

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Re: DAVID D. PERRY, a suspended member of
The West Virginia State Bar

Bar No.: 7881
Supreme Court No.: 19-1180
I.D. No.: 19-03-540



REPORT OF THE HEARING PANEL SUBCOMMITTEE

Pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, the Hearing Panel Subcommittee (hereinafter “HPS”) of the Lawyer Disciplinary Board hereby makes the following recommendation regarding the reinstatement of David D. Perry (hereinafter “Petitioner”).

I. PROCEDURAL HISTORY

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 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, Judge David M. Pancake, Judge 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 be 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 Hearing. 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 Office of Lawyer Disciplinary Counsel. 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.

II. STANDARD FOR REINSTATEMENT

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 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 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.

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). 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.

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.

III. FINDINGS OF FACT

A. Petitioner's Background

Petitioner graduated from Huntington High School in Huntington, West Virginia in 1978.¹ Petitioner was arrested and charged In October, 1979, with sale and possession of marijuana. Petitioner pleaded to a reduced misdemeanor charge of possession of a

¹The HPS Report from Petitioner's unsuccessful petition made findings of fact regarding Petitioner's background and those factual findings are incorporated herein. See Exhibit 2 at 10-16.

controlled substance in February 1980 and was sentenced to serve six months in jail, and served 183 days in the Cabell County Jail after his work release was revoked.

In November of 1983, Petitioner was pulled over for a bad headlight and was driving on an expired license, which at the time the law required him to go to jail for the same. He was placed under arrest for driving without a license. Unable to establish who owned the vehicle, the officer believed he had to impound the vehicle. Upon search of the vehicle, the arresting officer found several bags of marijuana. Petitioner was arrested for possession of marijuana and indicted for possession with intent to deliver. The Supreme Court issued an opinion in this forfeiture case and held that the arresting officer did not have adequate grounds for impoundment which resulted in the inventory search. As the officer failed to provide Petitioner a reasonable opportunity to make alternative disposition to impoundment, the search was invalid and the charges were ultimately dismissed in 1985. See State v. Perry, 174 W.Va. 212, 324 S.E.2d 354 (1984).

In 1985, Petitioner moved to Las Vegas, Nevada. He attended the University of Nevada, Las Vegas from 1988-1993 and graduated with a Bachelor of Arts in English. Petitioner then attended the Washburn University School of Law and graduated in 1996. While in law school, in December of 1994, he was charged with domestic assault and criminal trespass in Topeka, Kansas. After his 1996 graduation, Petitioner was unsuccessful in his attempts to pass the Nevada and West Virginia bar exams and began working as a paralegal at a law firm while he continued to study for the bar exam.

Petitioner successfully passed the Bar and was admitted to the West Virginia State Bar on or about March 9, 1999. After he was licensed, Petitioner opened and maintained his own law practice primarily focused on criminal defense. Petitioner was arrested on May 3, 2001 for battery, which after a bench trial a magistrate found him guilty, but was later dismissed upon appeal. Petitioner also had two protective orders issued against him, both protective orders were dismissed.

B. 2010 Statement of Charges, Suspension and First Petition For Reinstatement

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. The allegations of misconduct were summarized as follows by the Supreme Court of Appeals. Petitioner did not contest the following facts or oppose the findings of ethical violations.²

² 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 the Office of Disciplinary Counsel 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

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.

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,

law after a small article was in The Herald Dispatch newspaper in Huntington, West Virginia. The Office of Disciplinary Counsel would have sent that press release on or about December 5, 2011.

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.³ 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

³ 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.

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 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.

A reinstatement hearing was conducted by the HPS in Huntington, West Virginia on or about March 6, 2017. In addition to exhibits filed by ODC, the HPS heard testimony from three witnesses, including Petitioner.⁴ The HPS found that based upon the evidence presented that Petitioner met his burden that he presently possessed the integrity, moral character and legal competence to resume the practice of law. ODC had no objection to Petitioner's reinstatement to the practice of law. Neither party requested additional hearing by the Supreme Court of Appeals.

⁴There are HPS factual findings which include a summary of the testimony. Exhibit 2 at 22-28.

By Order entered August 30, 2017, the Court stated that it did not concur with the recommendation of the HPS and denied Petitioner's reinstatement.

C. Petitioner's Activities Following the Suspension

At the time of his sworn statement, Petitioner has not been a resident of West Virginia since approximately 2012, but stated that he visits twice per year. Petitioner stated in his petition that since his first petition was denied, he was employed as a driver for Uber and as an instructor for the Kids Golf Association beginning in July 2018. He also serves as a consultant with the Dutch Miller Automotive Group beginning in August 2018. And, he was a seasonal employee at the Royal Links Golf Club from November 2018-April 2019.

Petitioner submitted continuing legal education credits for the reporting period July 1, 2016 to June 30, 2018, which indicated a total of 12.00 hours including 3.22 of Ethics/Office Management/Substance Abuse and/or Elimination of bias. Petitioner further reported that he kept abreast of legal developments by reading law journals, opinions issued by the Supreme Court of Appeals, opinions issued by the Attorney General of West Virginia, and local news outlets in the state.

Petitioner stated that he would like to get his license back and feels he could be an asset to the legal community. Petitioner stated that he "paid a very stiff price for a transgression that [he] [takes] full responsibility for, and [he hopes] that the Court finds it within its discretion to give [him] another chance." Petitioner stated that should he be reinstated, his plans include practicing in West Virginia primarily in the areas of criminal

defense, adoptions, and representation of attorneys before ODC and the Lawyer Disciplinary Board.

A legal advertisement seeking public comment regarding Petitioner's petition was placed in the Herald Dispatch newspaper and was also posted to ODC's Twitter account. No public comments were received.

D. Reinstatement Hearing

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

1. 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 the Petitioner as an attorney. [Transcript 36-52]

2. 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 (KGA). 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 building.

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.⁵ 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]

⁵ Mr. Ross's business is currently at a standstill because of COVID-19.

3. 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 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]

4. Dr. David Frederick

Dr. Frederick's curriculum vitae and evaluation report are contained in Exhibits 19 and sealed Exhibit 17.

[Transcript 92-135]

5. 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]

6. 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]

7. 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 seeking a therapist or counselor as it was important to continue to examine his flaws.

[Transcript 23-35, 187-235]

IV. DISCUSSION AND RECOMMENDATION

Prior to petitioning, Petitioner waited the requisite three years after the date of the November 22, 2011 Order suspending his license to practice law. The 2011 Order

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. The 2017 HPS Recommendation was 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 as recommended by Dr. Miller, with quality updates regarding the therapy be submitted to ODC.

On or about September 1, 2020, Petitioner was evaluated by David E. Frederick, Ph.D. of Argus Psychological Services located in Huntington, West Virginia. ODC does not believe that Dr. Frederick's evaluation complies with the 2011 Order. Moreover, the record reflects that Dr. Frederick does not regularly perform a fitness evaluation for lawyers. [Transcript at 117]. Dr. Frederick acknowledged receipt of the Petition For Reinstatement prior to making his evaluation, conducted a clinical interview and issued a report after conducting clinical assessments of Petitioner. [Transcript at 95-96, 101-116] Critical to the question of rehabilitation is whether the conduct will occur if he is reinstated. Dr. Frederick's conclusion was that he believes Petitioner is fit to practice law. He further testified that his opinion was that his traits as outlined in the report only affect his personal life, but they do not significantly impact his professional life. [Transcript 125-126] The HPS recognizes that ODC respectfully disagrees with that aspect of Dr. Frederick's opinion. 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. Dr. Frederick did recommend weekly psychotherapy and Petitioner is 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 the Office of Disciplinary Counsel and Petitioner. 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.

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].

Petitioner's transgressions were serious, and warranted the harsh punishment he received. The most difficult question is determining if Petitioner has met his burden and deserves a chance to resume the practice of law. The Petitioner must present 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, along with addressing the fundamental question of whether Petitioner 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). Hess went on to state that the "question is whether or not the attorney has been rehabilitated." Id. at 194, 565. "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." Quoting Syllabus Point 2, In re Brown, 166 W/Va/ 226, 273 S.E.2d 567 (1980).

The evidence presented reflects that Petitioner has demonstrated great remorse for his previous misconduct, has acknowledged the severity of such, and appears to accept full responsibility thereof. Further, Petitioner has demonstrated a record of honorable

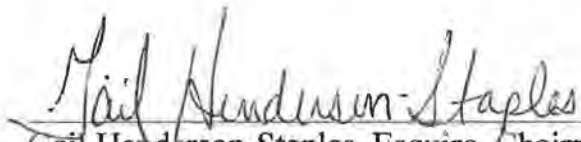
behavior since his suspension started and gave testimony which reflected that he had come to terms with his past wrongdoing and intends to adhere to high moral standards in the future. The evidence presented by Petitioner reflects a course of conduct that would enable the Court to conclude there is little likelihood that after he is readmitted to the practice of law that he will engage in unprofessional conduct. Hess, Id at 195, 563 Thus, based upon the underlying conduct that lead to Petitioner's suspension, the witnesses testimony discussed herein, and the clear and convincing evidence, Petitioner has demonstrated the requisite integrity and moral character to be reinstated to the practice of law.

The evidence is void of any reason the public confidence in the administration of justice would be adversely affected by the reinstatement of Mr. Perry's law license. Indeed, the primary purpose of an ethics proceeding "is not 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 Ethic vs. Pence, 171 W.Va. 68,74, 297 S.E.2d 843, 849 (1982).


V. RECOMMENDATION

Based on the foregoing, the Hearing Panel hereby, recommends that Petitioner's petition for reinstatement to the practice of law be granted 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 of law for a period of two years by a supervising attorney agreed upon between the ODC and Petitioner. The supervising

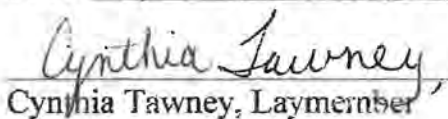
attorney will file monthly reports with the ODC; (2) If Petitioner returns to the active practice of law in the State of West Virginia, Petitioner must undergo psychotherapy for one year, or for a period of treatment to be determined by his therapist or counselor to better understand the nature and construction of his personality, including how his character traits may negatively affect his perceptions and behaviors and their impact on others. Further, to ensure that Petitioner is meeting this requirement, the ODC should receive quarterly updates on the psychotherapy, and a report at the end of treatment 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 reinstatement; and, (4) Petitioner be ordered to pay the costs of this reinstatement proceeding pursuant to Rule 3.15 of the Rules of Disciplinary Procedure prior to reinstatement.


Gail Henderson-Staples, Esquire, Chairperson
Hearing Panel Subcommittee

Date: 1/25/2021


Rhonda Miller Harsh, Esquire
Hearing Panel Subcommittee

Date: 01-23-2021


Cynthia Tawney, Laymember
Hearing Panel Subcommittee

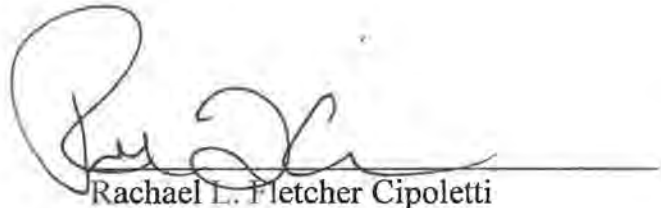
Date: 1/25/2021

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, day, the 28th day of January, 2021, served a true copy of the foregoing **"REPORT OF THE HEARING PANEL SUBCOMMITTEE"** upon Petitioner, David D. Perry, by mailing the same via electronic mail, with sufficient postage, to the following address:

ddpproductions@ymail.com

Notice to Respondent: for the purpose of filing a consent or objection hereto, pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, either party shall have ten (10) days from today's date to file the same.



Rachael L. Fletcher Cipoletti