



UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

November 14, 2014

PRESS RELEASE

The Chief Judge of the United States Tax Court announced today that the following practitioner has been disciplined by the United States Tax Court for reasons explained in an order issued in the case of the practitioner.

A copy of the order is attached.

1. W. Scott Phinney

Attachments

UNITED STATES TAX COURT

WASHINGTON, DC 20217

In re: W. Scott Phinney

ORDER OF DISBARMENT

By decision and opinion filed October 3, 2013, and reported at In re Phinney, 354 Or. 329 (2013), the Supreme Court of Oregon disbarred Mr. Phinney from the practice of law in the State of Oregon. Additionally, Mr. Phinney failed to inform the Chair of this Court's Committee on Admissions, Ethics, and Discipline of the entry of the October 3, 2013, decision and opinion of the Supreme Court of Oregon, within 30 days, as required by Rule 202(b), Tax Court Rules of Practice and Procedure.

The Court issued an Order to Show Cause on March 19, 2014, affording Mr. Phinney the opportunity to show cause, if any, why he should not be suspended or disbarred from practice before this Court, or otherwise disciplined. The Order to Show Cause instructed Mr. Phinney to (1) submit a written response to the order on or before April 22, 2014, and (2) notify the Court in writing on or before April 22, 2014, of his intention to appear, in person or by counsel, at a hearing concerning his proposed discipline scheduled before the United States Tax Court, 400 Second Street N.W., Washington, D.C. 20217, at 10:00 a.m. on July 16, 2014. On April 25, 2014, the Court received Mr. Phinney's Response to Order to Show Cause and Notice of Intent to Appear at the Scheduled Hearing, with attachments. On July 14, 2014, Mr. Phinney contacted the Court by telephone and requested that the hearing scheduled for July 16, 2014, be continued for health reasons. The Court granted Mr. Phinney's request, and that hearing was rescheduled for August 20, 2014, on which date the hearing was held.

Upon due consideration and for the reasons set forth in the attached Memorandum Sur Order, it is hereby

ORDERED that the Court's Order to Show Cause, issued March 19, 2014, is hereby made absolute in that, under the provisions of Rule 202, Tax Court Rules of Practice and Procedure, Mr. Phinney is forthwith disbarred from further practice before the United States Tax Court. It is further

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ORDERED that Mr. Phinney's name is hereby stricken from the list of practitioners who are admitted to practice before the United States Tax Court, and his practitioner access to case files maintained by the Court in electronic form, if any such access was given to him, is hereby revoked. It is further

ORDERED that Mr. Phinney is hereby prohibited from holding himself out as a member of the Bar of the United States Tax Court. It is further

ORDERED that the Court will file orders to withdraw Mr. Phinney as counsel in all pending cases in which he appears as counsel of record. It is further

ORDERED that Mr. Phinney shall, within 20 days of service of this order upon him, surrender to this Court his certificate of admission to practice before this Court.

By the Court:

(Signed) Michael B. Thornton

Michael B. Thornton
Chief Judge

Dated: Washington, D.C.
November 14, 2014

In re W. Scott Phinney

MEMORANDUM SUR ORDER

By Order to Show Cause dated March 19, 2014, the Court ordered Mr. W. Scott Phinney, a member of the Bar of the Court, to show cause why he should not be suspended or disbarred from practice before the Court or otherwise disciplined. See Rule 202(c), Tax Court Rules of Practice and Procedure. All Rule references herein are to the Tax Court Rules of Practice and Procedure, unless stated otherwise. The Order to Show Cause scheduled a hearing before the Court on July 16, 2014, if Mr. Phinney submitted a written notice of his intent to appear at the hearing on or before April 22, 2014.

This is a reciprocal discipline case. The Order to Show Cause issued to Mr. Phinney was predicated upon his disbarment from the practice of law in the State of Oregon by order of the Supreme Court of the State of Oregon, En Banc, filed October 3, 2013. In re Phinney, 354 Or. 329, 311 P.3d 517 (2013). See Rule 202(a)(2). It was also predicated upon his failure to report his disbarment in Oregon to the Chair of the Court's Committee on Admissions, Ethics, and Discipline within 30 days, as required by Rule 202(b). Mr. Phinney reported his disbarment to the Court in a letter dated January 15, 2014, which was more than 30 days after he was disbarred on December 2, 2013.

In response to the Order to Show Cause, Mr. Phinney filed a “Response to Order to Show Cause and Notice of Intent to Appear at the Scheduled Hearing”, hereinafter referred to as “Response”. Attached to the Response is a letter from the Yale Alumni Association of Oregon acknowledging Mr. Phinney’s full payment of the promissory note. A copy of the promissory note is also attached to the Response. Mr. Phinney also included with the Response a biography of himself and his wife. Mr. Phinney appeared before the Court at a disciplinary hearing on August 20, 2014. At that hearing, Mr. Phinney introduced, as a hearing exhibit, a letter from his legal representative, Jack Graham.

Background

On August 3, 2010, the Oregon State Bar filed a formal complaint against Mr. Phinney, which he answered on September 7, 2010. In re Phinney, Case No. 10-68 (2012) (hereinafter “Decision of the Trial Panel”). A trial panel heard the matter on August 8, 2011, and the trial panel’s majority opinion, received on May 10, 2012, disbarred Mr. Phinney from the practice of law. Id. The proceeding before the Supreme Court of Oregon came before that court on review of the decision of the trial panel of the Disciplinary Board of the Oregon State Bar. In re Phinney, 354 Or. 329 (2013). By decision and opinion filed October 3, 2013, the Supreme Court of Oregon disbarred Mr. Phinney from the practice of law in the State of Oregon, effective December 2, 2013. Id.

The misconduct in this case took place between September 2008 and January 2010, during which time Mr. Phinney, acting as treasurer for the Yale Alumni Association of Oregon (the association), wrote 21 checks for his own use in the total amount of \$32,600. Mr. Phinney knew that he had no right to withdraw the funds for his own use. Shortly after December 2010, the president of the association discovered a record that Mr. Phinney had written two checks payable to cash. He confronted Mr. Phinney, who only then admitted that he had been “borrowing” funds from the association. The president of the association closed the accounts and asked Mr. Phinney for an accounting. The accounting disclosed that Mr. Phinney had withdrawn a total of \$32,600 from the accounts, and that he had periodically paid back into one of the two accounts amounts totaling \$18,070. The accounting also disclosed that Mr. Phinney still owed the association \$14,530 at that time.

In August 2010, the Oregon State Bar filed a formal complaint against Mr. Phinney. The Oregon State Bar alleged that Mr. Phinney’s conduct constituted theft, in violation of Oregon Revised Statutes (ORS) 164.015, reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer in violation of Rule of Professional Conduct (RPC) RPC 8.4(a)(2), which prohibits criminal conduct that reflects adversely on a lawyer’s honesty and trustworthiness. The Oregon State Bar also alleged that Mr. Phinney knowingly converted association funds for his

own use in a manner involving dishonesty and reflecting adversely on his fitness to practice law, in violation of RPC 8.4(a)(3), which prohibits conduct involving dishonesty and misrepresentation that reflects adversely on a lawyer's fitness to practice law. Mr. Phinney filed an answer denying both alleged violations and affirmatively asserting mitigating factors concerning the alleged actions, including but not limited to: no prior discipline, personal and emotional problems, physical disability, and full and free disclosure.

In the proceedings before the trial panel of the Disciplinary Board of the Oregon State Bar, Mr. Phinney defended against the charges of misconduct by asserting that he had not committed theft because he never intended to steal the money but had just intended to borrow it. Mr. Phinney also alleged that he did not try to hide his conduct. Additionally, Mr. Phinney alleged that the association was not harmed by his actions because it did not need the money and he intended to repay the money with interest. Mr. Phinney further asserted that mitigating factors should be taken into consideration. Mr. Phinney asserted as mitigating factors his absence of a prior disciplinary record and full and free disclosure. Additionally, Mr. Phinney asserted that his personal and emotional problems should be taken into account and be considered mitigating factors.

After the hearing, the majority of the trial panel made findings and concluded that the sanction of disbarment was appropriate under the

circumstances, and after considering mitigating and aggravating circumstances the trial panel imposed the sanction of disbarment. Decision of the Trial Panel at 1.

The majority of the trial panel rejected Mr. Phinney's assertions and found that he was not credible.¹ The discussion of Mr. Phinney's credibility included the following, Decision of the Trial Panel at 5:

Because of the manner of presenting his testimony, his refusal to acknowledge the wrongful nature of his conduct, his constant rationalizations, and his refusal to accurately characterize his actions, the majority of the panel finds that the Accused is not credible. He attempted to convince the panel that he was simply naïve, but his claimed naiveté seemed contrived to the majority of the panel and is not believable. When questioned by the panel, the Accused frequently equivocated.

The trial panel opinion sets forth the reasons for rejecting Mr. Phinney's position. The majority opinion pointed out that, as a licensed attorney, Mr. Phinney should have known that he was breaching a fiduciary duty. Decision of the Trial Panel at 4. The majority opinion also noted that although Mr. Phinney did not hide his conduct, he also did not voluntarily reveal his conduct and did not think that he had permission to borrow the funds. Id. Further, the majority opinion noted that Mr. Phinney had not made any payments to the association since the discovery of his actions. Id. The majority opinion found that Mr. Phinney did not express any

¹ The Supreme Court of the State of Oregon found, based on their de novo review, Mr. Phinney's testimony credible on the subject of "unfortunate setbacks in his life that caused him extreme difficulties, including emotional issues", after noting that the trial panel did not appear to question Mr. Phinney's credibility with respect to that specific testimony. In re Phinney, 345 Or. 329, 338 n.9 (2013).

remorse for his actions and he refused to acknowledge the wrongful nature of his conduct: “The Accused testified that he has remorse for violating the trust of his friends in the association, whom he loves, but has not acknowledged remorse for engaging in dishonest conduct.” Decision of the Trial Panel at 5.

The majority of the trial panel were not persuaded by the mitigating factors asserted by Mr. Phinney. Decision of the Trial Panel at 9. With regards to Mr. Phinney’s personal problems, the majority opinion noted: “The Accused pointed to many personal problems but those usually are not relevant in this type of case.” Id. The majority opinion also noted that Mr. Phinney failed to offer any evidence of his mental disability and depressed emotional state; “he did not present any solid evidence, let alone any expert evidence that he has a mental disability or clinical depression and that either was involved in causing his conduct.” Id. The majority opinion also pointed to several aggravating circumstances, including the fact that Mr. Phinney misappropriated funds for his own personal use and also that Mr. Phinney offered various rationalizations for his conduct. Decision of the Trial Panel at 9-10.

The chair of the trial panel dissented from the majority’s finding that Mr. Phinney had committed a criminal act reflecting adversely on his honesty, trustworthiness, or fitness, in violation of RPC 8.4(a)(2), but concurred with the majority’s finding that Mr. Phinney had engaged in dishonest conduct in violation

of RPC 8.4(a)(3). The chair stated that he did not agree that the evidence clearly and convincingly led to the inferences drawn by the majority as to Mr. Phinney's mental state necessary to support its decision. Opinion Concurring in Part and Dissenting in Part at 2. The chair also disagreed with the majority as to their finding that Mr. Phinney was not credible. Opinion Concurring in Part and Dissenting in Part at 4. The chair dissented from the majority's decision to disbar Mr. Phinney, and concluded that the appropriate sanction was a 90-day suspension with reinstatement conditioned on full restitution. Opinion Concurring in Part and Dissenting in Part at 24.

Mr. Phinney petitioned the Supreme Court of Oregon to appeal the trial panel's decision. In his appeal, Mr. Phinney urged the Supreme Court of Oregon to find that he was not guilty of violating RPC 8.4(a)(2) or RPC 8.4(a)(3). In the alternative, Mr. Phinney urged the Supreme Court of Oregon to find that the appropriate sanction was a three-month suspension rather than disbarment. Mr. Phinney asserted that the trial panel viewed all facts and circumstances in a light least favorable to him, and did not meet their burden of proof. Mr. Phinney also asserted that a panel member of the majority opinion showed bias and unprofessional conduct during the trial by using improper language and arguing with him. The Supreme Court of Oregon was not persuaded by Mr. Phinney's assertions, and based on the court's de novo review of the trial panel's decision

pursuant to ORS 9.356(2), concluded that Mr. Phinney committed the substantial thefts of funds from an organization to which he owed a fiduciary duty of utmost honesty, confidence, and trust in violation of RPC 8.4(a)(2) and 8.4(a)(3). In re Phinney, 354 Or. 329, 337 (2013). In reaching their conclusion that the sanction of disbarment was appropriate, the Supreme Court of Oregon considered aggravating and mitigating factors.²

Discussion

As described above, Mr. Phinney was disbarred from the practice of law in the State of Oregon by order of the Supreme Court of Oregon, En Banc, filed October 3, 2013. While the order of the Supreme Court of Oregon disbaring Mr. Phinney from practice is entitled to respect in this Court, and will normally be followed, it is not conclusively binding on us. E.g., In re Ruffalo, 390 U.S. 544, 547(1968); Theard v. United States, 354 U.S. 278, 282 (1957); Selling v. Radford, 243 U.S. 46, 50 (1917).

² The Supreme Court of Oregon found for aggravating factors: (1) Mr. Phinney committed a criminal act, ABA Standard 9.22(k); (2) Mr. Phinney engaged in a pattern of repeated thefts (21 withdrawals) over a period of 17 months during 2008, 2009, and 2010, ABA Standard 9.22(c); (3) Mr. Phinney was admitted to practice in Oregon in 1982 and has substantial experience in the practice of law, ABA Standard 9.22(i); and (4) Mr. Phinney acted with a selfish motive, ABA Standard 9.22(b). In re Phinney, 354 Or. 329, 337 (2013). The court found four mitigating factors based on the record: (1) Mr. Phinney has no prior disciplinary record, ABA Standard 9.32(a); (2) Mr. Phinney engaged in full and free disclosure in the discipline process and he displayed a cooperative attitude toward the disciplinary proceedings, ABA Standard 9.32(3); (3) Mr. Phinney had repaid a substantial amount of the money he took prior to the discovery of his misconduct, ABA Standard 9.32(d); and (4) Mr. Phinney experienced personal and emotional problems during the period of time when he violated the rules of professional conduct, ABA Standard 9.32(c). Id. at 337, 338.

As true in the case of every reciprocal discipline case, the order disbaring Mr. Phinney from the practice of law in the State of Oregon raises a serious question about Mr. Phinney's character and fitness to practice law in this Court. The landmark opinion of the United States Supreme Court in Selling v. Radford, in effect, directs that we recognize the absence of "fair private and professional character" inherently arising as the result of the action of the Supreme Court of Oregon, and that we follow the disciplinary action of that court, unless we determine, from an intrinsic consideration of the record of the Oregon proceeding, that one or more of the following factors should appear: (1) that Mr. Phinney was denied due process in the form of notice and an opportunity to be heard with respect to the Oregon proceedings; (2) that there was such an infirmity of proof in the facts found to have been established in the proceedings as to give rise to a clear conviction that we cannot accept the conclusions of the Oregon proceedings; and (3) that some other grave reason exists which convinces us that we should not follow the discipline imposed by the Supreme Court of Oregon. See, e.g., Selling v. Radford, 243 U.S. at 50-51; In re Squire, 617 F.3d 461, 466 (6th Cir. 2010); In re Edelstein, 214 F.3d 127, 131 (2d Cir. 2000).

Mr. Phinney bears the burden of showing why, notwithstanding the discipline imposed by the Supreme Court of Oregon, this Court should impose no reciprocal discipline, or should impose a lesser or different discipline. See, e.g., In

re Roman, 601 F.3d 189, 193 (2d Cir. 2010); In re Sibley, 564 F.3d 1335, 1340 (D.C. Cir. 2009); In re Surrick, 338 F.3d 224, 232 (3d Cir. 2003); In re Calvo, 88 F.3d 962, 967 (11th Cir. 1996); In re Thies, 662 F.2d 771, 772 (D.C. Cir. 1980).

We have given Mr. Phinney an opportunity to present, for our review, the record of the disciplinary proceedings in Oregon, and to point out any grounds to conclude that we should not give effect to the action of the Supreme Court of Oregon. See Selling v. Radford, 243 U.S. at 51-52 (“an opportunity should be afforded the respondent * * * to file the record or records of the state court * * * [and] to point out any ground within the limitations stated which should prevent us from giving effect to the conclusions established by the action of the supreme court of Michigan which is now before us”).

In this proceeding, Mr. Phinney affirmed that no facts are at issue in this case. Transcript of the Disciplinary Hearing for W. Scott Phinney, August 20, 2014, at 6. Mr. Phinney asserts two reasons why the Court should divert from the prior discipline that had been given and reach a different result: (1) a member of the trial panel was abusive during the hearing, and (2) the trial panel and the Supreme Court of Oregon failed to consider the mitigating factors as set out in the ABA Standards. Transcript of the Disciplinary Hearing for W. Scott Phinney, August 20, 2014, at 6. With regards to the first reason, Mr. Phinney fails to provide any details or evidence of the alleged “abusive” conduct of the trial panel

member. Rather, he briefly raises the concern and moves on. Further, in his opening brief in the Supreme Court of Oregon proceeding, Mr. Phinney contended that a majority member of the trial panel showed “bias and unprofessional conduct during the trial”. In re Phinney, 354 Or. 329 (2012), W. Scott Phinney’s Petition and Opening Brief, dated November 21, 2012. Upon their de novo review of the trial panel’s determination, the Supreme Court of Oregon concluded that disbarment was the appropriate sanction.

With regards to the second reason, Mr. Phinney reiterates the same mitigating factors he cited before the trial panel. Mr. Phinney stated: “I think that’s an error in the process, to have a set of factors that are supposed to be considered and then to ignore them, or to make a decision that they’re moot, really doesn’t serve the purpose that they were established for.” Transcript of the Disciplinary Hearing for W. Scott Phinney, August 20, 2014, at 8. These, and other points made by Mr. Phinney during his hearing are identical to the points made in Mr. Phinney’s submission to the Supreme Court of Oregon. Moreover, the Supreme Court of Oregon upon their de novo review, considered mitigating factors in determining that it was appropriate to impose the sanction of disbarment. In re Phinney, 354 Or. at 337-338.

We do not sit as a court of review with respect to the proceedings before the Supreme Court of Oregon. See Selling v. Radford, 243 U.S. at 49-50; In re Sibley,

564 F.3d at 1341. To the contrary, as mentioned above, we are required to follow the action of the Supreme Court of Oregon unless, from an intrinsic consideration of the record before that Court, we can conclude that (1) Mr. Phinney did not receive notice or an opportunity to be heard in that proceeding, (2) that there was an infirmity of proof as to the factual basis for the discipline, or (3) that there was some other grave reason not to follow the action of the Supreme Court of Oregon. Selling v. Radford, 243 U.S. at 51.

In this proceeding, Mr. Phinney has not shown any of these three factors identified by the Supreme Court in Selling v. Radford. He was given a full opportunity to be heard by both the Disciplinary Board of the Oregon State Bar and the Supreme Court of Oregon, and, thus, there was no “want of notice or opportunity to be heard” in the Oregon proceeding. There was no infirmity of proof, as the facts were not disputed in this case. Finally, Mr. Phinney has not shown any “other grave reason” not to give effect to the action of the Supreme Court of Oregon, as he did not clearly establish either of the two reasons he cited as to why the Court should divert from the prior decisions. See Selling v. Radford, 243 U.S. at 51. Accordingly, we will give full effect to the disbarment of Mr. Phinney by the Supreme Court of the State of Oregon.

Considering the entire record in this matter, we conclude that Mr. Phinney has not shown good cause why he should not be suspended, disbarred or otherwise

disciplined, and we further conclude that, under Rule 202, the appropriate discipline in this case is disbarment.

The Committee on Admissions,
Ethics, and Discipline

Dated: Washington, D.C.
November 14, 2014