

FILE COPY

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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DAVID D. PERRY, a suspended member of the West Virginia State Bar, Petitioner

IN RE: Lawyer Disciplinary Board Case No. 10-4006



**VERIFIED PETITION FOR REINSTATEMENT TO PRACTICE LAW
IN WEST VIRGINIA**

Now comes your Petitioner, David D. Perry, proceeding pro se, and, pursuant to Rules 3.30. and 3.32. of the Rules of Lawyer Disciplinary Procedure, respectfully petitions this Honorable Court to reinstate Petitioner's license and privilege to practice law in the State of West Virginia.

In support of this pleading Petitioner hereby moves the Court to incorporate by reference all documents, including, contained in, and or related to a prior Verified Petition for Reinstatement filed before this Court December 21, 2015, and denied by ORDER august 30, 2017. Petitioner further submits the following facts for review and consideration thereof.

PROCEDURAL HISTORY

1. A disciplinary proceeding was initiated against Petitioner on December 3, 2010 resulting in an Order of the Supreme Court of Appeals dated November 22, 2011, and time stamped by the Office of Disciplinary Counsel December 1, 2011, whereby this Court approved the recommendation of the Hearing Panel Subcommittee (HPS) in the above-referenced matter, that: (1) Petitioner's law license be suspended indefinitely; (2) Petitioner be required to petition for reinstatement pursuant to Rule 3.32. of the Rules of Lawyer Disciplinary Procedure; (3) Petitioner not be permitted to seek reinstatement to the practice of law for a period of three years; (4) upon reinstatement, Petitioner's practice be supervised for a period of two years by an attorney agreed upon between the Office of Disciplinary Counsel (*hereinafter referred to as "ODC"*) and Petitioner; (5) prior to petitioning for reinstatement, Petitioner is required to undergo an independent psychiatric evaluation to determine fitness to practice law and be required to comply with any stated treatment protocol; and (6) Petitioner be ordered to reimburse the Lawyer Disciplinary Board the cost of the proceedings. (**SEE, attached Exhibit A, FINAL ORDER** of West Virginia Supreme Court of Appeals.)

The specific rule violations leading to and resulting in suspension Petitioner's law license were:

(A) Petitioner violated **Rule 1.7(b) of the Rules of Professional Conduct**

(B) Petitioner was found to have violated **Rule 1.16(d) and Rule 3.5(c) of the Rules of Professional Conduct**

(C) Petitioner was found to have violated **Rule 8.1(a) and Rule 8.4(c) and (d) of the Rules of Professional Conduct**

2. On or about December 21, 2015, Petitioner filed VERIFIED PETITION FOR REINSTATEMENT TO PRACTICE LAW IN WEST VIRGINIA.
3. On or about March 6, 2017, a four hour proceeding was conducted before a three-person Hearing Panel Subcommittee of the Lawyer Disciplinary Board, at the Cabell County Courthouse, in Huntington. (*Transcript of proceeding submitted to Hearing Panel Subcommittee and this Court by Office of Disciplinary Counsel on or about March 27, 2017. Petitioner has never read nor received copy of said transcript.*)
4. On or about March 27, 2017, the West Virginia State Bar Office of Disciplinary Counsel (ODC) submitted written report to this Court recommending Petitioner's reinstatement to practice law. Said report was authored by ODC attorney Jessica Donahue Rhodes, who has worked the case at bar from inception. (**SEE, attached Exhibit B**, copy of Lawyer Disciplinary Counsel's Recommendation Regarding the Reinstatement Petition of David D. Perry.)
5. On or about June 23, 2017, the Hearing Panel Subcommittee (HPS) of the Lawyer Disciplinary Board submitted written report to this Court recommending Petitioner's reinstatement to practice law. Said report was presented by Hearing Panel Subcommittee Chairman, Timothy E. Haught, who presided over the aforementioned four hour hearing. (**SEE, attached Exhibit C**, copy of Hearing Panel Subcommittee Report.)
6. On or about August 30, 2017, this Court denied Petitioner's VERIFIED PETITION FOR REINSTATEMENT TO PRACTICE LAW IN WEST VIRGINIA, absent explanation, reasoning, or opinion. (**SEE, attached Exhibit D**, copy of ORDER from West Virginia Supreme Court of Appeals.)
7. On or about October 2, 2017, via U.S. Mail, Certified Return Receipt, Petitioner filed Petition for Rehearing with the Clerk of the WVSCA. (**SEE, attached Exhibit E**, copy of PETITION for RECONSIDERATION HEARING before the West Virginia Supreme Court of Appeals.)

8. On or about October 9, 2017, Petitioner received correspondence from the Clerk of the WVSCA, dated October 3, 2017, with an enclosed time-stamped copy of Petitioner's Petition for Rehearing. The cover letter declared the Court's Order was not subject to rehearing, that the enclosed document would not be filed, and that the Court Order "concludes this Court's consideration of your petition." (**SEE, attached Exhibit F**, copy of Letter to Petitioner from Clerk of the West Virginia Court of Appeals.)
9. As of the filing of the current VERIFIED PETITION FOR REINSTATEMENT TO PRACTICE LAW IN WEST VIRGINIA now before this Court, Petitioner's period of suspension has entered the ninth year.

APPLICABLE RULES, STANDARDS, AND LAW

10. Rule 3.32. of the Rules of Lawyer Disciplinary Procedure referenced above, subtitled **Reinstatement procedure following suspension**, states in pertinent part (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.
11. Rule 3.30. of the Rules of Lawyer Disciplinary Procedure, subtitled **Requirements for reinstatement**, states in whole; 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 other requirements as to restitution, conditions, or some other act has been satisfied, such person shall not become entitled to engage in the practice of law in this State, whether such time has 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 character and fitness.
12. The general rule for reinstatement is that an attorney whose license is suspended or annulled carries the burden of proving he or she is fit to again commence the practice of law, and that includes a showing he or she possess the integrity, moral character, and legal competence to do so. This Court has further held that the nature of the original offense for which the Petitioner's license was suspended or annulled should also be

considered in evaluating a Petition for Reinstatement. Accordingly, Petitioner must demonstrate a record of rehabilitation.

13. This Court has held that “[r]ehabilitation 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*, 166 W.Va. 226, 273 S.E.2d 567. This Court has further defined rehabilitation via incorporation of a five-pronged test outlined in *In re Smith*, 214 W.Va. 83, 85, 585 S.E. 2d 602, 604 (1980).

DISCUSSION

In reinstatement cases, the fundamental question which the court must address is whether the attorney seeking reinstatement has shown that he presently possesses the integrity, moral character, and legal competence to resume the practice of law. In essence, the question is whether or not the attorney has been rehabilitated.

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. Specifically, the Court will consider when determining rehabilitation:

- (1) Nature of the original offense for which the petitioner was disbarred; and,

NO CHANGES SINCE WVSCA ORDER DATED AUGUST 30, 2017

- (2) Petitioner’s character, maturity, and experience at the time of his disbarment; and,

NO CHANGES SINCE WVSCA ORDER DATED AUGUST 30, 2017

- (3) Petitioner’s occupation and conduct in the time since his disbarment; and,

PETITIONER HAS MAINTAINED NEW EMPLOYMENT SINCE ORDER DATED AUGUST 30, 2017 AS FOLLOWS:

Kids Golf Association / Instructor July 2018-Present. (SEE, attached Exhibit H, Copy of KGA earnings data.)

Dutch Miller Automotive Group / Consultant August 2018-Present. (SEE, attached Exhibit I, Copy of DMAG earnings data.)

Royal Links Golf Club / Starter November 2018-April 2019 (Seasonal). (SEE, attached Exhibit J, Copy of RLGC earnings data.)

(4) Time elapsed since Petitioner's suspension, and

AS OF THE DATE OF THIS FILING TIME ELAPSED NOW EXCEEDS EIGHT YEARS

(5) Petitioner's present competence in legal skills.

NO CHANGES SINCE WVSCA ORDER DATED AUGUST 30, 2017

To quote the prior report/recommendation of West Virginia State Bar Attorney Jessica Donahue Rhodes, "Petitioner carries a heavy burden of persuading the Court that he presently possesses the integrity, moral character, and legal competence to resume the practice of law."

The same written report of the ODC said, "Lawyer Disciplinary Counsel acknowledges that the evidence reflects that Petitioner has demonstrated great remorse for his previous misconduct, has acknowledged the severity of such, and appears to accept full responsibility thereof" Ms. Donahue Rhodes went on to say, "Lawyer Disciplinary counsel also acknowledges that Petitioner has demonstrated a record of honorable behavior since disbarment..." and "Lawyer Disciplinary Counsel can affirm that Petitioner has proven that his reinstatement will not have a justifiable and substantial adverse effect of the public confidence in the administration of justice."

The ODC report by Lawyer Disciplinary Counsel continued detailed discussion of Petitioner's rehabilitation by expressly stating, "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 Ethics v. Pence, 171 W.Va. 68, 74, 297 S.E. 2d 843, 849 (1982).

Finally, Ms. Donahue Rhodes, Esquire, unequivocally concluded by writing..."Thus, based upon the underlying conduct that lead to Petitioner's suspension, the witness testimony discussed herein, and the clear and convincing evidence that Petitioner has the requisite integrity and moral character to the practice of law, Lawyer Disciplinary Counsel hereby recommends reinstatement of Petitioner's law license because the evidence shows that Petitioner has demonstrated full rehabilitation."

Under the heading of full disclosure, soon after receiving notice from former counsel of this Court's decision 2017 denying Petitioner's VERIFIED PETITION FOR REINSTATEMENT, Petitioner reached out to various persons in West Virginia in an attempt to understand the arbitrary and capricious ruling. As this Court decided not to issue a written opinion, Petitioner was left without, reason, rational, or remedy. One of the people Petitioner informally enlisted for assistance was former colleague Lonnie Simmons, Esq., a member in good standing of the West Virginia State Bar.

After reviewing pages of documents Petitioner forwarded to Attorney Simmons, the parties conducted telephone conversations in September and October 2017. Attorney Simmons advised Petitioner he was “baffled”, that based on the record he would have considered reinstatement a “slam dunk,” and ultimately asked for permission to call Lawyer Disciplinary Counsel Jessica Rhodes Donahue and speak with her about the case. Naturally, Petitioner gave permission.

Following Attorney Simmons telephone conversation with Lawyer Disciplinary Counsel Jessica Rhodes Donahue, he called the Petitioner to discuss the content of the call. Lonnie advised the Petitioner that Ms. Rhodes Donahue said:

- a) First time this ever happened to *her*; and,
- b) No idea what options Petitioner has, *if any*; and,
- c) If Petitioner were to immediately submit another Petition for Reinstatement, *now being aware of recent WVSCA Order, she would withdraw her recommendation for reinstatement.*

In Petitioner’s professional experience with Attorney Simmons, his integrity is beyond reproach. Moreover, he had no reason to lie. On the other hand, if what he said was true, then Lawyer Disciplinary Counsel Jessica Donahue Rhode’s integrity, character, and moral compass was, at the very least, open to question. Petitioner, disconcerted by the flip-flop of ODC Counsel Donahue Rhodes, called Chief Counsel of the Office of Disciplinary Counsel, Rachael Cipoletti, Esq. The two parties conducted a brief telephone conversation in August, and Petitioner forwarded Ms. Cipoletti correspondence memorializing said conversation shortly thereafter. (SEE, attached Exhibit G, copy of Letter to Rachel Cipoletti, Esq., ODC Chief Counsel.)

During September 2017 Petitioner continued reaching out to former colleagues and professional associates in hopes of uncovering details of why PETITION FOR REINSTATEMENT was summarily denied. During that time Petitioner participated in a telephone conversation with The Honorable David Pancake, West Virginia Circuit Court Judge Senior Status. Judge Pancake had previously testified before the Hearing Panel Subcommittee at a hearing in Huntington regarding the matter at issue. During said telephone conversation, Petitioner was advised by Judge Pancake that he recently had a brief conversation with sitting Justice Menis Ketchum pertaining to the denial of the Petition at issue.

When specifically asked by Petitioner about the content of said brief conversation regarding the case at bar with Justice Ketchum, Judge Pancake advised Petitioner that Justice Ketchum became somewhat agitated and said “*Damnit David...he doesn't even live in West Virginia.*” The aforementioned comment was made while both Judge Pancake and Justice Ketchum were attending some type of public rehabilitative and/or exercise therapy in Huntington. It is further Petitioner’s understanding that Justice Ketchum then got up and left the room.

Again, it is worthy to note this Court issued a non-specific, summary denial of Petitioner's Verified Petition for Reinstatement with no reason(s) given as to why. In light of the above conversation, which may or may not be improper, the underlying implication that non-residents of the great State of West Virginia are ineligible to hold a law license is false, discriminatory, and illegal.

Also in September 2017, Petitioner participated in a telephone conversation with Chris Miller, President of Dutch Miller Automotive. Mr. Miller had previously testified before the Hearing Panel Subcommittee at a hearing in Huntington regarding the matter at issue. During said telephone conversation, Petitioner was advised by Mr. Miller that he recently had a conversation sitting WVSCA Chief Justice Allen Loughry pertaining to the denial of Petitioner's Petition for Reinstatement. Further, Mr. Miller said that he had also spoken personally with Chief Justice Loughry twice prior to the then recent ruling by this Court, specifically about the case at bar.

When specifically asked about the content of his final conversation with the Chief Justice, Mr. Miller stated that Chief Justice Loughry expressly told him that "Petitioner could reapply in two years" and that the reason for denial of reinstatement to practice law in the State of West Virginia "was something the Court could just not overlook."

Here it is worthy to note that not only are the above conversation(s), individually and collectively, improper, but the content is even more troubling. Specifically, consider first that this Court effectively issued a one sentence summary denial of Petitioner's Verified Petition for Reinstatement. No Opinion. No Reason(s). No Remedy. This translates no other way but to recognize that the Chief Justice provided more information to an obviously interested third party than to the Petitioner or Petitioner's counsel regarding opinion, reason, and remedy, either personally or via collective Order of the Court.

Petitioner has successfully completed and/or presented evidence on the record satisfying ALL of this Court's mandatory prerequisites listed with specificity in Petitioner's Suspension Order, dated December 11, 2011, including, but not limited to,

- (1) Repayment to WVSB of all financial costs related to licensure suspension; and,
- (2) FBI background report; and,
- (3) WVSP background report; and,
- (4) Nevada Department of Safety background report; and,
- (5) Verified IRS Tax information; and,
- (6) Evaluation by licensed Psychotherapist; and,
- (7) Period of publication seeking Public Comment; and,

- (8) Detailed evidence of charity and community involvement; and,
- (9) Supporting testimony from community leaders and Honorable members of the West Virginia Judiciary; and,
- (10) Payment of State Bar Dues (*since refunded*); and,
- (11) Absorbing costs and completing State mandated MCLE classes (**SEE, attached Exhibit K**, MCLE Transcript.); and,
- (12) Recommendation of reinstatement by West Virginia Office of Disciplinary Counsel; and,
- (13) Finding of complete rehabilitation by same ODC; and,
- (14) Unanimous recommendation of reinstatement by Hearing Panel Sub-Committee; and,
- (15) Literally hundreds, if not thousands, of pages of evidence on the record supporting Petitioner's reinstatement, this Court issued a one sentence summary denial. No Opinion. No Reason. No Remedy.

CONCLUSION

In light of the above, it impossible to conclude other than the denial of Petitioner's Verified Petition for Reinstatement by this Court in 2017 was an action not based upon consideration of relevant factors on the record, but rather a clear error in judgment, and thus an arbitrary and capricious abuse of judicial discretion.

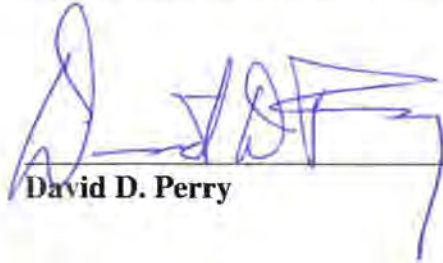
Why does West Virginia fund a multi-layered State ethics system for attorneys, to conduct and complete a two-year plus investigation, and dismiss its work categorically? How did this Court show "substantial deference" to the findings of the Hearing Panel Subcommittee? When faced recently with the possible creation of an intermediate court in West Virginia did this Court not object and offer a promise of more transparency and detailed opinion? Is this Court not held to the same standard it promulgates for others?

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF CABELL, to wit:

I, the undersigned, named in the **“VERIFIED PETITION FOR REINSTATEMENT TO PRACTICE LAW IN WEST VIRGINIA”**, after first being duly sworn, depose and say that the facts and allegations contained therein are true, except so far as they are stated to be upon information and belief, and if so stated to be upon information and belief, I believe them to be true.



David D. Perry

TAKEN, SUBSCRIBED, AND SWORN to before the undersigned Notary Public, in and for the County of Cabell, State of West Virginia, this 27 day of December, 2019.

My Commission expires 12 March 2022



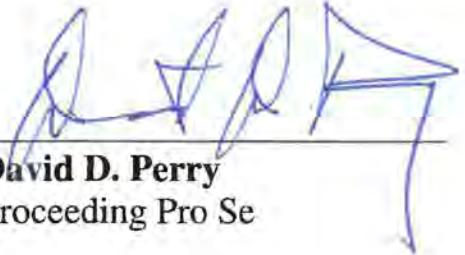


Notary Public

CERTIFICATE OF SERVICE

This is to certify that David D. Perry, a Suspended Member of the West Virginia State Bar, has this 27th day of December, 2019, served a true copy of the foregoing **“VERIFIED PETITION FOR REINSTATEMENT TO PRACTICE LAW IN WEST VIRGINIA”** w/attached Exhibits and Reinstatement Questionnaire, by first-class U.S. Mail, upon the following:

Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304



David D. Perry
Proceeding Pro Se