

IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



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REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE CASE.....	1
II. SUMMARY OF ARGUMENT	4
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	4
IV. STANDARD OF REVIEW	4
V. STANDARD FOR REINSTATEMENT	5
VI. FINDINGS OF FACT.....	6
1. 2011 SUSPENSION	6
2. REINSTATEMENT HEARING	10
A. Chris Miller	10
B. David Ross	11
C. The Honorable David M. Pancake	11
D. Dr. David Frederick.....	12
E. The Honorable Jay Hoke.....	13
F. The Honorable Family Court Judge Jara Howard.....	13
G. Petitioner.....	14
VII. HEARING PANEL SUBCOMMITTEE RECOMMENDATION.....	15
VIII. DISCUSSION	16
IX. CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases:

Committee on Legal Ethics v. Blair

174 W.Va. 494, 327 S.E.2d 671 (1984).....4

Committee on Legal Ethics v. Pence

171 W.Va. 68, 297 S.E.2d 843 (1994).....19

Committee on Legal Ethics v. McCorkle

192 W.Va. 286, 452 S.E.2d 377 (1994).....4

In re Brown

166 W.Va. 226, 273 S.E.2d 567 (1980).....6

In re Reinstatement of diTrapano

240 W.Va. 612, 814 S.E.2d 275 (2019).....4

In re Reinstatement of Smith

166 W.Va. 22, 270 S.E.2d 567 (1980).....6

Lawyer Disciplinary Board v. Hess

201 W.Va. 195, 495 S.E.2d 563 (1997).....6,19

Lawyer Disciplinary Board v. Sayre

207 W.Va. 654, 535 S.E.2d 719 (2000).....6

West Virginia Statutes and Rules:

R. of Appellate Proc. Rule 19.....4

R. of Appellate Proc. Rule 40(d)3

R. Professional Conduct Rule 1.7(b)1,5,9

R. Professional Conduct Rule 1.16(d)1,5

R. Professional Conduct Rule 3.5(c).....1,5

R. Professional Conduct Rule 8.1(a).....1,5

R. Professional Conduct Rule 8.4(c).....1,5

R. Professional Conduct	Rule 8.4(d)	1,5
R. Lawyer Dis. Proc.	Rule 3.15	2
R. Lawyer Dis. Proc.	Rule 3.30	5
R. Lawyer Dis. Proc.	Rule 3.32	1,5

I. STATEMENT OF THE CASE

Formal charges in this matter were filed against Petitioner with the Clerk of the Supreme Court of Appeals of West Virginia on or about December 3, 2010, and served upon him by legal notice published in West Virginia and Nevada on March 9, 16, and 23, 2011. Petitioner has testified that he did not stay in West Virginia for adjudication of the disciplinary charges because he “anticipated a bad result.” 12/19/16 Sworn Statement Trans. p. 10-11. The Statement of Charges alleged violations of Rules 1.7(b), 1.16(d), 3.5(c), 8.1(a), 8.4(c), and 8.4(d). Thereafter, the matter proceeded to hearing in Williamson, West Virginia, on May 19, 2011. On or about August 25, 2011, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”). The Supreme Court concurred with the recommendation of the Hearing Panel Subcommittee that Petitioner violated Rules 1.7(b), 1.16(d), 3.5(c), 8.1(a), 8.4(c), and 8.4(d), and ordered that Petitioner be suspended from the practice of law in the State of West Virginia, indefinitely; that he shall be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure; that he shall not be permitted to file a petition for reinstatement to the practice of law for at least three years after the date of this order suspending his license to practice law; that prior to petitioning for reinstatement, he must undergo an independent psychiatric evaluation to determine whether he is fit to engage in the practice of law, and that he must comply with any treatment protocol stated by the evaluator; upon any such reinstatement of his law license, [Petitioner’s] practice of law shall be supervised for a two-year period by a supervising attorney agreed upon by both the Office of Disciplinary

Counsel (hereinafter “ODC”) and [Petitioner]; and [Petitioner] shall pay the costs incurred in the disciplinary proceeding.

Petitioner filed a petition for reinstatement on or about December 21, 2015. The matter proceeded to hearing on March 6, 2017. Petitioner was represented by Richard W. Weston, Esquire. In addition to ODC Exhibits 1-11 being admitted into evidence, the HPS heard the testimony of Christopher D. Miller, The Honorable David M. Pancake, The Honorable Jay M. Hoke, and Petitioner. The Hearing Panel Subcommittee in the matter issued its recommendation on or about June 23, 2017. The Panel recommended that Petitioner’s petition for reinstatement to the practice of law be granted. The HPS further recommended that Petitioner undergo psychotherapy to better understand the nature and construction of his personality, including how his character traits may negatively affect his perceptions and behaviors and their impact on others as recommended by Dr. Miller, with quarterly updates regarding the therapy submitted to ODC. The Panel recommended that he undergo supervised practice for two years by an attorney agreed upon between ODC and Petitioner if he chose to practice law in West Virginia within five years from his reinstatement. The Panel further recommended that Petitioner complete any requirements as ordered by the State Bar of West Virginia regarding his Continuing Legal Education requirements and dues requirements prior to reinstatement; and be ordered to pay the costs of the proceeding pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

On or about August 30, 2017, the Supreme Court of Appeals of West Virginia entered an Order denying Petitioner’s first petition for reinstatement. On or about October 2, 2017, Petitioner filed a Petition for Reconsideration. On or about October 3, 2017, the Deputy Clerk of the Supreme Court of Appeals, advised by letter that neither the Rules of Appellate Procedure,

nor the Rules of Lawyer Disciplinary Procedure, provide for the filing of a petition for reconsideration in this matter.

Petitioner filed his second Petition for Reinstatement on or about December 27, 2019. Thereafter, this matter proceeded to hearing in Huntington, West Virginia, on November 16, 2020. The Hearing Panel Subcommittee was comprised of Gail T. Henderson Staples, Esquire, Chairperson; Rhonda Miller Harsh, Esquire; and Cynthia Tawney, Layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the ODC. Petitioner appeared *pro se*. The Hearing Panel Subcommittee heard testimony from Chris Miller, David Ross, The Honorable David Pancake, Dr. David Frederick, the Honorable Jay Hoke, and the Honorable Jara Howard, and Petitioner. In addition, ODC Exhibits 1-20 and Petitioner's Exhibits 1-3 were admitted into evidence.

On or about January 29, 2021, the HPS filed its written report with the Court recommending that Petitioner's license be reinstated with certain conditions.

On February 8, 2021, ODC filed its consent to the recommendation.

On or about February 22, 2021, Petitioner filed his consent to the recommendation.

On February 24, 2021, ODC filed a motion to supplement the record and a motion to seal pursuant to Rule 40(d) of the Rules of Appellate Procedure.

On or about April 15, 2021, the Court scheduled this matter for oral argument and directed the parties to submit to a briefing schedule.

On or about April 15, 2021, the Court entered an Order granting ODC's motion to supplement the record and to seal the supplemented exhibit.

II. SUMMARY OF ARGUMENT

Petitioner carries a heavy burden of persuading this Honorable Court that he presently possesses the integrity, moral character and legal competence to resume the practice of law. Indeed, the more serious the nature of the underlying offense, the more difficult the task becomes for Petitioner to show a basis for reinstatement. The evidence presented by Petitioner reflects a course of conduct that would enable the Court to conclude there is little likelihood that after he is readmitted to the practice of law that he will engage in unprofessional behavior and has demonstrated the requisite integrity and moral character to be reinstated to the practice of law.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Rules of Appellate Procedure, this Honorable Court's Order set this matter for oral argument to take place on September 28, 2021.

IV. STANDARD OF REVIEW

The Supreme Court is the final arbiter of legal ethics problems and must make the ultimate decision about public reprimands, suspension or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984). While the Court gives respectful consideration to the recommendations of the HPS, this Court ultimately exercises its own independent judgment regarding reinstatement:

A de novo standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

Syl. Pt. 2, In re Reinstatement of diTrapano, 240 W. Va. 612, 814 S.E.2d 275 (2018) (*quoting* Syl. Pt. 3, Comm. on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994)).

V. STANDARD FOR REINSTATEMENT

The applicable rules regarding reinstatement following suspension are Rules 3.30 and 3.32 of the Rules of Lawyer Disciplinary Procedure. Rule 3.30 provides:

Rule 3.30. Requirements for reinstatement.

When for any reason, other than for nonpayment of membership fees, the license of any person to practice law has been or shall be suspended or annulled, whether or not for a limited time or until requirements as to restitution, conditions, or some other act shall be satisfied, such person shall not become entitled to engage in the practice of law in this State, whether such time [h]as elapsed or such other requirements as to restitution, conditions, or some other act have been satisfied, until such person shall have been restored to good standing as a member of the West Virginia State Bar as provided herein. Any conviction for false swearing, perjury or any felony, and the person's prior and subsequent conduct shall be considered in the determination of good moral character and fitness.

Rule 3.32(a) provides as follows:

Rule 3.32 - Reinstatement procedure following suspension.

(a) A person whose license to practice law has been or shall be suspended in this State for a period of more than three months and who shall desire reinstatement of such license, shall file a verified petition in the Supreme Court of Appeals reciting what he or she shall have done in satisfaction of requirements as to restitution, conditions, or other acts incident to the suspension, by reason of which the lawyer believes he or she should be reinstated as a member of the state bar and should have his or her license to practice law restored. The petitioner shall also file a completed reinstatement questionnaire provided by the Office of Disciplinary Counsel. At the time of filing such petition and questionnaire with the Clerk of the Supreme Court, the petitioner shall file a copy of each with the Office of Disciplinary Counsel, which shall investigate the same and determine whether a hearing is necessary.

Petitioner was suspended indefinitely for violating Rules 1.7(b), 1.16(d), 3.5(c), 8.1(a), 8.4(c), and 8.4(d) of the Rules of Professional Conduct. The fundamental question which must be addressed is whether the attorney seeking reinstatement has shown that he presently possesses

the integrity, moral character and legal competence to assume the practice of law. Lawyer Disciplinary Board v. Hess, 201 W.Va. 195, 495 S.E.2d 563 (1997). The Court has also defined rehabilitation in this context to mean the correction of specific, identifiable vices or illnesses which may have contributed directly to the sanction. Where the sanction resulted from no identifiable vice or illness, sufficient evidence of rehabilitation is presented by a showing that Petitioner has behaved honorably since the sanction was imposed by the Court. In re Smith, 166 W.Va. 22, 270 S.E.2d 567 (1980). Furthermore,

Rehabilitation is demonstrated by a course of conduct that enables the court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in unprofessional conduct.

Syl. Pt. 2, In re Brown, Id.; Syl. Pt. 3, Sayre, Id.

The burden of proof is on Petitioner to establish his case for reinstatement. In re: Brown, 166 W.Va. 226, 273 S.E.2d 567 (1980). The standard of proof is clear and convincing evidence.

VI. FINDINGS OF FACT

1. 2011 SUSPENSION

The Court has held in assessing an application for reinstatement “consideration must be given to the nature of the original offense for which the applicant was disbarred. Obviously, the more serious the nature of the underlying offense, the more difficult the task becomes to show a basis for reinstatement.” In re Brown, 166 W. Va. 226, 273 S.E.2d 567 (1980).

The Statement of Charges issued by the Lawyer Disciplinary Board on December 3, 2010, was based upon Petitioner’s conflict of interest and conduct prejudicial to the administration of justice in having several sexual conversations with his client’s wife, then withdrawing from the same client’s criminal case just prior to the scheduled trial date, failing to

appear in court on the withdrawal motion after the judge ordered him to appear, and making false representations to Disciplinary Counsel during the investigation. Petitioner did not contest the following facts or oppose the findings of ethical violations.¹

Christopher Cline was indicted in Mingo County, West Virginia, on January 22, 2009, on several criminal charges. Mr. Cline was incarcerated while his criminal charges were pending because he could not post bond. At first, Mr. Cline had appointed counsel, who was not Petitioner. In the later part of February of 2009, Christine Cline, later known as Christine Tidwell, contacted Petitioner by telephone about representing her then husband, Mr. Cline. Petitioner quoted a fee and, about a week later, Ms. Tidwell provided partial payment with an agreement for her to make another payment soon thereafter. On March 2, 2009, Ms. Tidwell appeared at Petitioner's office to make another additional payment. On that same day, Ms. Tidwell entered into a "Third Person Compensation Agreement" and "Employment Contract" with Petitioner. Also on March 2, 2009, Petitioner entered his "Notice of Appearance" for Mr. Cline in the criminal case. On March 4, 2009, Petitioner filed several documents in Mr. Cline's case, and sent a letter to Mr. Cline, in jail, and also to Ms. Tidwell, about taking over the case, and informing them of the documents he filed in the case. Petitioner also scheduled a meeting with Mr. Cline for March 8, 2009.

¹ Petitioner was present in the State of West Virginia during the investigation as evidenced by his appearance at a sworn statement on May 14, 2010. However, Petitioner left for the State of Nevada thereafter, and did not provide any updated addresses to ODC at that time. The Statement of Charges filed against Petitioner was served by publication in newspapers in West Virginia and Nevada. Respondent indicated in his sworn statement on December 19, 2016, that he received a copy of the Statement of Charges when he received the entire file on or about September 30, 2014, and this date is reflected in a September 3, 2014 letter to Petitioner indicating that his entire file would be copied and mailed to him by that date without charge. Petitioner related that he was informed by his sister of his suspension from the practice of law after a small article was in The Herald Dispatch newspaper in Huntington, West Virginia. The ODC would have sent that press release on or about December 5, 2011.

Petitioner met with Mr. Cline on March 8, 2009, to discuss the case and to have Mr. Cline sign the "Employment Contract." The day after, March 9, 2009, Petitioner filed a motion to continue the trial in Mr. Cline's case from March 24, 2009, until April 22, 2009. Petitioner also sent Mr. Cline letters about what was going on in his case. The Court denied Petitioner's motion to continue on March 13, 2009.

Between March 8, 2009, and March 16, 2009, Petitioner and Ms. Tidwell spoke on the telephone several times about legal fees. During those conversations, Petitioner made comments about Ms. Tidwell's mouth, while also asking her on several occasions about having oral sex with him, and actually masturbating during one telephone call. Thereafter, on March 16, 2009, Petitioner did appear in court for a hearing, and a brief continuance of the trial was granted by the court. Petitioner continued to file documents in Mr. Cline's case and would advise Mr. Cline when such was done. Petitioner also continued to ask for full payment of his legal fees. After several letters, Petitioner gave Mr. Cline until April 6, 2009, to make a payment or he would move to withdraw. Also on April 6, 2009, Petitioner received a telephone call from Michael Sparks, who was at that time the Prosecuting Attorney for Mingo County, West Virginia, about Ms. Tidwell recording her conversations with Petitioner. Petitioner then had a meeting with Mr. Cline in jail on April 8, 2009, about Ms. Tidwell's accusations and the failure to pay his legal fees. On April 9, 2009, Petitioner sent Mr. Cline a letter advising that he would file a motion to withdraw due to the failure to pay legal fees and a breakdown of the attorney-client relationship. Petitioner filed the motion to withdraw in Mr. Cline's case on April 10, 2009.

Mr. Cline appeared in court on April 13, 2009, for a hearing in his case. Petitioner did not appear at the hearing, and the judge noted that he had told Petitioner to appear that day for several reasons, which included the fact that Petitioner was not appearing in another court and

Petitioner had been told that there was no continuance granted in the case. The judge then re-appointed Mr. Cline's former appointed counsel to represent him. Mr. Cline ended up entering a plea to a new charge filed in an information, and the other charges were dismissed on May 21, 2009.

Mr. Cline filed an ethics complaint against Petitioner on June 23, 2009. In the investigation of the complaint, Petitioner under oath denied offering oral sex to Ms. Tidwell and denied any phone sex with her. Ms. Tidwell testified during the disciplinary hearing about Petitioner offering to reduce his legal fees if she performed oral sex. Further, Ms. Tidwell stated that Petitioner had threatened to withdraw from Mr. Cline's case if she did not meet his sexual demands.² There was also testimony at the hearing from Mr. Sparks, the prosecutor, about a possible conflict for Petitioner in representing Mr. Cline regarding any potential plea offers when Petitioner's own interest in Ms. Tidwell could cloud his advice to Mr. Cline.

Petitioner violated his duties to his client, the public, the legal system, and the legal profession. A lawyer's duty of loyalty to a client includes a duty to avoid conflicts of interest. In Petitioner's case, he created a conflict under Rule 1.7(b) by his own interest in having sexual relations with his client's wife which conflicted with the interests of his client, who was incarcerated. A violation of the duty to the general public includes not engaging in dishonest misconduct. Petitioner was dishonest by the providing false representations to Disciplinary Counsel in his case. Further, lawyers are officers of the court, and must abide by the rules of substance and procedure in making sure they fulfill their duties to the legal system. Petitioner did

² A recording of telephone calls between Ms. Tidwell and Petitioner, along with a transcript of the recordings, were admitted into evidence during the disciplinary hearing. These recordings contained the conversations about Ms. Tidwell's mouth, while also asking her on several occasions about having oral sex with him, and actually masturbating during one telephone call.

not appear in Court for his client, even after being told to appear by the Judge, which certainly did not fulfill his duty to the legal system. The legal system was also affected by Petitioner's misconduct that was prejudicial to the administration of justice by having telephone conversations about sexual relations with his client's then wife while his client was incarcerated. Finally, the duty to the legal profession was violated by Petitioner when he withdrew from his client's case only a few days before the trial was scheduled, and by making false representations to Disciplinary Counsel during the investigation.

2. REINSTATEMENT HEARING

The Hearing Panel Subcommittee heard testimony from Chris Miller, David Ross, The Honorable Pancake, Dr. David Frederick, The Honorable Circuit Court Judge Hoke, The Honorable Family Court Judge Howard, and Petitioner. The hearing was conducted on November 16, 2020, at the Cabell County Courthouse. The summary of the testimony of the witnesses is as follows:

A. Chris Miller

Mr. Miller lives in Huntington, West Virginia and is the President of Dutch Miller Auto Group. Mr. Miller has known Petitioner since 2007 and they met through social channels. After Petitioner was suspended from the practice of law in 2011, he later began doing work for Mr. Miller in or about 2012. Mr. Miller testified that Petitioner has done vehicle trades, which entails trading assets to other dealerships. Mr. Miller explained that Petitioner is insured to make these asset exchanges, which requires a background check. He further stated that Petitioner has chauffeured customers and has done mystery shopping for the dealership. Mr. Miller further testified about Petitioner's charitable and giving heart and his good works in the community.

Mr. Miller believes that Petitioner should be reinstated to the practice of law and stated

that he believes that Petitioner has a desire to do good with his license if given the opportunity. Mr. Miller testified he would use Petitioner as an attorney. [Transcript 36-52]

B. David Ross

Mr. Ross lives in Las Vegas, Nevada. He is the Founder and Director of Kid's Golf Association. Mr. Ross is Petitioner's supervisor in his position as a golf coach for the Kid's Golf Association. The KGA is a program taught in conjunction and cooperation with the Clark County School District in Las Vegas, Nevada. The program brings a golf program to the schools, thereby making learning to golf both convenient and affordable. Classes are before or after the school day and focuses on learning the fundamentals, the rules, golf etiquette and manners, golf IQ, and character builders.

Mr. Ross testified that he was aware of the circumstances that lead to Petitioner's suspension, and had no hesitation allowing Petitioner to work with the kids in his programs. Petitioner is paid \$40 an hour by Mr. Ross and he works approximately 4 days a week.¹ He further testified that Petitioner was also a mentor to other coaches in the program. Mr. Ross said that Petitioner was an excellent employee. Mr. Ross testified that Petitioner was patient and attentive with his students and he believed that the kids learned a lot during the 6-week course with Petitioner. Mr. Ross testified that Petitioner had successfully comported his behavior to the code of conduct for his coaches. [Transcript 54-74]

C. The Honorable David M. Pancake

David M. Pancake was a judge for the Sixth Judicial Circuit, which presides over Cabell County in West Virginia. He was appointed by former Governor Cecil Underwood in 1998, and he retired from the court on January 31, 2014. Judge David Pancake lives in Huntington, West

¹ Mr. Ross's business is currently at a standstill because of COVID-19.

Virginia. Judge Pancake became a member of the West Virginia State Bar in 1971 and prior to becoming a member of the judiciary he practiced law in Huntington, West Virginia. Judge Pancake met Petitioner through his relationship with Petitioner's father and the church their families attended. Judge Pancake also testified that Petitioner was always prepared when he was practicing law in his court room.

Judge Pancake stated that without hesitation he believes that Petitioner possesses the personal and professional integrity and moral character to resume the practice of law. He testified that he was disappointed when Petitioner lost his license for the conduct he engaged in, but further stated that he felt strongly that if reinstated he would fully adhere to the rules. Judge Pancake said getting his license back would "be a blessing for him because he'll be able to walk straight with his head high." [Transcript 75-91]

D. Dr. David Frederick

Dr. Frederick's curriculum vitae and evaluation report are contained in Exhibits 19 and sealed Exhibit 17. [Transcript 92-135]

Dr. Frederick does not regularly perform a fitness evaluation for lawyers as contemplated by the Court. [Transcript at 117]. The record is not at all clear as to what Dr. Frederick reviewed prior to making his evaluation, but it is evident Dr. Frederick conducted a clinical interview and issued a report after conducting clinical assessments of Petitioner. Dr. Frederick's conclusion was that he believes Petitioner is fit to practice law. He further testified that his opinion was that the traits outlined in the report only affect his personal life², not his professional life. [Transcript 125-126]

² Barometers of wellness and acknowledgment of the inextricable link between a lawyer's mental health and their ability to practice law is crucial to protect the public. More importantly, it is critical for legal professionals because of the alarming statistics that involve mental health issues.

E. The Honorable Jay Hoke

Jay M. Hoke is a judge of the Twenty-Fifth Judicial Circuit, which presides over Boone and Lincoln counties in West Virginia. Judge Hoke was admitted to the West Virginia State Bar in 1982. Judge Hoke was first elected in 1988 as the Lincoln County Prosecuting Attorney, having previously been the assistant prosecutor and having been appointed prosecutor in 1987 and 1988. In 1992, Judge Hoke was elected to the bench in the Boone and Lincoln County circuit. He currently serves as Chief Judge of the Twenty-Fifth Judicial Circuit. He also is one of seven judges on the West Virginia Mass Litigation Panel, which processes complex litigation for the entire state.

As required by the judicial canons, Judge Hoke testified pursuant to a subpoena issued by Petitioner. Judge Hoke testified that he became familiar with Petitioner when he was counsel of record in a murder case in his court room. Judge Hoke testified that Petitioner's legal competence was above average and that he was prepared for trial. Judge Hoke testified that he knows of no impediment for Petitioner not to return to the practice of law. Judge Hoke acknowledged he had not been in contact with Petitioner other than agreeing to testify on his behalf. [Transcript 135-147]

F. The Honorable Family Court Judge Jara Howard

Family Court Judge Jara Howard currently resides in and is a native of Cabell County. She was elected to the Sixth Family Court Circuit in May 2016 and took office January 1, 2017. She previously worked as a Child Support Enforcement Attorney with the West Virginia Bureau of Child Support Enforcement Division from 1994 to 1997. From 1997 until she took the bench, she was an assistant prosecuting attorney in Cabell County.

As required by the judicial canons, Judge Howard testified pursuant to a subpoena issued

by Petitioner. Judge Howard testified that she first met Petitioner when she was an assistant prosecutor for Cabell County, and Judge Howard agreed that it was fair to say the two did not like each other. She testified that she believed that Petitioner was flamboyant and behaved in a manner to bring attention to himself, not always to the benefit of his client. However, Judge Howard testified that over a period of years she saw him evolve and realized that he was there for his client's interests, not his own. She was later involved with him in charitable efforts to benefit the community. She agreed that her contact with him over the years has been sporadic, but that nothing gives her pause to change her opinion.

Judge Howard testified that she believed that Petitioner possessed the personal character and integrity to resume the practice of law. She further testified that while the underlying conduct was egregious, she believed that he has been adequately punished and his reinstatement would not negatively impact the system. She testified that she would have no issue having him appear before her or appointing him as a guardian *ad litem* to represent children in her court room.

[Transcript 169-189]

G. Petitioner

Petitioner testified it was important for him to return to West Virginia and clean up the mess he made with his law license. He stated that the biggest regret of his life was not staying to fight for himself. Petitioner testified that he would like to return to Nevada, and perhaps teach law students at UNLV, but certainly he would like to return to the area particularly since his parents are no longer living in Huntington, West Virginia.

Petitioner is uncertain if he wants to practice law in the future, but is not uncertain as to what he loved about practicing law. He testified that he loved making a difference and knowing

that if he did his job correctly then other people could benefit. He stated that he evolved as a lawyer and learned to effectuate change, not just argue. He testified that despite his love of practice that nothing gives him more satisfaction than working with kids as a coach. Petitioner, who was, at times, testifying with tears falling to counsel table, talked about loving to figure things out and that 11 years ago he lost something [his law license] that he loved and it was his fault. Petitioner testified that he was closer now to being the man he's always wanted to be and he's better than the mistake he made.

Petitioner further testified that he would agree to continue seeing a therapist or counselor as it was important to continue to examine his flaws. [Transcript 23-35, 187-235]

VII. HEARING PANEL SUBCOMMITTEE RECOMMENDATION

The Hearing Panel Subcommittee recommended that Petitioner's license to practice law be reinstated pursuant to the following conditions: (1) if Petitioner returns to the active practice of law in the State of West Virginia, Petitioner must undergo supervised practice for a period of two years by a supervising attorney agreed upon by the ODC and Petitioner with monthly reports to ODC; (2) if Petitioner returns to the active practice of law in the State of West Virginia, Petitioner must undergo psychotherapy for one year, or for a period of treatment to be determined by his therapist or counselor to better understand the nature and construction of his personality, including how his character traits may negatively affect his perceptions and behaviors and their impact on others. The Panel further recommended that in order to ensure that Petitioner is meeting this requirement, that the treating therapist should file quarterly reports with ODC, and a final report at the end of treatment that expresses that no further treatment is needed; (3) Petitioner complete any requirements as ordered by the West Virginia State Bar regarding his CLE requirements and dues prior to his reinstatement; and (4) that Petitioner be ordered to pay

the costs of the instant reinstatement proceeding prior to be reinstatement.

VIII. DISCUSSION

The Court set out a five-factor test to evaluate a petitioner's rehabilitation, stating that they must consider: (1) the nature of the original offense for which the petitioner was suspended, (2) the petitioner's character, maturity, and experience at the time of his suspension, (3) the petitioner's occupations and conduct in the time since his suspension, (4) the time elapsed since the disbarment, and (5) the petitioner's present competence in legal skills.

As it relates to the first factor, Petitioner's transgressions were serious and warranted the harsh punishment he received. The evidence presented reflects that Petitioner has demonstrated great remorse for his previous conduct, has acknowledged the severity of such, and appears to accept full responsibility thereof. It is only through failure and acknowledgment of those failures that we may find the opportunity to seek redemption. As it relates to the second factor, it is undisputed that Petitioner was an experienced lawyer when he engaged in the conduct that resulted in his suspension. As it relates to the third factor, the evidence reflects that Petitioner has demonstrated a record of honorable behavior since his suspension and intends to adhere to high moral standards in the future. As to factor four, as of the filing of this brief, nearly ten years has elapsed since the time of Petitioner's suspension. Lastly, several witnesses testified as to Petitioner's preparedness and competency as a lawyer in his preparation and presentation of cases.

Finally, a critical aspect of the question of reinstatement is whether Petitioner has complied with the Court's order wherein he was suspended from the practice of law. The 2011 Order suspended Petitioner's license to practice law indefinitely but stated that he must wait a minimum of three years prior to seeking reinstatement. Petitioner waited the requisite three years

after the date of the November 22, 2011 Order suspending his license to practice law.

The 2011 Order also required Petitioner to undergo an independent psychiatric evaluation to determine whether he was fit to engage in the practice of law and required that he must comply with any treatment protocol stated by the evaluator, upon any such reinstatement of his law license. Petitioner was evaluated by David E. Frederick, Ph.D., of Argus Psychological Services located in Huntington, West Virginia on or about September 1, 2020. It is ODC's position that Dr. Frederick's evaluation does not comply with the 2011 Order. Specifically, the Court order requires a psychiatric evaluation and the evaluation by Dr. Fredericks is a psychological evaluation. In its proposed findings to the HPS filed December 21, 2020, the undersigned recommended that Petitioner obtain a psychiatric evaluation that would comply with the requirements set forth by the Court and offered to facilitate the same on Petitioner's behalf. On or about January 11, 2021, Petitioner underwent a psychiatric evaluation by Timothy Thistlethwaite, M.D. It is noted that Petitioner did not wait to see if the HPS made the same distinction before submitting to the psychiatric evaluation. It is further noted that the HPS did not make any issue of the distinction in its January 29, 2021 report to the Court recommending his reinstatement.

ODC received the psychiatric evaluation on February 1, 2021, and the same was filed under seal with the Court on February 24, 2021. The report reflects that the examination consisted of a clinical psychiatric interview, mental status examination, psychology testing, and review of the documents provided by ODC which are referred to in the report. The report states with a reasonable degree of medical certainty that Petitioner is currently fit for duty as an attorney. The report further states that he has made his own efforts to gain insight from his past and has made significant strides to change his behaviors. The report noted that there is some

evidence to suggest he has an ongoing personality disorder, but did not meet the criteria for a specific diagnosis. Additionally, Petitioner testified he was willing to seek therapy and counseling services to address personal issues.

The Court further ordered that Petitioner's practice of law shall be supervised for a two-year period by a supervising attorney agreed upon by both ODC and Petitioner. While this is not a condition that can be satisfied unless and until the Court order reinstatement, during his sworn statement, Petitioner stated that he had spoken with several attorneys within the local Bar, including Attorney Gina Stanley, Attorney Paul Ryker, Attorney Scott McClure, and Attorney Ashley Lockwood and intimated they would be willing to agree to supervise his practice should he be reinstated to the practice of law.

Finally, the Court ordered Petitioner to pay the costs associated with the suspension proceedings and Petitioner paid those in or about September of 2014. The Court did not assess additional costs associated with the first unsuccessful petition for reinstatement.

As such, at this time, Petitioner has complied with the Court's 2011 Order.

IX. CONCLUSION

Petitioner stated in his closing argument:

In the last 40 months since my first petition was denied, just this time you've been around me, you can probably imagine I have had great opportunity for reflection, for examining myself, our system, the process and most importantly, my mistakes. Successes are easy. Life is easy when you're successful, but when you shoot yourself in the foot and you get up and walk again—somebody said once a man should not be judged by his successes but rather how he gets up from his failure, how he responds to his failures. There's no doubt I failed. I've failed several times in my life, but I always get back up.

[Transcript 236-237]

Speaking of the presentment of his case, he argued:


This is all evidence of my capability to change. Whatever time frame you put onto it, it's all evidence that I will not always be what I once was.

[Transcript 241].

The evidence presented by Petitioner reflects a course of conduct that would enable the Court to conclude there is little likelihood that after he is readmitted to the practice of law that he will engage in unprofessional conduct as contemplated by Hess. The evidence is void of any reason the public confidence in the administration of justice would be adversely affected by the reinstatement of Petitioner's law license. Indeed, the primary purpose of an ethics proceeding "is no punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys." Committee on Legal Ethics v. Pence, 171 W.Va. 68, 74, 297 S.E.2d 843, 849 (1982). It is anticipated by his course of conduct since his suspension that Petitioner will strive to uphold the standards of integrity expected of officers of the Court. Petitioner has met the burden to have the opportunity to seek redemption and the recommendations as set forth by the Hearing Panel Subcommittee create an accountability structure to ensure the protection of the public.

Respectfully submitted,

The Lawyer Disciplinary Board
By Counsel

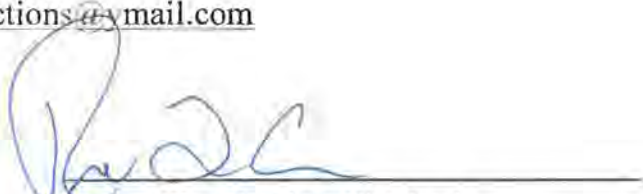


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CERTIFICATE OF SERVICE

This is to certify that I, **Rachael L. Fletcher Cipoletti**, Chief Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this 16th day of July, 2021, served a true copy of the foregoing **"REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD"** upon Petitioner David D. Perry by mailing the same, United States Mail with sufficient postage, as well as electronic mail, to the following address:

David D. Perry
2925 Wigwam PW #1422
Henderson, Nevada 89074
ddpproductions@gmail.com



Rachael L. Fletcher Cipoletti