

STATE OF MAINE

SUPREME JUDICIAL COURT  
Docket No. BAR-12-14

F. LEE BAILEY,

Plaintiff

v.

BOARD OF BAR EXAMINERS,

Defendant

**PLAINTIFF'S MEMORANDUM  
IN SUPPORT OF ADMISSION TO THE BAR**

The Plaintiff, F. Lee Bailey, by and through counsel, Norman, Hanson & DeTroy, LLC, submits the following memorandum in support of his admission to the bar of the State of Maine.

**INTRODUCTION**

Mr. Bailey seeks admission to practice law in the state of Maine having been formerly disbarred in Florida (2001) and Massachusetts (reciprocally, 2003) as a result of misconduct which occurred in 1996. As explained more fully below, notwithstanding his previous disbarment, Mr. Bailey has established by clear and convincing evidence that he currently possesses the requisite honesty and integrity to practice law in the state of Maine.

**MEMORANDUM OF LAW**

“The Bar Rules treat an attorney who has been disbarred in another state as if the attorney has been disbarred also in Maine.” *Application of Hughes*, 598 A.2d 1101 (Me.

1991) (hereinafter referred to as *Hughes I*). An attorney who has been disbarred in another jurisdiction need not be readmitted to that jurisdiction before applying for admission to the Maine bar. *Application of Hughes*, 608 A.2d 1220 (Me. 1992) (hereinafter referred to as *Hughes II*); *see also Hughes I*, 608 A.2d at FN2. An applicant who has been formerly disbarred has the “burden of presenting clear and convincing evidence demonstrating 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 question “is not whether the [applicant] deserves further punishment for [his] past misdeeds, but whether [his] moral character will *at present* permit [him] to practice law as a credit to the profession and without risk to the public.” *In re Application of Hughes*, BAR-90-17, 2 (February 6, 1991) (Wathan, J.) (emphasis added); *see also In re Hiss*, 368 Mass. 447, 454-455 (1975).

Pursuant to the Bar Rules, the factors to be considered when determining whether the applicant has met his burden to demonstrate his moral character and competency:

- (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).<sup>1</sup>

In assigning weight and significance to prior conduct, this Court has referenced the following factors from the ABA's Guide to Bar Admission Requirements<sup>2</sup>:

1. the applicant's age at the time of the conduct
2. the recency of the conduct
3. the reliability of the information concerning the conduct
4. the seriousness of the conduct
5. the cumulative effect of the conduct or information
6. the evidence of rehabilitation
7. the applicant's positive social contributions since the conduct
8. the applicant's candor in the admissions process
9. the materiality of any omission or misrepresentations

ABA CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, COMPREHENSIVE

GUIDE TO BAR ADMISSION REQUIREMENTS viii-ix (2013) [hereinafter referred to as ABA

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<sup>1</sup> 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).

<sup>2</sup> The ABA Factors have not been applied where an applicant has been disbarred in another jurisdiction.

Factors]; *See Nicholson v. Board of Bar Examiners*, BAR-07-01, 10 (December 6, 2007) (Levy, J.); *see also Weinberg v. Board of Bar Overseers*, BAR-11-14, 3 (May 7, 2012) (Gorman, J.).

This Court has emphasized that the opinions of character witnesses as to the applicant's current moral fitness, the applicant's positive social contributions since the conduct, and any other evidence relevant to the applicant's current honesty, diligence, or reliability are substantially determinative in the assessment of an applicant's good moral character. *See In re Application of Hughes*, BAR-90-17, 3 (February 6, 1991) (Wathan, J.); *See also Nicholson*, BAR-07-01 at 10.

For example, in *Hughes*, the applicant, an experienced lawyer who had practiced for more than seven years, stole more than \$400,000 in client funds consistently throughout a five-year period. *Hughes I*, 594 A.2d at 1099. As part of her fraudulent scheme, she continually falsified federal legal documents to conceal her embezzlement. *Id.* She was criminally convicted, sentenced to a four-year term of imprisonment, all suspended, five years of probation, and ordered to pay more than \$400,000 in restitution. *Hughes I*, 594 A.2d at 1099; *In re Application of Hughes*, BAR-90-17, 1 (October 22, 1991) (Wathan, J.). Ms. Hughes resigned from the Georgia bar and the Law Court treated her resignation as the equivalent of disbarment. *Hughes I*, 594 A.2d at 1101. Ms. 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 Ms. Hughes had the present moral fitness and character to practice law in Maine, the Court referenced: (1) Ms. Hughes' full and truthful disclosure of her criminal misconduct, (2) the duration and persistence of her misconduct, (3) Ms.

Hughes' 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 explained that:

[Ms. Hughes'] 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.

*Hughes I*, 594 A.2d at 1102.

Although Ms. Hughes had a significant history of criminal, dishonest, and fraudulent acts related to her law practice and involving embezzlement of client funds, the Court properly focused its inquiry into her present moral character, including her conduct since disbarment, and found that she was fully rehabilitated in terms of moral fitness. *In re Application of Hughes*, BAR-90-17, 1 (February 6, 1991) (Wathan, J.). The Court did not reference any positive social contributions of Ms. Hughes since disbarment but credited the testimony of two respected members of the Maine bar who had known Ms. Hughes since she moved to Maine three years before applying to the Maine bar. *Id.* at 3. Both testified to her good moral character without reservation and with knowledge of her past criminal acts. *Id.* Although Ms. Hughes had made no payments in restitution, the Court characterized her financial history since disbarment as generally positive and

found that her supervision of the expenditure of public funds as a paralegal was evidence that she could be trusted to manage client funds again.<sup>3</sup> *Id.*

Despite Ms. Hughes' embezzlement of more than \$400,000 in clients' funds over a period of five years, fraudulent cover up, criminal conviction, and failure to make restitution, the Court appropriately focused on Ms. Hughes' 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. *Id.* at 1221.

Similarly, in *In re Hiss*, Alger Hiss petitioned for reinstatement to the Massachusetts Bar at the age of 69 after being disbarred 22 years earlier after being convicted of two counts of perjury before a Federal grand jury. *In re Hiss*, 368 Mass. 447, 448-449 (1975) (cited in *Hughes I*, 594 A.2d at 1101). Mr. Hiss was tried and convicted of providing false testimony during a grand jury investigation by the Committee on Un-American Activities of the House of Representatives relating to his alleged involvement in the American Communist Party. *Id.* In its review of his petition for reinstatement, the Massachusetts Supreme Judicial Court stated, “[a]t the outset, we stress that we are not here concerned with a review of the criminal case in which Hiss was tried, convicted and sentenced.” *Id.* at 450. It 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 451. The Court reasoned that the law looks favorably upon one who has achieved reformation, rewarding him with the opportunity to serve; “[t]he chastening effect of a severe sanction such as disbarment may redirect the

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<sup>3</sup> The Court did not explain how or to what extent Ms. Hughes, as paralegal at the Department of Transportation, supervised the expenditure of public funds.

energies and reform the values of even the mature miscreant.” *Id.* at 454.

During the review of his petition by the Board of Bar Examiners, Mr. Hiss maintained his innocence of the perjury charges, rather than proclaim his repentance and affirm his adjudicated guilt. *Id.* at 455. As a result, the Board concluded that it was obliged to deny his petition for readmission. *Id.* at 455. However, the Massachusetts Supreme Judicial Court reversed, reasoning that “[t]he continued assertion of innocence in the face of prior conviction does not, as might be argued, constitute conclusive proof of lack of necessary moral character to merit reinstatement [. . .] [F]undamental justice demands that a person who believes he is innocent though convicted should not be required to confess his guilt of something he honestly believes he did not commit.” *Id.* at 457-458. Accordingly, the court refused to disqualify the petitioner for reinstatement simply because he continued to protest his innocence despite his conviction. *Id.* at 459.

In its reinstatement of Mr. Hiss, the Court focused on his activities since his disbarment and concluded they reflected the efforts of a man who tried to pick up the pieces of his life after disbarment and earn a living in other fields of endeavor while maintaining his scholarly interests in the law. *Id.* at 462. Mr. Hiss had pursued his scholarly interests through a program of lectures delivered to a wide variety of public forums and the publication of scholarly articles and books. *Id.* at 462-463. The Court found that Mr. Hiss’s reputation in the business world was uniformly good and he had earned a reputation for industry and honesty. *Id.* at 463. The court concluded that:

[t]hough Hiss, himself, in holding fast to his contention of innocence, admits no rehabilitation of character, we believe that the evidence amply warrants the board’s finding that he would not now commit the crime of

which he was convicted. 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 467.

More recently, the Massachusetts Supreme Judicial Court reinstated an attorney after his conviction of two counts of insurance fraud and subsequent disbarment as a result of an “investigation that exposed a pattern of insurance fraud [within his] firm’s highly publicized personal injury law practice.” *In the Matter of Ellis*, 457 Mass. 413, 413 (2010). In 2000, Mr. Ellis was sentenced to six months of incarceration and five years’ probation. *Id.* at 414. In 2008, eight years after his disbarment, Mr. Ellis petitioned for reinstatement to the bar. *Id.* The court recognized that a fundamental precept of our legal system is that persons can be rehabilitated. *Id.* “A prior conviction, even of a serious crime, is not an absolute bar to the admission or reinstatement and does not preclude a showing of present moral fitness.” *Id.* “The test is whether at the *present* time, in spite of his previous misconduct, the petitioner has rehabilitated himself sufficiently to inspire public confidence, that is whether he currently possesses the necessary moral character and legal acumen to be admitted to the bar of the Commonwealth.” *Id.* The court explained that “[i]n judging whether [the petitioner] is fit to serve as an attorney, the court looks 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 he was disbarred; (3) the petitioner's occupation and conduct in the time since his disbarment; (4) the time elapsed since his disbarment; and (5) the petitioner's present competence in legal skills." *Id.* at 415. No one factor is considered dispositive and the court "weigh[s] the circumstances concerning the petitioner's misconduct against his subsequent actions that show rehabilitation." *Id.*

The court balanced Mr. Ellis's involvement in a campaign of highly publicized insurance fraud and resulting convictions with his post-disbarment activities showing his "commit[ment] to serving his family and community" which included "the parenting of his children at home while his wife worked, his efforts to become a teacher, his coaching endeavors on four of his town's youth teams, and his many charitable activities through his church and other organizations." *Id.* at 416. The court also took note of a "number of letters from neighbors, work supervisors, and an attorney regarding the petitioner's current, rehabilitated reputation in the community." *Id.* at 417. Mr. Ellis also made arrangements with two experienced attorneys with whom he was acquainted to act as his "ethical advisers" should he be permitted to resume his law practice.

The court found that Mr. Ellis had demonstrated that despite his prior criminal acts related to his law practice, "he possess[ed] the current moral qualifications and learning to practice law, and that his admission to the bar would not be detrimental to the public interest." *Id.* at 418. Mr. 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 24 months, and that he maintain malpractice insurance. *Id.*

**I. Mr. Bailey has established by clear and convincing evidence that he possesses the requisite moral character to practice law in Maine.**

Applying the Maine Bar Rules and relevant case law to the facts in this case, Mr. Bailey has established by clear and convincing evidence that he possesses the requisite moral character to practice law in Maine despite his previous disbarment.

**A. Pursuant to M. Bar R. 7.3(j)(5), Mr. Bailey has established that he possesses the requisite moral character to practice law in Maine.**

Pursuant to M. Bar R. 7.3(j)(5), Mr. Bailey has established clear and convincing evidence as to each of the determinative factors to show that “it is likely that [his admission] will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest”<sup>4</sup>:

(A) There has been no allegation nor any evidence presented or admitted that Mr. Bailey has not fully complied with the terms of his disbarments.

(B) Likewise, there has been no allegation nor any evidence presented or admitted that Mr. Bailey engaged or attempted to engage in the unauthorized practice of law. To the contrary, the Court heard ample testimony from William Golden, Esq., Theodore Kirchner, Esq., Edward Lynch, Esq., and Richard Hale, among others, that Mr. Bailey was continuously upfront about his disbarment and was very careful not to practice law or give the impression that he was engaged or attempting to engage in the unauthorized practice of law.

(C) Mr. Bailey has recognized the wrongfulness and seriousness of his misconduct throughout the application process. At the hearing before the Board, Mr. Bailey admitted that he had used poor judgment and bad decision making and “made

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<sup>4</sup> M. Bar R. 7.3(j)(5)(F) is not included in this analysis because continuing legal education is not relevant to Mr. Bailey’s circumstances as he has very recently passed the Maine Bar Exam.

some serious mistakes in very unusual circumstances.” Before this Court, Mr. Bailey testified about many mistakes he made including:

(1) Entering into a complicated and unusual agreement without proper documentation of the parties’ understandings.

(2) Failing to get the court’s blessing of the agreement including judicial accounting on a regular basis.

(3) Failing to identify and address the inherent conflicts in the unusual forfeiture arrangement between him, his client, and the government.

(4) Sending an ex parte letter to Judge Paul which he admitted was “unethical conduct, improper, unwise, and a knee jerk reaction.”

(5) Failing to read the judicial orders in January 1996, making assumptions as to their contents, and acting or failing to act in violation of the orders. Mr. Bailey explained that that “certainly was substandard performance on my part. I should have made it my business to read the letter and not assume anything.”

Mr. Bailey has acknowledged that the seriousness of his misconduct warranted disbarment.

(D) There has been no allegation or evidence presented or admitted that Mr. Bailey has engaged in any other professional misconduct since his disbarment. To the contrary, several witnesses who have known Mr. Bailey in professional contexts since disbarment including William Golden, Esq. and Theodore Kirchner, Esq., among others, testified to Mr. Bailey’s highly ethical and professional conduct throughout his employment at New England Insulation.

(E) Mr. Bailey, through his own testimony and the testimony of several

character witnesses, established that he has the requisite honesty and integrity to practice law in this state. Witnesses from every era of Mr. Bailey's life and every community of which Mr. Bailey has been a part testified as to Mr. Bailey's integrity and adherence to the principles of fairness, kindness, compassion, graciousness, selflessness, honesty, humility, trustworthiness, dedication, etc. Notably, several respected members of the Maine bar who have come to know Mr. Bailey in several capacities, testified as to Mr. Bailey's honesty and integrity and uniformly recommended his admission to the Maine bar.

Therefore, pursuant to M. Bar R. 7.3(j)(5), Mr. Bailey has met his burden to establish clear and convincing evidence that he possesses the requisite moral character and integrity to practice law in the state of Maine.

**B. Mr. Bailey's conduct since disbarment outweighs the seriousness of the misconduct underlying his disbarment.**

Pursuant to the ABA factors to consider in assigning weight and significance to prior conduct, Mr. Bailey's conduct since disbarment outweighs the seriousness of the conduct underlying his disbarment.

1-2: Age and recency of the conduct.

Mr. Bailey was 63 years old at the time of the misconduct underlying his disbarment. The misconduct occurred in 1996, almost 17 years ago. Although Mr. Bailey was an experienced lawyer at the time of his misconduct, he has recognized the mistakes he made, learned from them, and reformed himself since disbarment.

3. Reliability of the information concerning the conduct.

Mr. Bailey does not dispute the legitimacy or justice of his disbarment but retains a point of disagreement with at least one fact finder on the issue of his agreement with the

government as to the Biochem Pharma stock. He has acknowledged his mistakes in the *Duboc* case and does not challenge the findings that he acted in violation of several rules of professional responsibility.

4. Seriousness of the conduct.

Mr. Bailey has admitted that he has committed serious mistakes of judgment which resulted in his disbarment. However, in assessing the seriousness of Mr. Bailey's misconduct, it is important to note that Mr. Bailey was never accused, charged, or convicted of having any criminal intent with respect to the misconduct that led to his disbarment. Mr. Bailey's misconduct was not recurring or persistent. It was the product of instances of lapse in judgment arising out of his handling of a single case.

5. Cumulative effect of the conduct.

Although there was no evidence presented as to a cumulative effect of Mr. Bailey's misconduct, whatever cumulative effect Mr. Bailey's conduct and subsequent disbarment had on public opinion can be reasonably attributed to Mr. Bailey's notoriety, his client's vast assets, and the unique circumstances of forfeiture arrangement in *Duboc* rather than the specific misconduct of Mr. Bailey. Certainly, the cumulative effect of Mr. Bailey's misconduct pales in comparison to the cumulative effect on public opinion of the Watergate lawyers' criminal misconduct that led to their disbarment. *See* THE LAWYERS OF WATERGATE HOW A "THIRD-RATE BURGLARY" PROVOKED NEW STANDARDS FOR LAWYER ETHICS, ABA J., June 2012, at 36, 64 (explaining that all of the Watergate lawyers who have sought readmission have been granted readmission to practice law.)

6. Evidence of rehabilitation.

Mr. Bailey has rehabilitated and reformed himself since disbarment. Mr. Bailey recognized that he was overly self reliant in the *Duboc* case. He acknowledged that he should have consulted other attorneys as to the proper handling of the novel circumstances of the forfeiture agreement. Additionally, Judge Fishman and William Golden, Esq. both of whom have known Mr. Bailey for several decades, testified as to the changes in Mr. Bailey since his disbarment. He is more humble, less self reliant, more conscious of perspectives different than his own, and more careful in his decision making. This is consistent with Mr. Bailey's expressed intentions if he is permitted to practice in Maine. He has described his future practice as co-counsel in consultation or collaboration with other lawyers, particularly trial and appellate lawyers. Mr. Bailey intends to share his knowledge and experience with young lawyers and law students at the University of Maine. Mr. Golden put it simply: Mr. Bailey has settled down; nearing his 80th birthday, he is seeking a measured life in Maine and is no longer chasing headlines.

7. Positive social contributions since the conduct.

Mr. Bailey's positive social contributions since his misconduct have been extensive both in Maine and nationally. Mr. Bailey has provided the Court a non-exhaustive list of his community engagements since 2009. *See* Bailey's Exhibit 1. Additionally, the Court heard the testimony of Judge Sullivan, Deborah Elliot, John Nale, Esq., Gordon Vaughan, Esq., Edward Lynch, Esq., Richard Hale, Marshall Jarvis, Steven Schwartz, Esq., and Mr. Bailey himself, among others, of his tireless commitment to community and business development in Maine, promotion and improvement of our judicial system, legal education, veterans affairs, prison reform, the American Polygraph

Association, as well as simple neighborly endeavors to help those around him.

8-9. Candor in the admissions process and materiality of any omissions or misrepresentations

Mr. Bailey was honest and forthcoming throughout the admissions process. He disclosed to the best of his ability every requested piece of information about him throughout his life and legal career as well as issued waivers to the Board to freely obtain whatever information it or its counsel deemed necessary for evaluation.

i. The bribe.

The Board majority found that Mr. Bailey had “contrived” for the purposes of the Board hearing his explanation that one of the reasons he sent the ex parte letter to Judge Paul in January 1996 was to alert Judge Paul of his concern that Duboc’s new lawyers had ulterior motives including a potential bribe to the Judge. *See* Decision of the Board, 15-16 (November 30, 2012). However, Mr. Bailey had testified as to that exact explanation 12 years before in June of 2000 before Referee Ellis during the Florida disbarment proceedings. *See* Bailey’s Exhibit 10, 906.

ii. Residency and taxes.

Additionally, the Board majority found that Mr. Bailey “intentionally provided the Board with a confused picture of his residences in the last ten years” so as to “detract from Bailey’s failure to file state income tax returns for a number of years.” *See* Decision of the Board, 17-18 (November 30, 2012). This finding is squarely belied by the fact that Mr. Bailey gave Board counsel a waiver to obtain whatever information Board counsel deemed necessary from the Massachusetts Department of Revenue (MDR) which resulted in Board counsel’s receipt of a report dated February 30, 2013 from the MDR explaining that Mr. Bailey has no outstanding income tax liability to

Massachusetts. See Bailey's Exhibit 8.

iii. "Businesses"

The Board majority also took issue with Mr. Bailey's failure to list corporate entities of which he had some interest; specifically, 17 Prescott Road, Inc. and Heli-Boss, LLC. However, Mr. Bailey and Edward Lynch, Esq. explained that 17 Prescott Road, Inc. was not a business but rather a corporation that held title to Mr. Bailey's home in Lynn, Massachusetts. Mr. Bailey's home in Lynn was a two-unit residence in which Mr. Bailey lived and was never operated as a "business." Mr. Lynch explained that it is very common for multi-unit homes to be held as a corporate entity or trust to limit the personal liability of the homeowner. In fact, Mr. Lynch explained that he lives in multi-unit home which he has held in trust for several years for that same purpose. Similarly, Mr. Bailey and Edward Lynch, Esq. explained that Heli-Boss, LLC held as its only asset a helicopter used personally by Mr. Bailey. Mr. Bailey and Mr. Lynch explained that holding an aircraft in the form of an LLC or other corporate entity is very common to limit personal liability of the owner.

Mr. Bailey did not view his ownership of these entities as "businesses" and therefore failed to list them on his bar application although he acknowledged that nondisclosure was an oversight.

iv. Tax Court.

Additionally the Board took issue with Mr. Bailey's failure to disclose the ongoing litigation in the tax court related to the tax consequences of the *Duboc* case. Mr. Bailey has admitted that this omission was an oversight and was entirely forthcoming of the tax court proceedings throughout the Board's and its counsel's inquiry into those

matters.

In summary, challenges to Mr. Bailey's candor during the admissions process have been plainly undermined. The Board majority's conclusions as to Mr. Bailey's honesty throughout the admissions process are belied by Mr. Bailey's prior testimony during the Florida bar proceedings, the MDR, and Mr. Lynch's testimony about the use and purpose of 17 Prescott Road, Inc. and Heli-Boss, LLC.

Most importantly, Mr. Bailey has not made any misrepresentation to the Board, Board counsel, or the Court during the admissions process and there is no allegation or evidence to show otherwise. To the extent that Mr. Bailey has overlooked or omitted information before supplementing his application, those omissions are not material to the Court's determination of his moral fitness to practice law. Mr. Bailey initially overlooked a handful of civil cases in which he was a party, and a "default" on a loan, but promptly supplemented his application to include disclosure of the same. There is no allegation or evidence that Mr. Bailey intentionally withheld information or prevented the Board or Court from discovering any information relevant to their evaluation of his application.

In conclusion, consistent with the ABA's determinative factors, Mr. Bailey's extensive and continuing service to his community since disbarment outweighs the misconduct underlying his disbarment.

## **II. Other considerations raised by the Court.**

The Court invited comment on several issues including: (A) whether admission to the Maine bar requires reinstatement in the disbarring jurisdictions; (B) the extent to which witnesses' testimony may be influenced by Mr. Bailey's celebrity; (C) the extent

to which this Court applies full faith and credit to other jurisdictions; and (D) whether Mr. Bailey's prior conduct warrants permanent disbarment.

**A. Reinstatement in the disbarring jurisdiction is not required so long as the applicant proves his moral fitness to practice law in Maine.**

The Board has previously argued to this Court and the Law Court that an applicant who has been disbarred in another jurisdiction must be reinstated in that jurisdiction before she can be admitted to the Maine bar. *Hughes I*, 594 A.2d at fn. 2. This Court rejected the Board's argument and admitted the applicant before reinstatement in the disbarring jurisdiction; the Law Court affirmed. *In re Application of Hughes*, BAR-90-17, 1 (February 6, 1991) (Wathan, J.); *affirmed by Hughes II*, 608 A.2d at 1221. The Law Court summarily addressed the issue by stating that even if the applicant had satisfied the disbarring jurisdiction's requirements for readmission, she would still be required to prove by clear and convincing evidence her moral fitness to practice law in Maine. *See Hughes I*, 608 A.2d at fn. 2.

Therefore, Mr. Bailey is not required to be reinstated in Florida and Massachusetts before he is admitted to the Maine bar.

**B. Witnesses' testimony was not influenced by Mr. Bailey's celebrity.**

**i. Maine lawyers.**

The Court heard from several experienced and well-respected Maine lawyers who attested to Mr. Bailey's honesty and integrity and uniformly recommended his admission to the Maine bar.

For example, Theodore Kirchner, Esq., an experienced and well-respected trial lawyer, testified as to his relationship with Mr. Bailey for more than seven years at New

England Insulation. Mr. Kirchner is mature and professional. His association with Mr. Bailey has been completely aside from Mr. Bailey's celebrity and his opinion of Mr. Bailey is likewise unaltered by Mr. Bailey's notoriety.

Additionally, John Nale, Esq., a seasoned and well-respected lawyer, attested to Mr. Bailey's solid moral character. Mr. Nale's association with Mr. Bailey for the past several years is based on their shared interest in prison reform and dedication to service. Mr. Nale's opinion of Mr. Bailey is grounded and genuine and not affected by Mr. Bailey's fame.

Likewise, Steven Schwartz, Esq., an experienced and well-regarded trial lawyer and member of the Board of Overseers of the Bar, testified as to his opinion of Mr. Bailey's good character. Mr. Schwartz has known Mr. Bailey more recently but his background in ethics and professional responsibility lend credibility to his assessment of Mr. Bailey's integrity. Mr. Schwartz testified that he would not have entered into the Oversight Agreement with Mr. Bailey if he was not confident in Mr. Bailey's honesty and integrity. Mr. Schwartz's opinion of Mr. Bailey is genuine.

**ii. Lawyers and jurists from away.**

Similar to the Maine lawyers, the Court heard testimony from several lawyers and jurists from other states who have had lasting relationships with Mr. Bailey.

For example, Richard Sprague, Esq., an experienced and esteemed litigator of the Pennsylvania bar testified about his long-standing relationship with Mr. Bailey. Mr. Sprague is regarded as one of the nation's best trial lawyers and is perhaps more well-known than Mr. Bailey. Considering Mr. Sprague's extensive relationship with Mr. Bailey and his own stature within the legal community, Mr. Sprague's opinion as to Mr.

Bailey's character and integrity is unlikely to have been influenced by Mr. Bailey's celebrity.

Judge Fishman of the Massachusetts Superior Court testified as to his relationship with Mr. Bailey over the last forty years. Judge Fishman is a thoughtful and highly-regarded jurist of the Massachusetts trial court. His close relationship with Mr. Bailey is long-lasting and his opinion of Mr. Bailey is genuine.

Likewise, Judge Sullivan testified about his relationship with Mr. Bailey for nearly thirty years. Judge Sullivan is incredibly accomplished in his own right as a former Chief Judge of the Federal Court of Appeals for the Armed Forces and general counsel to the NRO. He, like Judge Fishman and other members of the judiciary, is unlikely to be influenced by Mr. Bailey's notoriety.

**iii. Non-lawyer witnesses.**

Many friends and colleagues of Mr. Bailey shared with the Court their opinions of Mr. Bailey's honesty and integrity.

For example, Robert Hoover attested to Mr. Bailey's moral character. Mr. Hoover is one of the most decorated pilots of WWII and achieved significant fame as an air-show pilot for several decades. Mr. Hoover shared a remarkable story about Mr. Bailey's *pro bono* representation of him in a controversial case before the Federal Aviation Administration. Considering Mr. Hoover's own notoriety, his down-to-earth demeanor, and his experience with Mr. Bailey, it is unlikely that Mr. Hoover's opinion is affected by Mr. Bailey's celebrity.

Additionally, Robin Brodie, the widow of Mr. Bailey's best friend, Theodore Brodie, testified as to her close and long-standing relationship with Mr. Bailey and his

late wife, Patricia. Ms. Brodie shared insight into Mr. Bailey's relationship with her late husband including the deathbed promise Mr. Bailey made to Mr. Brodie to care for Mr. Brodie's family after his death. Ms. Brodie's opinion of Mr. Bailey is genuine.

Likewise, Richard Hale and Marshall Jarvis, business owners who live in Maine, testified as to their opinions of Mr. Bailey in the communities in which they share. Mr. Hale and Mr. Jarvis are both mature, thoughtful, and accomplished businessmen whose opinions of Mr. Bailey are authentic and not based on any perceived benefit from association with his celebrity.

In sum, numerous witnesses from Mr. Bailey's past and present attested to his good character and integrity. Most of these witnesses are highly accomplished, mature, and experienced people who are not likely to be influenced by Mr. Bailey's celebrity. The Court's concern about one of the witnesses' zealous attestation of Mr. Bailey's ethics is noted, however Mr. Bailey urges the Court to evaluate the balance of the men and women of incredible integrity and character that have testified genuinely as to his moral character.

**C. Mr. Bailey does not ask this Court to re-review the Florida and Massachusetts disbarment proceedings.**

Mr. Bailey does not challenge the legitimacy of the Florida and Massachusetts disbarment orders. Nor does he challenge that full faith and credit should be given to their orders of disbarment. However, Mr. Bailey has offered evidence regarding those proceedings to rebut Board counsel's representations of his conduct in *Duboc*. Specifically, Mr. Bailey has offered evidence regarding his agreement with the government which does not wholly assent to the disbarring courts' characterization of his

conduct with respect to the Biochem Pharma stock.<sup>5</sup> Notwithstanding this evidence, Mr. Bailey does not dispute that his ultimate disbarment was warranted.

**D. Mr. Bailey's misconduct does not warrant permanent disbarment.**

Mr. Bailey's conduct in the *Duboc* case does not warrant disbarment for the rest of his life.<sup>6</sup> Mr. Bailey's conduct is readily distinguishable from John Duncan's crimes of egregious and continuous embezzlement of client funds which justified Mr. Duncan's permanent disbarment. *See generally Board of Overseers of the Bar v. Duncan* BAR-08-03 (July 8, 2008) (Silver, J.). While Mr. Bailey's misconduct was in violation of several rules of professional responsibility, it was not criminal. Mr. Bailey's misconduct was not motivated by any intention to defraud, cheat, or steal anything from anyone. Accordingly, Mr. Bailey was never charged or convicted of any crime arising out of the mistakes he made in *Duboc*.

While the misconduct underlying Mr. Bailey's disbarment is significant, it lacks the egregiousness and gravamen of culpable mens rea to warrant permanent disbarment. Therefore, Mr. Bailey's prior conduct and subsequent disbarment does not prevent him from establishing that he presently possesses the requisite moral character to practice law in Maine.

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<sup>5</sup> See for instance Judge Horn's remarks at the close of the Court of Claims hearing (Bailey Exhibit 9) and Dr. Earle's testimony that Mr. Bailey passed the polygraph exam. *See also* paragraph I of Mr. Bailey's Offer of Proof in the Court of Claims (No. 96-666C), page 11, and Mr. Bailey's Petition for Writ of Certiorari, *Bailey v. Florida Bar*, 2002 WL 32135302, 16 (2002), *cert denied Bailey v. Florida Bar*, 535 U.S. 1056 (2002).

<sup>6</sup> Mr. Bailey was not permanently disbarred from any jurisdiction and has been permitted to reapply to the Florida bar since 2006.

## CONCLUSION

The question before the Court is not whether Mr. Bailey deserves further punishment for his prior mistakes, but whether his good character will *at present* permit him to practice law as a credit to the profession and without risk to the public. Mr. Bailey has established by clear and convincing evidence the affirmative answer to that question. Accordingly, and for the foregoing reasons, Mr. Bailey respectfully requests that this Court permit him to practice law in the state of Maine.

Dated at Portland, Maine, this 13th day of March, 2013.

/s/ Peter J. DeTroy  
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