and in fee simple," and that the government agreed not to seek forfeiture of this stock, which was to become the source of the various fees and expenses in connection with the Duboc case, in lieu of the cash previously offered or other form of payment. The government's initial motion and a subsequent motion to dismiss Bailey's complaint were denied. *Bailey v. United States*, 40 Fed. Cl. 449 (1998); *Bailey v. United States*, 46 Fed. Cl. 187 (2000). However, after trial the Court of Claims ruled for the government and rejected Bailey's claims to recover the value of the stock. *Bailey v. United States*, 54 Fed. Cl. 459 (2002). The Court of Claims trial decision, published after Bailey's Florida disbarment, although ruling for the government, includes findings supportive of Bailey's view of some of the financial transaction events in the *Duboc* case.

The Florida bar initiated a disciplinary proceeding against Bailey in 1999. An extensive hearing was held before a referee. Based on the facts relating to the *Duboc* case, as described above, the referee recommended disbarment, finding, by

clear and convincing evidence, that Bailey had violated the following provisions of the Rules Regulating the Florida Bar: Rules 3-4.3 (conduct unlawful or contrary to honesty and justice); 4-1.6(a) (disclosure of information relating to representation of client); 4-1.7(b) (independent or professional judgment in the representation materially limited by lawyer's own interest); 4-1.8(a) (acquisition of ownership, possessory, security, or other pecuniary interest adverse to client); 4-1.8(b) (use of information to disadvantage of client); 4-1.15(a) (commingling of client's funds with lawyer's own); 4-3.3(a)(1) (false statement to tribunal); 4-3.4(c) (knowing violation of rules of tribunal); 4-3.5(a) (attempt to influence judge, juror, prospective juror, or other decision maker); 4-3.5(b) (communication as to merits of case with judge or official); 4-8.4(a) (violation of Rules of Professional Conduct); 4-8.4(b) (criminal misconduct); 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation); 4-8.4(d) (conduct prejudicial to administration of justice); and 5-1.1 (property entrusted to attorney for specific purpose held in trust must be applied only to that purpose). The Florida Supreme Court affirmed these findings, and Bailey was ordered disbarred, with capacity to apply for reinstatement after five years. *The Florida Bar v. Bailey*, 803 So.2d 683 (Fla. 2001). Bailey has not sought reinstatement in Florida.

2. The *McCorkle* case

On May 9, 1997, federal agents seized a significant amount of property of William J. McCorkle, Chantal McCorkle, and their ten corporations. The property seized included business and other records, money in various bank accounts, cars, and other property seized for evidentiary and forfeiture purposes.

On March 5, 1998, a federal grand jury in Orlando, Florida returned an indictment charging the McCorkles, some of their associates, and their ten corporations, with ninety felony counts, including conspiracy, mail fraud, credit card fraud, perjury, and money laundering. The indictment and a superseding indictment charged that the McCorkles operated a nationwide telemarketing fraud from June 1, 1992 through July 21, 1997, in violation of 18 U.S.C. §§ 1341 and 1343 (1998). The indictment detailed the McCorkles' many false representations, promises, and deceptive practices in selling videos and related materials representing that customers could make enormous profits using the McCorkle method of investing in "pre-foreclosed" and "distressed" real estate, and promising that McCorkle would partner deals with customers using the McCorkles' money. The indictment also charged that the McCorkles had laundered and conspired to launder telemarketing fraud proceeds in violation of 18 U.S.C. §§ 1956-57 (1998).

The indictment contained a forfeiture count alleging that any proceeds that the McCorkles obtained from the fraud and money laundering were forfeitable to

the United States. The indictment also stated the government's intent to seek forfeiture of any other substitute property of the defendants pursuant to 18 U.S.C. § 982 (b)(2) (1998), if the specified property cannot be located, has been transferred or sold to, or deposited with a third party. Federal law enforcement agents arrested the McCorkles on March 10, 1998.

Early in the proceeding, William McCorkle retained Bailey to represent him. Bailey was paid from $2 million that had been placed in a Cayman Islands trust by the McCorkles for the payment of their attorney fees and was transferred by the trust to Bailey. The $2 million were proceeds of the telemarketing scheme and thus were subject to forfeiture pursuant to 18 U.S.C. § 982(a)(1), which states, in pertinent part:

> The court, in imposing sentence on a person convicted of an offense in violation of . . . [18 U.S.C. §§ 1956 or 1957] shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

On November 4, 1998, after a trial, a jury found William and Chantal McCorkle guilty of numerous fraud and money laundering violations.

After convicting the McCorkles, the jury was instructed regarding forfeiture, and returned a special verdict finding that certain real and personal property, including numerous bank accounts, were involved in, traceable to, or facilitated the fraud and laundering violations charged in the indictment and, thus, were subject to forfeiture. Among the accounts subject to forfeiture to the United States was the

$2 million that had been placed in the Cayman Islands trust for the payment of the McCorkles' attorney fees and transferred to Bailey. Bailey knew from the outset of his representation that the funds could be subject to forfeiture. *United States v. McCorkle*, 321 F.3d 1292, 1296 (11th Cir. 2003).

At the January 25, 1999, sentencing, the District Court, as a part of the McCorkles' sentencing package, entered an order of forfeiture that conveyed the forfeited interests to the United States. The United States then brought a civil action for conversion and civil theft against Bailey. To defeat the government's right to such proceeds established by the jury's verdict, Bailey had to file a petition with the District Court and prove that he had received the money as a bona fide purchaser for value without cause to believe that the money was subject to forfeiture ("BFP"). *See* 21 U.S.C. § 853(n)(6)(B) (1998). Bailey filed his petition on February 16, 1999.

The District Court referred Bailey's petition to a magistrate judge. On March 5, 1999, the government sought an order to show cause why Bailey should not be held in civil contempt for failing to turn over the funds withdrawn from the trust. On March 30, 1999, the magistrate judge, in advance of the hearing on the merits of Bailey's petition, entered a preliminary order directing Bailey to either deposit $2 million into the registry of the court or, by May 3, 1999, post a $2 million bond. Bailey did neither because the trust fund was nearly empty; by October 1998,

Bailey had disbursed its contents to himself and the McCorkles' other lawyers as legal fees for the McCorkles' defense. *United States v. McCorkle*, 321 F.3d 1292, 1295 n.3 (11th Cir. 2003).

In October 1999, the magistrate judge conducted an evidentiary hearing on the merits of Bailey's petition and on Bailey's failure to comply with the preliminary order to either deposit the $2 million with the court or post bond. In January 2000, the magistrate judge recommended that the District Court (1) deny Bailey's petition because Bailey had failed to establish that he was a BFP, and (2) require Bailey to show cause why he should not be held in civil contempt for failing to comply with the magistrate judge's preliminary order.

On June 29, 2000, the District Court entered an order adopting the magistrate judge's recommendation that Bailey's petition be denied, thus giving the Government clear title to the $2 million trust fund earmarked for legal fees. *Id.* at 1295-96. However, the court also concluded that it lacked the statutory authority to order Bailey to forfeit $2 million because that trust fund, having been spent, was no longer available. *United States v. Bailey*, 288 F. Supp. 2d 1261, 1263 (M.D. Fla. 2003). As an alternative, the District Court suggested that the final determination that the government had clear title to the trust fund assets enabled the government to pursue a common law action against Bailey for conversion. *United States v. McCorkle*, 321 F.3d 1292, 1295 n.3 (11th Cir. 2003).

On July 24, 2001, the government filed suit against Bailey. The complaint alleged conversion and civil theft and sought the entire $2 million from the trust fund, punitive damages on the conversion count, and treble damages on the civil theft count. *See* Fla. Stat. § 772.11(1) ("Any person who proves by clear and convincing evidence that he or she has been injured in any fashion by [civil theft] has a cause of action for threefold the actual damages sustained . . . .").

Prior to trial, the District Court granted partial summary judgment in favor of the government. It concluded that as a result of the "relation-back doctrine," as codified in 21 U.S.C. § 853(c), the government acquired all right, title, and interest in the money comprising the trust fund the moment that it was laundered by the McCorkles in violation of federal law, and that Bailey, therefore, necessarily converted the fund when he disbursed it to himself and the McCorkles' other attorneys. *United States v. Bailey,* 288 F. Supp. 2d 1261, 1265-66 (M.D. Fla. 2003). As such, it granted the government's motion for summary judgment on the conversion claim, and that claim proceeded to trial on the issue of punitive damages only. The court also ordered that the civil theft claim would go to trial only on the issue of intent, *i.e.*, whether Bailey obtained the contents of the fund "with the felonious intent to commit a theft." *Id*. at 1266.

After a four-day trial, a jury awarded the government $3 million in punitive damages on the conversion claim and also found against Bailey on the civil theft

claim, which resulted in a trebled award of $6 million. Bailey moved for reconsideration of the court's decision granting summary judgment and to set aside the punitive damage award as unconstitutional, citing the Unites States Supreme Court's recently published opinion, *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003).

The District Court granted Bailey's motion for reconsideration, vacated its earlier order granting partial summary judgment in favor of the government, and entered judgment as a matter of law in favor of Bailey on both of the government's claims. *United States v. Bailey,* 288 F. Supp. 2d 1261, 1281-82. Its order was based on a reevaluation of its earlier ruling regarding the relation-back provision of § 853(c) and the state-law tort requirement that a plaintiff in a suit for conversion or civil theft must establish possession or a right to immediate possession at the time of the alleged conversion. Specifically, the court now held that the government could not rely exclusively on the relation-back doctrine to establish such a possessory interest. *See id*. at 1267-79. The court also considered Bailey's alternative argument regarding punitive damages, *id*. at 1279, and held that a $3 million punitive award was unconstitutionally excessive, applying the *Campbell* due process analysis. *See id.* at 1279-81.

On appeal, the government argued that the District Court erred in holding that it lacked the requisite possessory interest in the legal trust fund at the time of

the alleged conversion. The government also challenged the District Court's order setting aside the jury's punitive damage award. The Eleventh Circuit affirmed the District Court's finding of failure to prove conversion and, consequently, did not address the issue of punitive damages. *United States v. Bailey*, 419 F.3d 1208 (11th Cir. 2005). Thus, Bailey was ultimately absolved of any responsibility to surrender any of the $2 million paid to him for his attorney fees from the Cayman Islands trust.

3. Residences and State Tax Status

Bailey made many differing statements regarding where he resided from 2002-2010 in court filings, corporate registration statements, state and federal tax filings, and in his Bar Admission Applications and supplementary materials. Many statements indicated that Bailey resided in Lynn, Massachusetts during this time. One witness testified that Bailey was his neighbor in Lynn, and that he understood that the Lynn home was Bailey's primary residence. This information conflicted with the Florida residence addresses Bailey listed on some state tax returns.

These conflicting statements regarding residence led the Massachusetts tax authorities to review Bailey's state income tax compliance for years in which he had filed no Massachusetts income tax return or had filed a nonresident tax return. The conflicting statements regarding residence and the state income tax compliance

issues generated by the conflicting statements were of significant concern to the Board of Bar Examiners in reaching its decision, and appropriately so.

Subsequent to the Board of Bar Examiners decision, the Massachusetts taxing authorities, in a letter dated February 20, 2013, indicated that they would not be pursuing efforts to demonstrate that Bailey was a Massachusetts resident from 2002 to 2009, and that Bailey had no outstanding income tax liabilities in Massachusetts.

The Board also asserts that Bailey was a resident of Maine in 2009 and should have filed a Maine income tax return for that year. While Bailey spent time in Maine in 2009 in connection with prospective business ventures and visiting friends, the Court finds that he did not begin residing in Maine on a full time basis until sometime in 2010. Bailey did file a part-year Maine tax return for 2010.

4. Businesses Listed and Other Inconsistencies on Bar Admission Application

In response to a question on the bar admission application that asked Bailey to list "any businesses" that "you now or previously operate[d] or control[led] or in which you have or had an ownership interest," Bailey did not list Heli-Boss, LLC, a Massachusetts LLC of which Bailey was sole owner and operator from June 2006 to October 2009. In the Certificate of Organization signed by Bailey in 2006, he described the "business" of this LLC as "to own, operate and maintain helicopter aircraft and in general to engage in any activities directly or indirectly related or

incidental thereto." Bailey claimed substantial business deductions from owning and operating the helicopter on his 2007 and 2008 federal income tax returns. When his LLC sold the helicopter in 2009, Bailey claimed a $33,000 "business" tax loss on his federal income tax return.

Bailey testified at hearing that Heli-Boss, LLC, did not need to be disclosed on his bar application because, in his view, it was not a "business."

Bailey also did not list on his application a Massachusetts corporation that held title to Bailey's home in Lynn, Massachusetts, during 2002-2010. The business of the corporation was "real estate development." Bailey was the only officer and resident agent of the corporation for most of that time period. Bailey claimed business losses stemming from the Massachusetts home on his 2009 federal income tax return, and the corporation filed its own income tax returns.

Bailey also did not list Tel-Share Publishing Co., a family business in which Bailey was one of two or three shareholders, and Bahamas Enterprises, Inc., a corporation solely owned by Bailey sometime during the 1990s.

In response to a question on the bar application that asked, "Have you ever been a named party to any civil action," Bailey did not list litigation in the United States Tax Court that Bailey had initiated in 2008. This litigation resulted in the Tax Court decisions addressed in this opinion.

In response to a question on the bar application that asked whether he ever defaulted on any debt, Bailey answered "No." Bank of America had filed a foreclosure action against Bailey in 2003 after he stopped paying the mortgage on his home in Florida. Bailey testified to the Board that he answered "No," to the question about the default because "I thought that question asked did you ever stiff anybody for any money and I didn't." Bailey testified at the hearing in this Court that he did not view his failure to pay his mortgage as a "default." The house in question was apparently sold in 2004, and any debts associated with that property were apparently satisfied.

5. The Tax Court Proceedings

The Board asserts that the Tax Court, in *Bailey v. Commissioner of Internal Revenue*, T.C. Memo, 2012-96, found that Bailey had underreported his taxable income by more than $6 million between 1993-2001 and that this underreporting of income "reflects poorly on his ethics and character."

On November 6, 2007, the Internal Revenue Service had issued to Bailey two statutory notices of deficiency indicating deficiencies in income tax payments, failure-to-file additions to tax, and accuracy-related penalties totaling $4,957.493. *Id*. at 3.[10] The deficiency notices were the result of investigations and audits initiated between December 1994 and April 2002, *id*. 46-49, and covered the tax

[10] The Westlaw paging for this citation indicates page 2, the LEXIS paging for this citation indicates page 3. When pin cites are used referencing this opinion, the LEXIS paging is used.

years 1993 through 2001. Thus, from December 1994 forward, Bailey was aware that his financial activities and tax reporting relating to both his law practice, including the transactions in the *Duboc* and *McCorkle* cases, and his yacht and aircraft related businesses were subject to scrutiny by the I.R.S.

Bailey initiated the action in the Tax Court in 2008 challenging I.R.S. deficiency assessments and penalties. After an extensive pretrial practice and a trial, the Tax Court issued its initial decision April 2, 2012.

The Tax Court decision speaks for itself and shows a mixed picture of results from poor recordkeeping and mistaken expectations in a time when Bailey was involved in, perhaps, too many business ventures and too much high fee prospect but high fee payment uncertainty litigation. For example, from 1994 through failure of his claims against the United States government in 2002, Bailey was claiming a fee of as much as $3 million from the *Duboc* case from which, ultimately, he received approval for approximately $1,200,000 in expenses, but had to pay significant sums to the government and received no fee at all for two years of very intense work. Also during the time period reviewed by the Tax Court, Bailey's wife had died; several business ventures had concluded, apparently without much success; he was disputing with the government his claims to between $5 million and $10 million in fees, expenses, and payments, including his claim to

the appreciated value of the Biochem stock and his fee in the *McCorkle* case; and he was defending the Florida disbarment proceeding.

In concluding its opinion, the Tax Court recognized the difficulties Bailey created for himself, and for the Tax Court, by the combination of poor documentation of law and business transactions, mistaken expectations and assumptions about what he might receive as income and what he could claim as expenses, and changes in income and reimbursements imposed by court orders.

> By this standard, we find that Mr. Bailey's underpayments for 1993 through 1995 and 1997 through 2000 were negligent.[11] This is so whether and to the extent that the underpayments result from his failure to report income (whether from Duboc, the payments signed over to Broder, the $100,000 math error, or the other items of unreported income revealed during the audit) or from his claiming of deductions that he did not substantiate or to which he is not entitled. For most of the items adjusted in the notice of deficiency, he failed to keep records and thereby made the examination of his return a forensic and almost archeological challenge. The examination turned up multiple instances of his depositing income into multiple accounts in order to frustrate others' potential attempts to seize his funds; but one effect of this strategy was to introduce confusion into his own record-keeping and accounting.
>
> We do not blame Mr. Bailey for failing to anticipate the outcome of his dispute with the Government about the Biochem Pharma proceeds, and had he reported fee income from Mr. Duboc in accordance with his professed theory (i.e., that he was entitled to take money for personal use as fees when earned), then we would not impose the penalty on the income he derived from the Biochem Pharma stock sales (i.e., derived temporarily until he had to repay it). However, he failed to report on

[11] Tax years 1996 and 2001 are not addressed in this portion of the opinion because no penalties were imposed for the deficiencies found for those years.

> any tax return any of the money he drew down from the Biochem Pharma sales. That failure was negligent.

Bailey v. Commissioner of Internal Revenue, T.C. Memo, 2012-96, 156-57.

The Tax Court opinion resolved many issues in Bailey's favor and many issues against him. Its ultimate computation of liabilities based on its determinations found that Bailey is responsible for deficiencies and penalties totaling $1,930,116.05, *Bailey v. Commissioner of Internal Revenue*, Nos. 3080-08 & 3081-08 (unreported, January 11, 2013), a significant sum, but less than half the nearly $5 million claimed in the original notices of deficiency. Bailey appealed the Tax Court decision on April 8, 2013.[12]

Viewing the totality of the circumstances, the Court finds that the record related to the Tax Court proceeding and the positions Bailey asserted in that proceeding do not demonstrate a failure of good character and fitness that should preclude his admission to the bar. The nearly $2 million obligation to the I.R.S. that apparently remains outstanding is, however, a fitness concern that is addressed later in this opinion.

6. Professional and Community Activities

Although disbarred, Bailey has continued to write, speak, teach, and participate in efforts to improve the criminal justice and corrections system, support

[12] To determine the current status of the Tax Court case, the Court took judicial notice of the electronic docket entries for the Tax Court case. If either party objects to such taking of judicial notice, *see* M.R. Evid. 201(e), an objection should be filed by May 6, 2013.

economic development efforts and help returning veterans in Maine and Massachusetts, and be an active member of the communities where he has lived. He has regularly been invited to speak at meetings and training sessions of law and business groups both in Maine and nationally, including being a presenter at Law Enforcement Executive Development Seminars run by the Federal Bureau of Investigation at the FBI Academy and other locations. Bailey has also organized fundraising and other charitable events and written or updated articles and books on criminal law and trial practice. Of particular note, Bailey has pursued his long-standing commitment to improving educational and job opportunities for inmates transitioning from prison to the community. In all of these activities, Bailey has acknowledged his disbarment and avoided actions that could constitute practicing law without a license while engaging with lawyers, law enforcement personnel, and persons involved in the correctional system and in business development.

Friends and professional colleagues of Bailey also report that as a result of the disbarment and subsequent events, he is a more humble person, recognizes mistakes he has made, and is more accepting of advice and counsel of others as he moves forward with his still very active life. The Court finds many of these statements of friends and professional colleagues to be credible.

III. CHARACTER AND FITNESS EVALUATION

An applicant for admission to the bar in Maine who is disbarred in another jurisdiction has the burden of presenting clear and convincing evidence demonstrating either (1) "that the applicant is a person of good character and is fit to practice law," M. Bar Admit. R. 9(d)(6)(E), or (2) that the applicant has "the moral qualifications, competency, and learning in the law required for admission to practice law in this State," M. Bar R. 7.3(j)(5). The applicant must also demonstrate, to the clear and convincing evidence standard, that admission to practice will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest. *Bd. of Overseers of the Bar v. Campbell*, 663 A.2d 11, 12-13 (Me. 1995).

Bailey's application is presented pursuant to Bar Admission Rule 9. As indicated earlier, the Court views the standards articulated in Bar Admission Rule 9 and Bar Rule 7.3 as essentially the same for purposes of this proceeding.

The standard articulated by the single justice in *Hughes* and affirmed in *In re Hughes*, 594 A.2d 1098 (Me. 1991), governs the decision making on Bailey's application. That standard recognizes that there have been serious ethical failures in the past, but requires that this Court decide if the applicant has demonstrated good character and fitness in the present to the clear and convincing evidence standard. As the single justice stated, the question "is not whether the [applicant]

deserves further punishment for her past misdeeds, but whether her moral character will at present permit her to practice law as a credit to the profession and without risk to the public." *In re Application of Hughes*, BAR-90-17, 2 (*Wathen, J.*) (February 6, 1991) (unreported); *see also In re Hiss*, 333 N.E.2d 429, 434-35 (Mass. 1975).

Looking to the present, and not considering further punishment for past misdeeds, in no way disrespects or diminishes the seriousness of the Florida bar proceeding, or the significance of the sanction imposed by the Florida Supreme Court and imposed reciprocally by the Massachusetts Supreme Judicial Court. The Florida Supreme Court's 2001 opinion allowed Bailey to seek reinstatement or readmission after a period of five years if he could demonstrate sufficient good character and fitness, and again take and pass the bar exam to qualify for readmission. *The Florida Bar v. Bailey*, 803 So.2d 683, 695 (2001). Bailey did not apply for admission in Maine until 2011, five years after the Florida Supreme Court would have allowed him to seek readmission.

The opinion in *Hughes* also demonstrates that the Court should not demand perfection in ones conduct, even in the present. Hughes was disbarred in Georgia after being convicted of a felony, theft of over $400,000, and falsifying documents. Bailey was not convicted or even charged with any crime leading to his

disbarment.[13] Subsequent to her conviction, as of the time of her admission in Maine, and despite a court ordered restitution requirement, Hughes had not repaid any of the $400,000 stolen from her victims. Bailey paid to the court or the government all sums he had been ordered to repay in the *Duboc* case. After disbarment, Bailey was ultimately successful in defending against government efforts to require him to repay all or some of the fees he had earned in the *McCorkle* case.

Although the outstanding debt of $400,000 apparently was of little concern to the court in *Hughes*, times and the perceptions of importance of significant outstanding debt as a fitness issue may have changed in the two decades since *Hughes*. Accordingly, the Court would be remiss if it did not recognize and address the debt issue at some point in this opinion.

The factors listed in the Bar Rules that must be demonstrated for reinstatement of a disbarred attorney, *In re Williams*, 2010 ME 121, ¶ 6, 8 A.3d 666 (citing *In re Hughes*, 594 A.2d at 1101) are equally applicable to decide if present good character and fitness to practice has been demonstrated in support of an application for original admission of an attorney disbarred in another jurisdiction. Those factors are:

[13] The contempt order that resulted in Bailey serving time in jail was a civil remedial contempt order that allowed Bailey's release when the required funds were paid to the court.

> (A) the [applicant] has fully complied with the terms of all prior disciplinary orders;
>
> (B) the [applicant] has neither engaged nor attempted to engage in the unauthorized practice of law;
>
> (C) the [applicant] recognizes the wrongfulness and seriousness of the misconduct;
>
> (D) the [applicant] has not engaged in any other professional misconduct since resignation, suspension or disbarment;
>
> (E) the [applicant] has the requisite honesty and integrity to practice law;
>
> (F) the [applicant] has met the continuing legal education requirement of Rule 12(a)(1) [. . . .]

M. Bar R. 7.3(j)(5).[14]

As noted above, in *Hughes*, the applicant committed theft of more than $400,000 in client funds over a five-year period. *In re Hughes*, 594 A.2d at 1099. As part of her fraudulent scheme, she falsified federal legal documents to conceal her embezzlement. *Id.* She was convicted, sentenced to a four-year term of

[14] M. Bar R. 7.3(j)(5) parallels Rule 25(E) of the ABA Model Rules for Lawyer Disciplinary Enforcement. The ABA Model Rules for Lawyer Disciplinary Enforcement do not comment on the admission of an applicant in a given jurisdiction after disbarment in another jurisdiction other than to state that "[u]nless disciplinary counsel present evidence demonstrating procedural irregularities in the other jurisdiction's proceeding or presents other compelling reasons, the court shall reinstate or readmit a lawyer who has been reinstated or readmitted in the jurisdiction where the misconduct occurred." *See* ABA Model Rules for Lawyer Disciplinary Enforcement 25(J).

imprisonment, all suspended, five years of probation, and ordered to pay more than $400,000 in restitution. *Id*. Hughes resigned from the Georgia bar and the Law Court treated her resignation as the equivalent of disbarment. *Id.* at 1101. Hughes moved to Maine six years after her disbarment and applied for admission to the Maine bar three years later—nine years after disbarment. *Id.* at 1099.

In determining whether Hughes had the present moral fitness and character to practice law in Maine, the Court referenced: (1) Hughes's full and truthful disclosure of her criminal misconduct, (2) the duration and persistence of her misconduct, (3) Hughes's age at the time of the misconduct, (4) her experience as an attorney at the time of the misconduct, (5) her efforts to conceal her misconduct, (6) her cover up by falsifying legal documents, (7) the amount of money stolen, (8) her failure to repay victims, (9) her subsequent financial history and experience handling the money of others, and (10) the unlikelihood that her criminal behavior would reoccur.

The Law Court noted that:

> [Hughes's] course of conduct persisted [] for more than five years, coming after she had already practiced law for seven years and at a time when she was in her mid-thirties, [Ms. Hughes] took more than $400,000 from people who had put their trust in her as their attorney, and to hide her defalcations she swore falsely to legal documents required in her real estate practice. Her admitted conduct constituted not merely moral turpitude, but moral turpitude directly and specifically related to her practice of law. We note that [Ms. Hughes] has had no experience in any capacity since 1980 that has tested her rehabilitation for handling the money of others.

In re Hughes, 594 A.2d at 1102.

Although Hughes had a significant history of criminal, dishonest, and fraudulent acts related to her law practice and embezzlement of client funds, the single justice focused on her present moral character, including her conduct since disbarment, and found that she was fully rehabilitated and fit to practice. *In re Application of Hughes*, BAR-90-17, 1 (*Wathen, J.*) (February 6, 1991) (unreported). The single justice did not reference any positive social contributions of Hughes since disbarment. It considered testimony of two members of the Maine bar who had known Hughes since she moved to Maine three years before applying to the Maine bar. *Id.* at 3. Both apparently testified to her good moral character without reservation and with knowledge of her past criminal acts. *Id.* Although Hughes had made no payments of the court ordered restitution, apparently this financial history was not held against her and did not impede the finding that she was qualified for admission. *Id*.; *see also Application of Hughes*, 608 A.2d 1220 (Me. 1992).

Despite Hughes's embezzlement of more than $400,000, criminal conviction, and failure to make restitution, the Law Court, reviewing the single justice, focused on Hughes's present moral character and held that she had rehabilitated herself since disbarment and presently possessed the requisite moral

fitness and character to practice law in the State of Maine. *Application of Hughes*, 608 A.2d at 1221.

Looking to precedent from other states addressing similar issues with an applicant previously convicted of crimes, the Maryland Supreme Court observed that:

> In original admissions to the Maryland Bar, the test of present moral character is whether, "viewing the applicant's character in the period subsequent to his misconduct, he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion."

In re Hyland, 663 A.2d 1309, 1316 (Md. 1995) (quoting *In re A.T.*, 408 A.2d 1023, 1027 (Md. 1979)).

Two reinstatement after disbarment precedents from Massachusetts also provide guidance for deciding what conduct may support reinstatement or original admission of a disbarred attorney.

In re Hiss, 333 N.E.2d 429 (Mass. 1975) was cited with approval in *Hughes*, 594 A.2d at 1101. Alger Hiss petitioned for reinstatement to the Massachusetts bar after being disbarred twenty-two years earlier, following conviction of two counts of perjury in a politically motivated prosecution arising from House Un-American Activities Committee proceedings during the "Red Scare" days of the 1950s. The court acknowledged the serious nature of the crime as conclusive evidence of past unfitness but recognized that its focus was on the petitioner's present fitness and

held that his past unfitness did not necessarily disqualify him at the present time. *Id.* at 437-38. The court articulated its criteria to guide a reinstatement as follows: "In judging whether a petitioner satisfies these standards and has demonstrated the requisite rehabilitation since disbarment, it is necessary to look to (1) the nature of the original offense for which the petitioner was disbarred, (2) the petitioner's character, maturity, and experience at the time of his disbarment, (3) the petitioner's occupations and conduct in the time since his disbarment, (4) the time elapsed since the disbarment,[19] and (5) the petitioner's present competence in legal skills." *Id*.

In granting reinstatement, the court concluded that:

> The considerable evidence of his present good character, his exemplary behavior over a substantial time span, and the tributes paid to him by eminent practitioners who have known him well during the period convince us that, despite the gravity of the crime and his maturity at the time of its commission, "his resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest."

Id. at 441 (citing S.J.C. Rule 4:01 § 18(4)).

Citing the standards articulated in *Hiss*, the Massachusetts Supreme Judicial Court recently reinstated an attorney after his conviction of two misdemeanor counts of insurance fraud and subsequent disbarment as a result of an investigation into a pattern of insurance fraud within his firm's highly publicized personal injury law practice. *In re Ellis*, 930 N.E.2d 724, 725-26 (Mass. 2010). Ellis was

reinstated with conditions that he attend an educational class on the proper handling of an IOLTA account, that his IOLTA account be audited for twenty-four months, and that he maintain malpractice insurance. *Id.* at 728-29.

With this background, the Court will consider Bailey's application for admission petition in accordance with the factors as listed in subparagraphs A-F of the Bar Rule 7.3(j)(5) and the precedents discussed above. In this consideration the Court must decide if Bailey has demonstrated, by clear and convincing evidence that, at the present time, he has the good character and fitness to be admitted to the practice of law and his admission "will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." *Campbell*, 663 A.2d at 12-13.

Before addressing the specific factors outlined in the Bar Rules and applied by analogy to the application pursuant to the Bar Admission Rules, the Court offers several observations that guide its consideration of Bailey's application.

First, the decision accepts the law articulated in *In re Hughes*, 594 A.2d 1098 (Me. 1991) directing that the Board of Bar Examiners and the Court can consider an application for admission to the bar, even from a person who has been and remains disbarred in another jurisdiction and who, in that case, had demonstrated little remorse and remained in violation of a court order requiring payment of restitution. In adopting Bar Admission Rule 9A, the conditional

admission rule, that includes, in Rule 9A(a), a prohibition on consideration of conditional admission for persons who have been and remain disbarred in another jurisdiction, the Court gave no indication that it intended to change the holding in *Hughes* that permits unconditional admission of a person who has been and remains disbarred in another jurisdiction. If, in this era of greater interstate law practice and consideration of reciprocal admissions, the rule articulated in *Hughes* should be reconsidered,[15] that would be a decision for the Supreme Judicial Court, not this single justice, to make.

Second, comparing Bailey's application to *Hughes* and the analogous reinstatement cases discussed above, a key difference is that Bailey has been convicted of no crime that served as a basis for his disbarment and, except for the Tax Court decision published three months ago and presently on appeal, has paid all sums he has been ordered to pay by various courts.

Third, the Board of Bar Examiners expressed significant concern about (1) Bailey's various statements regarding his place of residence related to his state income tax payment obligations; (2) the 2012 findings of the Tax Court; and (3) apparently incomplete answers on Bailey's Bar Admission Application regarding (i) corporations or businesses in which he had an interest, (ii) past debts

[15] *See, for example, Fla. Bd. of Bar Exam'rs re Webster*, 3 So. 3d 1058 (Fla. 2009); *Fla. Bd. of Bar Exam'rs re Higgins*, 772 So. 2d 486, 487 (Fla. 2000) (an attorney disbarred in the state in which the professional misconduct occurred must first be readmitted in that jurisdiction before becoming eligible for readmission in Florida).

including a mortgage that was foreclosed, and (iii) litigation in which Bailey has been a party. These, in the Board's view, demonstrate significant, present flaws in character and fitness to practice law.

As numerous Law Court opinions demonstrate, determination of residence, domicile, and state income tax payment responsibility is less that an exact science in today's society when individuals often may live, work, and receive income in various states. *See Luker v. State Tax Assessor*, 2011 ME 52, 17 A.3d 1198 (three opinions); *State v. Thonpon*, 2008 ME 166, 958 A.2d 887 (two opinions); *Peterson v. State Tax Assessor*, 1999 ME 23, 724 A.2d 610; *Stevens v. State Tax Assessor*, 571 A.2d 1195 (Me. 1990); *Green v. State Tax Assessor*, 562 A.2d 1217 (Me. 1989). That individuals may, in good faith, claim residence or domicile in ways that limit their state income tax obligations is neither illegal nor unethical unless the claim is demonstrated to be false or fraudulent.

The principal residence/tax issue here is Bailey's claim to have been domiciled in Florida while also spending considerable time living and working in Massachusetts. Bailey's state income tax obligation issues were investigated by the Massachusetts tax authorities, apparently on several occasions. In 2013, the Massachusetts authorities advised that they were not pursuing any claim that Bailey had improperly avoided Massachusetts state income taxes. That declaration resolves the residence/tax issue for purposes of this case. The declaration from

Massachusetts was not available to the Board of Bar Examiners before their decision. It is one factor that causes this Court to make some findings different from those of the Board of Bar Examiners.

This opinion has already discussed the 2012 Tax Court opinion and why the facts and conclusions stated in it regarding past transactions do not prevent the Court from making a finding of good character and fitness to practice law. Regarding other apparently incomplete information on the Bar Admission Application, the Court finds no intent to mislead or deceive. It does note that the rigor of the application completeness analysis must be different for one who has been in many ventures in law and business over a period of sixty years, 1952-2012, compared to one who has recently graduated from law school and is just beginning a professional career.

Regarding the identified businesses, the Court notes that today it is not unusual for individuals to create corporations for residences or vehicles, including aircraft that are really personal residences or vehicles.[16] The corporate status may provide legitimate tax or limitation of liability advantages. While it may have been a better choice to list all residence and vehicle corporations on Bailey's application, the Court will not find that failure to do so demonstrates lack of good

[16] *See Flaherty v. Muther*, 2013 ME 39, ¶ 1, --- A.3d --- (personal residence held as "Buffett Coastal Trust"); *Victor Bravo Aviation, LLC v. State Tax Assessor*, 2011 ME 50, ¶ 4, 17 A.3d 1237 (aircraft was its own LLC separate from personal and corporate user/owners); *Blue Yonder LLC v. State Tax Assessor*, 2011 ME 49, ¶ 3, 17 A.3d 667 (personal aircraft was its own LLC).

character or fitness to practice law. Looking at the accuracy of information regarding corporations, business activities, debts, litigation, and obligations in the fifteen years or so before Bailey's disbarments, the record demonstrates that Bailey was involved in this period in many ventures in law and business, that he insufficiently maintained separate records for those ventures, that he confused and comingled assets and accounts, and that poor record maintenance and comingling of accounts and assets constituted several grounds for his disbarment. From 1994 forward, Bailey was aware that his income reporting and recordkeeping were subject to close scrutiny by the I.R.S. Most of the problems Bailey faced are indicated in publicly available records and court decisions. No cover up, no deception. The Court finds that incomplete disclosure of this information on Bailey's application was based on poor recollection or recordkeeping and not any present intent to deceive.

Turning to the factors listed in M. Bar R. 7.3(j)(5), the Court finds proved, to the clear and convincing evidence standard, that:

(A) Bailey has fully complied with the terms of all prior disciplinary orders. He waited more than five years after disbarment before applying for admission, and he has paid all sums he has been ordered to pay by any court or administrative order and final judgment.

(B) Bailey has neither engaged nor attempted to engage in the unauthorized practice of law. After disbarment, Bailey has continued to engage in business activity and law related work, including participating, with counsel, as a corporate representative in settlement discussions regarding law suits. He has also been consulted by Maine lawyers and others on law related questions. In these consultations, he has cautioned that he is not admitted to practice and is not providing legal advice. The Board of Bar Examiners points to testimony of one lawyer in particular as suggesting that Bailey is practicing law or providing legal advice, but the Court finds that that testimony does not demonstrate that Bailey is violating the prohibition on practicing law.

(C) Bailey recognizes the wrongfulness and seriousness of the misconduct that led to his disbarment. He testified to this at several points, perhaps more unequivocally than in his similar testimony before the Board of Bar Examiners. Particularly, the Court finds that Bailey recognizes that his ex-parte contacts with Judge Paul were wrong, as was his poor recordkeeping, comingling of client and personal funds, and failure to have an explicit written agreement with the Department of Justice lawyers regarding the uses of the Biochem stock and its proceeds that were transferred to him in trust.

(D) Bailey has not engaged in any professional misconduct since his disbarment. As noted above, the Court finds that the residence/tax status issues,

the application incompleteness issues, and the findings and conclusions of the Tax Court do not indicate professional misconduct that has occurred since Bailey's disbarment.

(E) Judged by the standards articulated and applied in *Hughes*, Bailey presently has the requisite honesty and integrity to practice law. His testimony acknowledged the errors he made in the past, and the changes he is making in his outlook on life and his practices to avoid repetition of those errors in the future. Since disbarment Bailey has demonstrated a continuing commitment to community and business development first in Massachusetts and, beginning in 2008, in Maine. That effort has had some success and some failure, but his commitment and honesty in pursuing community improvement appears sincere. Bailey also has—as he has since first becoming a lawyer—continued to engage in efforts to train and educate lawyers and law enforcement officers, improve programs for veterans, and support prison reform and transition of individuals from prison to community life.

(F) Regarding compliance with the continuing legal education requirement of Bar Rule 12(a)(1), this issue was not specifically addressed in the record or in Bailey's closing argument to this Court. Further, there is serious question as to whether this requirement applies to individuals seeking admission by examination pursuant to Bar Admission Rule 9. However, Bailey's testimony in the record, and the descriptions in the record of law related education programs in

which Bailey has participated as a presenter during the last two years would indicate that Bailey appears to have more than enough hours presenting and participating in continuing legal education programs to meet the requirements of Bar Rule 12(a)(1).

IV. CONCLUSION

Based on its review of the record and the findings stated above, the Court finds, by clear and convincing evidence, that, but for the tax debt issue, F. Lee Bailey has proved that he has the requisite present good character and fitness to be admitted to the Maine bar and that his admission to practice will not be detrimental to the integrity and standing of the bar, the administration of justice, or the public interest. The combination of his demonstrated intelligence, broad experience, energy, and commitment to reform of himself and the law can be a valued addition to the community of lawyers who are the Maine bar.

With the tax debt issue unresolved, however, the Court cannot find, by clear and convincing evidence, that Bailey has demonstrated present fitness to be admitted to the practice of law. As indicated in *Bailey v. Commissioner of Internal Revenue*, T.C. Memo 2012-96, Bailey's income tax problems arose from a combination of poor recordkeeping, a large number of ventures ongoing at once without sufficient oversight in the tax years at issue, and disputed but ultimately imposed obligations to make large financial payments. There is no issue of

intentional tax evasion. However, large financial obligations may cloud one's judgment as to what is in the best interest of clients and what is best practice for compliance with professional and ethical obligations. Thus, large debts are a cause for fitness concerns in bar admission practice.

The Maryland Supreme Court has observed that: "The conduct of an applicant in satisfying his or her financial obligations and exhibiting financial responsibility is an important factor in assessing good moral character." *Hyland*, 663 A.2d at 1316; *see also In re Steele*, 865 P.2d 285 (Mont. 1993); *Matter of Anonymous*, D-51-09 (N.Y. App. Div., Third Dept., Sept. 25, 2009) (unreported). *Hyland*, *Steele*, and *Anonymous* are each distinguishable from the instant case because each involved large tax or student loan debts that had been finally adjudicated and were long overdue and about which the bar admission applicant had engaged in misconduct during the bar admission process by making false or misleading statements about the nature and creation of the debt and efforts to satisfy the debt. Bailey has engaged in no misconduct or deception regarding the tax debt. His challenge to the tax debt is on appeal, after his significant success in the Tax Court, reducing the claimed deficiency by approximately $3 million.

A general survey of the state precedent on the debt payment issue suggests that the existence of a debt, by itself, may not result in finding of lack of good moral character. Rather, findings of failure of proof of good moral character tend

to be based on misconduct regarding effort—or lack of effort—to pay the debt, or misconduct referencing the debt payment obligation in the bar admission process. *See Failure To Pay Creditors as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 108 A.L.R. 5th 289, §§ 2(a), (b) (2004). "It has been held that it is not the fact of debt, but the absence of a genuine effort to meet one's responsibilities that serves to establish a lack of the character and integrity expected and required of one who seeks to become a member of the bar." *Id*. at 13.

Sometimes, in other jurisdictions, debt obligation or payment issues have been addressed by making a preliminary finding of good moral character, but one that leads to a conditional admission to monitor how the applicant addresses the debt obligation. *Id*.

In Maine bar admission practice, concerns about debt, good recordkeeping, comingling of personal and client funds and other financial issues can be addressed through a conditional admission pursuant to Bar Admission Rule 9A. The 2011 Advisory Committee Note supporting adoption of the Rule 9A states that appropriate conditions can support successful rehabilitation by monitoring "the ability to operate and manage work, finances, business and personal relationships,

and health without further risk to self or others from prior conduct indicating a lack of good moral character."[17]

Address of Bailey's current, though not final, federal tax obligation, $1,930,116.05, is not so easily resolvable. Resolution of this issue was not addressed in any detail by evidence or advocacy before this Court, although Bailey was provided details as to how the deficiency was calculated by a communication dated February 6, 2013, a month before the hearing. In light of the Court's other findings, the Court might have considered, as conditions of Bailey's admission to practice, a plan for outside attorney monitoring of Bailey's law practice related recordkeeping and finances, and a plan to satisfy the tax deficiency should a significant deficiency remain after appeal. But the Court cannot make acceptance of a plan to monitor Bailey's practice and address the tax debt a condition of Bailey's admission, as doing so would cause his admission to become a conditional admission pursuant to Rule 9A. As noted earlier, Rule 9A(a) explicitly bars consideration of conditional admission of attorneys currently disbarred in another jurisdiction.

The Court recognizes that in *Hughes,* a large, unpaid debt existed, its resolution was apparently unaddressed by the applicant for admission, and it was not a concern addressed by the *Hughes* court. But, as indicated above, the

[17] The Advisory Committee Note to Rule 9A was adopted before the change in Bar Admission Rule terminology to "good character and fitness."

existence of large debts can compromise professional judgment and client relations in ways that must be recognized in considering admission applications. The issue of an outstanding, though not final, judgment ordering payment of nearly $2 million must be addressed in consideration of a bar admission. This issue remaining unaddressed is the only bar to this Court's granting Bailey a certificate of good character and fitness to be admitted to the practice of law.

Bailey has the burden to prove, by clear and convincing evidence, good character and fitness to practice law. With the tax debt issue unresolved, and not seriously addressed at hearing or in the written closing arguments, the Court cannot find present fitness to practice proven by clear and convincing evidence. Accordingly, the Court must deny the petition to grant an unconditional admission and issue a certificate of good character and fitness to practice law. For the present, this denial will be without prejudice to a timely request for reconsideration addressing how, if at all, the Court should treat the obligations indicated in the January 11, 2013, Tax Court orders in reaching its decision on good character and fitness.

To allow consideration of whether to make further filings suggesting how, if at all, the Court should treat the tax debt in this case, the Court will stay entry of this order into the Court's docket until May 10, 2013. There will be no final, appealable judgment before that date. By May 6, 2013, either party may submit

materials seeking reconsideration or revision of this order as it addresses the tax debt issue currently on appeal from the Tax Court.

The Court respects the thorough consideration given to this application by the Board of Bar Examiners, the sincere concerns expressed by the Board in its decision, and the difficulty of some of the factual and legal issues addressed in this case. If the tax debt issue can somehow be resolved at this level, the Court would anticipate that it would stay any effect of any order to issue a certificate of good character and fitness to practice law until expiration of the period for taking an appeal or determination of an appeal, if an appeal is taken by the Board.

ORDER

The Court ORDERS:

1. The petition of F. Lee Bailey for a certificate of good character and fitness is denied.

2. Either party may submit materials supporting reconsideration or revision of this order, as it addresses the tax debt issue, by May 6, 2013.

3. Entry of this order into the docket to start the running of the time to file an appeal is stayed until May 10, 2013. If a motion for reconsideration or similar post-trial motion is filed, the time for filing an appeal would be further extended by application of M.R. App. P. 2(b)(3), until the Court rules on such motions.

Dated: April 18, 2013

FOR THE COURT,

_____

Donald G. Alexander
Associate Justice