

IN RE: DAVID W. PERRY

NO. BD-2004-024

S.J.C. Judgment of Reinstatement entered by Justice Spina on October 21, 2014.¹

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¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

In the Matter of)

DAVID W. PERRY,)

Petition for Reinstatement)

SJC No. BD-2004-024

HEARING PANEL REPORT

I. Introduction

Represented by counsel, on November 5, 2013, David W. Perry filed with the Supreme Judicial Court a petition for reinstatement from an order of term suspension the Court entered on January 4, 2005, effective retroactive to May 13, 2004. Matter of Perry, S.J.C. No. BD-2004-024, 21 Mass. Att'y Disc. R. 538 (2005). We received evidence under the petition at an evidentiary hearing on Thursday, June 5, 2014. The petition was opposed by Bar Counsel. The petitioner testified on his own behalf and called three witnesses; bar counsel called no witnesses. Fourteen exhibits were admitted into evidence.

This panel was favorably impressed with the petitioner's efforts at reform and rehabilitation. His approach to his reinstatement presented a paradigm case of what the members of this panel would like to see from every applicant for reinstatement. Among other things, he recognized, acknowledged, and accepted responsibility for what he had done wrong, and he credibly described what he has done to avoid relapse. He devotes considerable time to *pro bono* activities, demonstrating a commitment to service. Further, the petitioner candidly and responsibly offered additional steps that he would be willing to take going forward to maintain an ethical practice, and we have accepted these conditions. After considering the evidence,

therefore, the panel recommends that the petition for reinstatement be allowed on the proposed conditions.

II. Standard

A petitioner for reinstatement bears the burden of proving that he possesses “the moral qualifications, competency, and learning in the law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest.” S.J.C. Rule 4:01, § 18(5); Matter of Daniels, 442 Mass. 1037, 1038, 20 Mass. Att’y Disc. R. 120, 122-123 (2004) (rescript). See Matter of Dawkins, 432 Mass. 1009, 1010, 16 Mass. Att’y Disc. R. 94, 95 (2000) (rescript); Matter of Pool, 401 Mass. 460, 463, 5 Mass. Att’y Disc. R. 290, 293 (1998). Rule 4:01, § 18(5) establishes two distinct requirements, focusing, respectively, on (i) the personal characteristics of the petitioner; and (ii) the effect of reinstatement on the bar and the public. Matter of Gordon, 385 Mass. 48, 52, 3 Mass. Att’y Disc. R. 69, 73 (1982).

In making these determinations, a panel considering a petition for reinstatement “looks to ‘(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 [suspension], and (5) the petitioner’s present competence in legal skills.’” Daniels, 442 Mass. at 1038, 20 Mass. Att’y Disc. R. at 122-123, quoting Matter of Prager, 422 Mass. 86, 92 (1996), and Matter of Hiss, 368 Mass. 447, 460, 1 Mass. Att’y Disc. R. 122, 133 (1975).

III. Disciplinary Background¹

The petitioner, admitted to the bar in 1986, received a three-year suspension under a stipulation for discipline based on a series of criminal convictions,² related primarily to substance

¹ This summary is based on the report of the decision at 21 Mass. Att’y Disc. R. 538, supplemented by credible evidence at the hearing, indicated by references to the record.

² Convictions (a) through (c), infra, followed admission to sufficient facts for a guilty finding, the disciplinary equivalent of a conviction. S.J.C. Rule 4:01, § 12(1).

and alcohol abuse and motor vehicle violations, as well as his failure to give bar counsel timely notice of the convictions.³ The petitioner had been convicted of the following offenses:

- a. On April 12, 1998, for operating a motor vehicle with a suspended license (G.L. c. 90, §23);
- b. On October 5, 1998, for possession of a Class B drug (G.L. c. 94C, § 34C); driving under the influence of drugs (G.L. c. 90, § 24F), and operating a motor vehicle with a suspended license;
- c. On November 29, 2000, for operating a motor vehicle with a suspended license; and
- d. On October 22, 2003, for conspiracy to possess cocaine with intent to distribute (21 U.S.C. § 846), for which he received a probationary term of sixty months. Tr. 24 (Perry). The petitioner's sentence for this conviction departed downwards from the federal sentencing guidelines range, based on the petitioner's rehabilitation and assistance to the government.

The⁴ petitioner was temporarily suspended from practice on May 13, 2004. On November 19, 2004, the petitioner and bar counsel stipulated to his three-year suspension, retroactive to the date of his temporary suspension. Tr. 25-26 (Perry). In the stipulation for discipline filed with the board, bar counsel acknowledged the petitioner's rehabilitation and continued sobriety, as well as his service as a mentor to recovering addicts. The board accepted the stipulation, and the Court imposed the proposed term suspension.

The petitioner successfully completed his federal probation, Tr. 24-25 (Perry); Ex. 1, at tab 4 (BC-047), and he first sought reinstatement in 2008. The hearing panel in that matter was impressed with the petitioner's recovery from substance abuse and with his service to recovering addicts. Its recommendation against reinstatement at the time was based on concerns about the manner of the petitioner's operation of housing for recovering addicts, which the reinstatement panel thought reflected adversely on his legal skills and judgment, and about the truthfulness of information he provided on certain mortgage applications. Ex. 6. The panel suggested that the

³ We credit the petitioner's testimony that he mistakenly believed that his convictions based on admissions to sufficient facts did not have to be reported, and that while he did notify bar counsel of the 2003 conviction, he did not do so within ten days. Tr. 81-84 (Perry).

petitioner address these concerns in any later petition for reinstatement. Ex. 6, at 11. Following the board's adoption of the panel's report, the Court denied his petition. Ex. 1, at 20.

As noted below, we find that the petitioner has addressed the concerns expressed by the first reinstatement panel he is now ready to return to practice.

IV. Findings

A. Moral Qualifications

The petitioner has amply demonstrated the required moral qualifications for re-admission to practice.

The petitioner accepts responsibility for his misconduct and expresses credible remorse. Ex. 1, at 24-25. He asserts, and we credit, that he is a changed man, Tr. 40-41, 79 (Perry); Ex. 1, at 24-25, willing to accept guidance from others, including mentoring under a written agreement with an experienced practitioner. Tr. 41-42, 74-75, 126-129 (Perry). He recognizes that his first application for reinstatement was premature, Ex. 2, at 11 (BC-075), and sees his return to the profession as a privilege rather than a right. Ex. 2, at 11 (BC-075).

Until his drug-related arrest in 2001, the petitioner had practiced for about fifteen years without client complaints to bar counsel, and without having been disciplined for professional misconduct.⁴ Tr. 20-21 (Perry). Yet, during those fifteen years, the petitioner struggled with his addictions to alcohol and cocaine, Tr. 22 (Perry), and in 2000 and 2001 his drinking and cocaine use escalated until he was arrested. Tr. 22 (Perry).

November 15, 2001, the day the petitioner was arrested, is also his sobriety date, i.e., the date when he last drank alcohol or abused controlled substances. Tr. 26-27 (Perry). He maintains his sobriety by, among other things, attending meetings of Alcoholics Anonymous about three times a week, and his participation in AA events on the east coast and in the midwest.

⁴ To be sure, the absence of professional discipline during the petitioner's first fifteen years of practice was partially attributable to his failure to report to bar counsel his first three convictions. Yet, during those years the petitioner did nothing to cast doubt on his competence, diligence, loyalty, etc., towards his clients.

Tr. 29-30 (Perry); Tr. 187-189 (Farnsworth); Ex. 1, at 7-8. He also attends sessions of the professional conduct group of Lawyers Concerned for Lawyers. Tr. 70-71 (Perry); Ex. 14.

Since 2006, the petitioner has run sober houses, where recovering addicts or alcoholics live in a mutually supportive environment as they attempt to maintain their sobriety. Tr. 16-17 (Perry); Ex. 1, at 5-6. As shown in the supportive letters submitted to us, through the petitioner's support for the sober house tenants he has helped addicts turn their lives around. Ex. 3, Ex. 4. Since 2002, he has also volunteered his time at various jails and other institutions to assist the addicted. Ex. 1, at 7-8. The federal judge who sentenced him in 2003 has invited his participation in the new federal district court drug court program, and he has followed up on that invitation. Tr. 64-67 (Perry). The petitioner is also considering undertaking – with guidance from a mentor -- representation in the state drug courts, where his own experience can be leveraged to help addicted defendants. Tr. 68 (Perry).

This panel finds credible the petitioner's testimony addressing the first panel's concerns about his judgments in the management and operation of his sober houses. He has remedied various code violations and his buildings have passed municipal inspection. Tr. 17-20, 42 (Perry). He now works with his neighbors to ensure that his tenants are more smoothly integrated into the surrounding community. Tr. 61-64 (Perry); Ex. 9, Ex. 10. Equally important, he recognizes the lapses in judgment that were one of the primary concerns of the first hearing panel, and he credibly described how he would now handle matters differently. Tr. 31-40 (Perry). We also find credible that the pending lawsuits about the petitioner's sober houses invoke issues of public import, and not merely the petitioner's self-interest in receiving rental income. Tr. 144-149 (Tine).

This panel also found credible the petitioner's response to the first panel's other concern: his inadequate attention to his duty of candor towards the mortgage lender that funded his acquisition of his first "sober house," resulting in his signing a loan application that reported income he was not then earning, instead relying on anticipated earning from rental payments.

We credit that the petitioner recognizes the circumstances that gave rise to that conduct and its wrongfulness, and that he is now committed to avoiding such conduct in the future. Tr. 52-53, 55 (Perry). Essentially, the petitioner, by overstating his actual income, to include rental income in addition to earned income, took advantage of a mortgage application that did not require him to document his income. Tr. 59-60 (Perry). The petitioner allowed his desire to undertake his new business to blind him towards his obligation to ensure that his statement of income was accurate.⁵ Tr. 43-53, 54-55, 102-103, 104-108 (Perry). Still, since obtaining the mortgage loan he has remained current on his mortgage payments, thus avoiding the primary risk – default – that his higher mortgage interest was calculated to underwrite. Tr. 50 (Perry). In addition, a few weeks before this reinstatement hearing the petitioner disclosed to his mortgage servicer the falsity of his claimed income. Tr. 56-57 (Perry); Ex. 12. While some might characterize this as mere cosmetics for the benefit of this reinstatement panel, it is to the petitioner's credit that, by acting on his moral duty to correct his wrongs, he has exposed himself to potentially adverse action by his mortgagee or its assignee.

In finding that the petitioner has made the required showing of moral fitness,⁶ we also take into consideration the testimony of the petitioner's character witnesses and the letters

⁵ We do not find the inconsistency, suggested by bar counsel, between the petitioner's testimony before us and that before his first reinstatement panel. We find credible that he completed his mortgage application by telephone with the assistance of a mortgage broker, and that he did not read the hard copy when he signed it at the closing. Tr. 109-118 (Perry).

We also find credible his testimony that, while he moved out of the sober house about one month after the loan, he had intended to live there as his primary residence, as he represented on his loan application. Tr. 122-123 (Perry). Currently, he lives in one of his sober houses. Tr. 126 (Perry).

⁶ The panel is unpersuaded that the petitioner's assistance to his residents during their criminal proceedings, to arrange sentences involving community service in lieu of a fine, constituted unauthorized practice that disqualifies the petitioner from reinstatement. Tr. 87-93 (Perry). We credit the testimony that any appearances in court by Perry with residents of his sober houses was strictly as the Executive Director of the sober houses for the purpose of informing the court that a resident was in compliance with the sober house rules and in compliance with the [sobriety] program. Tr. 87 and 135 (Perry). Nor do we find that the petitioner engaged in the unauthorized practice of law in assisting a resident of the sober house in preparing a motion for the court requesting to perform community service in lieu of a fine. We credit the testimony that Perry did not sign or file any motion with the court (nor was any exhibit entered to show this) Tr. 134 (Perry); and that his contribution related to instructing the resident that he would need to go before the court to request the performance of community service in lieu of payment of a court fee. Tr. 91-93; 134 (Perry).

supporting his reinstatement. Ex. 3, Ex. 4. That testimony and those letters portray the petitioner as a person of good moral character, Tr. 152-153 (Tine), committed to helping others. Tr. 171-176, 179-180, 181-182 (McSwiggan). Ex. 3, Ex. 4. To be sure, some of the witnesses were not able to give us a before-and-after description of the petitioner and his path to reform. Tr. 27-28, 76 (Perry); Tr. 149-150 (Tine); Tr. 178-179 (McSwiggan). Yet our focus is on current moral fitness.

Further, the petitioner's sponsor in Alcoholics Anonymous, Steven Farnsworth, has known the petitioner since before his misconduct. Tr. 28 (Perry); Tr. 186-187, 189 (Farnsworth). Contrast Matter of Hiss, 368 Mass. at 464, 1 Mass. Att'y Disc. R. at 137-138; and Matter of Dawkins, 432 Mass. at 1011, n. 5, 16 Mass. Att'y Disc. R., at 96, n. 5.⁷ Mr. Farnsworth gave credible testimony about the changes in the petitioner's character and outlook. Tr. 190-193 (Farnsworth). He also provided credible insight to how an addict's path to recovery can be long and difficult, lending support to the petitioner's testimony that the additional time since the petitioner's first application for reinstatement was necessary for him to secure changes to his character and outlook.⁸ Tr. 28-29, 40-42 (Perry); Tr. 190-192 (Farnsworth).

For the foregoing reasons, this panel is prepared to make "what amounts to a certification to the public that [the petitioner] is a person worthy of trust." Daniels, 442 Mass. at 1039, 20 Mass. Att'y Disc. R. at 123; Matter of Centracchio, 345 Mass. 342, 348 (1963). Of course, the conduct giving rise to the petitioner's suspension is "conclusive evidence that he was, at the time, morally unfit to practice law..." Dawkins, 432 Mass. at 1010-1011, 16 Mass. Att'y Disc. R. at

⁷ In Hiss, the board and the Court discounted testimony from witnesses who did not acknowledge the petitioner's guilt and did not distinguish his character before and after the underlying conviction leading to disbarment. In Dawkins, the Court upheld the hearing panel's rejection of supportive letters that focused on good works before suspension, yet shed little light on rehabilitation or current moral qualifications, and one of the writers admitted knowing little of the petitioner's wrongdoing or that the petitioner had been suspended twice.

⁸ "[A] sponsor is a person who guides you down to the path of recovery. I know today the distinction between sobriety and recovery. Sobriety is the absence of alcohol in my system.... Recovery is when you start to take actions that you're not used to taking to change the man that you brought in." Tr. 29 (Perry). The petitioner himself sponsors other participants in AA. Tr. 30 (Perry).

95 (citations omitted), and that misconduct “continued to be evidence of his lack of moral character ... when he petitioned for reinstatement.” Dawkins, 432 Mass. at 1010-1011, 16 Mass. Att’y Disc. R. at 95 (to same effect, see Centracchio, 345 Mass. at 346, Matter of Waitz, 416 Mass. 298, 304, 9 Mass. Att’y Disc. R. 336, 342(1993)). Still, a “fundamental precept of our system is that a person can be rehabilitated,” Matter of Ellis, 457 Mass. 413, 414, 26 Mass. Att’y Disc. R. 158, 163 (2010), and the petitioner has overcome the presumption arising from his prior discipline. The petitioner “establish[ed] affirmatively that ... he [has] redeemed himself...” Dawkins, 432 Mass. at 1010-1011, 16 Mass. Att’y Disc. R. at 95; see also Ellis, 457 Mass. at 414, 26 Mass. Att’y Disc. R. at 163-164. He has demonstrated “[r]eform ... manifested by some external evidence...” going far beyond “the passage of time alone [which] is insufficient to warrant reinstatement.” Waitz, 416 Mass. 298, 305, 9 Mass. Att’y Disc. R. 336, 343 (1993); see also Daniels, 442 Mass. at 1038, 20 Mass. Att’y Disc. R. at 123. He has led “a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions.” Matter of Prager, 422 Mass. at 92, quoting Matter of Hiss, 368 Mass. at 452, 1 Mass. Att’y Disc. R. at 126.

B. Learning and Competence in the Law

Under S.J.C. Rule 4:01, § 18, a petitioner must also demonstrate that he has the “competency and learning in the law required for admission to practice law in this Commonwealth.” The petitioner has been suspended for ten years, after fifteen years of practice. On the one hand, the length of the petitioner’s absence from practice requires a convincing showing that he has maintained his learning and legal competence. On the other hand, the petitioner has demonstrated his competence during the fifteen years of his active practice. The combination of the petitioner’s prior practice, his hands-on experience in his own litigation, and his course of continuing legal education satisfy his burden of proving adequate learning and competence.

The petitioner intends to return to practicing worker's compensation law before the department of industrial accidents. Tr. 67-68, 97-98 (Perry). We credit that during his suspension he attempted to keep up with developments in that law, but that he feels the need to brush up on his skills. Tr. 67-68 (Perry). We commend the petitioner's good judgment in recognizing this need and in recognizing the need, while making a gradual transition to active practice, to maintain his income from his current work running sober houses. Tr. 124-126 (Perry). We do not fault the petitioner because, during the first two years following his unsuccessful attempt at reinstatement in 2008, he focused on his recovery, his assistance to recovering addicts, and his personal litigation.

In the circumstances, we find adequate and appropriate the petitioner's course of education within the last three or four years. In and after 2010, the petitioner has attended six seminars on civil and criminal practice, legal technology, and real estate law. Tr. 94-96 (Perry); Ex. 1, at 10-11 and Tab 8. He also attended the trust accounting seminar presented by bar counsel, Tr. 94 (Perry); Ex. 1, at 11, a seminar presented by the Law Office Management Assistance Program, Ex. 1, at 11, and the preparation course for the multi-state professional responsibility examination. Tr. 94 (Perry); Ex. 1, at 11. He has purchased continuing legal education materials about civil and criminal practice, trial practice, and probate law, and he has maintained a subscription to Massachusetts Lawyers Weekly. Ex. 1, at 12.

In other reinstatement cases, a petitioner's last-minute attendance at a scattering of seminars with little relevance to their proposed resumption of practice has not sufficed to support reinstatement. See, e.g., Matter of Loman, S.J.C. No. BD-96-0005, hearing panel report at 3-4 (December 29, 2009). In contrast, here the petitioner chose a course of studies relevant to his anticipated practice.⁹

⁹ A worker's compensation practice potentially includes prosecuting and trying claims in administrative hearings and enforcing their outcome in the superior court, as well as third-party tort claims and the occasional tort claim against an employer for injuries not arising out of and in the course of employment. Therefore, the courses the petitioner took concerning civil litigation are pertinent to his proposed return to practice. The petitioner is also considering undertaking criminal representation in the drug courts.

The petitioner also gained valuable experience in civil litigation, trial and appellate practice, and the underlying substantive law as a party to on-going civil litigation concerning his sober houses with the City of Boston. Tr. 71-74, 97, 99-101 (Perry); Tr. 150-151, 153-154 (Tine); Ex. 1, at 12-19(b). His proposed mentor, Andrew Tine, Esq., represented the petitioner's entities in that litigation and observed first-hand the petitioner's exercise, *pro se*, of his lawyering skills. Attorney Tine has sufficient confidence in the petitioner's skills to refer cases to him. Tr. 155-156 (Tine).

For all of the foregoing reasons, we find that the petitioner has demonstrated the competence and learning in the law required for reinstatement.

C. Effect of Reinstatement on the Bar, the Administration of Justice and the Public Interest

We turn now to what is commonly referred to as the "public interest" prong of the test for reinstatement. "In this inquiry we are concerned not only with the actuality of the petitioner's morality and competence, but also on the reaction to his reinstatement by the bar and public." Matter of Gordon, 385 Mass. at 53, 3 Mass. Att'y Disc. at 73. The panel must consider whether the public will perceive the bar as viewing the original offense with sufficient gravity and find confirmation of the seriousness with which the board and the court take their obligation to assure the protection of the public above all else, along with the deterrent effect of the decision whether or not to reinstate in this case. Matter of Ellis, 457 Mass. at 418, 26 Mass. Att'y Disc. R. at 168; Matter of Pool, 401 Mass. at 464, 5 Mass. Att'y Disc. R. at 298, Matter of Gordon, 385 Mass. at 55, 3 Mass. Att'y Disc. R. at 77-78.

Given our findings above, the petitioner has also shown that both the public and the bar will perceive his reinstatement as appropriate and warranted. We need say no more.

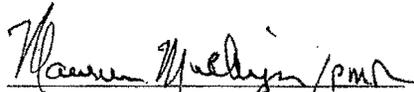
V. **Conclusions and Recommendation**

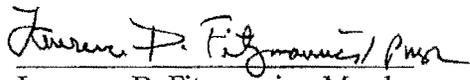
For the foregoing reasons, we recommend that the petition for reinstatement be allowed, on conditions the petitioner acknowledges will be helpful to his resumed practice.¹⁰

Specifically:

- The petitioner shall enter into a mentoring agreement with Attorney Andrew J. Tine, on the terms set forth in Exhibit 11 to this reinstatement proceeding,¹¹
- The petitioner shall continue to attend meetings of LCL's professional conduct group for a year following his reinstatement and to the extent practicable.

Respectfully submitted,
By the Hearing Panel,


Maureen Mulligan, Esq., Chair


Laurence D. Fitzmaurice, Member


Regina E. Roman, Esq., Member

Filed: September 26, 2014

¹⁰ By recommending these conditions we do not imply that the petitioner cannot be trusted to resume practice. Contrast Matter of Shyavitz, 26 Mass. Att'y Disc. R. 612 (2010) (remanding reinstatement matter where conditions imposed suggested board's lack of trust).

¹¹ The mentoring relationship might present some difficulties, where Attorney Tine's office is in Rhode Island, while the petitioner will work from his Boston-area home. Tr. 126-127 (Perry); Tr. 161-163 (Tine). Still, we do not understand that a mentoring agreement must be between attorneys practicing in the same office. The difference between this mentoring arrangement and others found acceptable by bar counsel appears to us to be only a matter of degree. Further, the proposed terms of the mentoring contract require the mentor to make quarterly reports to bar counsel, and we are confident that bar counsel will take appropriate action if necessary.