In re Bonn BROWN.

No. 13338.

Supreme Court of Appeals of West Virginia.

Dec. 19, 1980.

Application for readmission to practice of law was made. After remand to Committee of Ethics, 262 S.E.2d 444, the Supreme Court, Miller, J., held that extremely serious nature of original offense of bribing a juror, coupled with separate conviction of conspiring to bribe public officials, warrants denial of reinstatement.

Petition denied.

1. Attorney and Client ⇐61

In order to regain admission to practice of law, disbarred attorney bears burden of showing that attorney presently possesses integrity, moral character and legal competence to resume practice of law; attorney must demonstrate record of rehabilitation to overcome adverse effect of previous disbarment, and court must conclude that such reinstatement will not have justifiable and substantial adverse effect on public confidence in administration of justice, in which regard the seriousness of the conduct leading to disbarment is an important consideration.

2. Attorney and Client ⇐61

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

3. Attorney and Client ⇐61

Absent showing of some mistake of law or arbitrary assessment of facts, recommendation made by State Bar Ethics Committee in regard to reinstatement of an attorney is to be given substantial consideration.

4. Attorney and Client ⇐61

Extremely serious nature of offenses that led to disbarment, to wit, of bribing a juror, coupled with separate conviction of conspiring to bribe public officials, warrants denial of reinstatement to practice of law.

Syllabus by the Court

1. The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration.

2. 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.

3. Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Ethics Committee in regard to reinstatement of an attorney are to be given substantial consideration.

George R. Triplett, Elkins, Fowler & Paterno and John R. Fowler, Charleston, for Brown.

John O. Kizer and Robert H. Davis, Jr., Charleston, for Legal Ethics Committee.

DiTrapano, Jackson & Buffa and Rudolph L. DiTrapano, Charleston, amicus curiae.

MILLER, Justice:

The applicant in this case, Bonn Brown, seeks to be readmitted to the practice of law. On February 2, 1973, the applicant was adjudged guilty on three counts of

conspiracy to commit bribery and the bribery of a juror, a Ralph Buchalew. This conviction in federal district court formed the basis for this Court's suspension of his license to practice law. *In re Brown*, 157 W.Va. 1, 197 S.E.2d 814 (1973). Upon the affirmance of his criminal conviction after an appeal, his license was annulled by this Court by order entered December 21, 1973.

Subsequently, under Article VI, Section 35 of the By-Laws of the West Virginia State Bar (Bar By-Laws), he applied for reinstatement of his license to practice law. We determined that the procedure for handling a petition for reinstatement required a factual development by way of an evidentiary hearing before the Committee on Legal Ethics of the West Virginia Bar (Ethics Committee). *In re Brown*, W.Va., 262 S.E.2d 444 (1980). A full evidentiary hearing has now been held before the Ethics Committee and it has filed a written report opposing the reinstatement of his license to practice law.

After our latest opinion involving Mr. Brown, we issued *In re Smith*, W.Va., 270 S.E.2d 768 (1980) which discussed standards for the reinstatement of a lawyer whose license had been annulled. The Ethics Committee initially contends that there are some portions of *In re Smith* that are confusing—for instance, Syllabus Point 2 suggests that after the five-year waiting period, the disbarred attorney may apply for readmission and unless the original offense which lead to disbarment "is so serious that the court cannot be satisfied that the public will be adequately protected," an attorney's license to practice will be reinstated.[1]

However, Syllabus Point 3 indicates that a disbarred attorney does initially have a burden to meet before he will be reinstated: "Where the petitioner shows a record of honorable behavior since disbarment, the petitioner's burden has been met...."[2] Moreover, the majority opinion in *Smith* does refer to "the five objective criteria set forth in *Hiss* and *Brown, supra*, for determining whether a disbarred attorney should be reinstated." 270 S.E.2d at 773. This was a specific reference to the criteria that are found in *In re Brown*, W.Va., 262 S.E.2d 444, 446 (1980):

"The ultimate question is whether he possesses the integrity, high moral character and legal competence to justify the reinstatement of his license. Most courts have considered a number of factual inquiries in answering this question, as illustrated by *In re Hiss* [368 Mass. 447, 333 N.E.2d 429 (1975)], *supra:*

'In judging whether a petitioner satisfies these standards and has demonstrated the requisite rehabilitation since disbarment, it is necessary to look to (1) the nature of the original offense for which the petitioner was disbarred, (2) the petitioner's character, maturity, and experience at the time of his disbarment, (3) the petitioner's occupations and conduct in the time since his disbarment, (4) the time elapsed since the disbarment, and (5) the petitioner's present competence in legal skills. See

1. The complete text of Syllabus Point 2 is:
"Article VI, Section 35, *By-Laws, West Virginia State Bar*, which provides that an attorney whose license to practice has been annulled may reapply for admission after five years is a rule of compassion, and unless the Court concludes that the underlying offense which caused the original disbarment is so serious that the Court cannot be satisfied that the public will be adequately protected, a lawyer's license to practice law will ordinarily be reinstated after five years of satisfactory behavior."

2. The entire Syllabus Point 3 is:
"In a proceeding for reinstatement of an attorney's license after annulment general testimony that the petitioner either is or is not of good moral character is entitled to little weight. Where the petitioner shows a record of honorable behavior since disbarment the petitioner's burden has been met with regard to those elements which are within his control and the burden is then upon the Committee on Legal Ethics, if they wish to contest reinstatement, either to present facts and circumstances which would lead to an inference of bad character or lack of fitness to practice law, or to show that the nature of the original offense was of such gravity that the likelihood of future injury to the public is sufficiently significant that sound public policy precludes reinstatement for that reason alone."

Application of Spriggs, 90 Ariz. 387, 388, n. 1, 368 P.2d 456 (1962); *In re Barton*, 273 Md. 377, 379, 329 A.2d 102 (1974); *In re Application of Strand*, 259 Minn. 379, 381, 107 N.W.2d 518 (1961); *In the Matter of the Petition of Seijas*, 63 Wash.2d 865, 868–869, 389 P.2d 652 (1964). Cf. *In re Petition of Dawson*, 131 So.2d 472, 474 (Fla.1961).' [368 Mass. 447 at 460, 333 N.E.2d 429 at 437–38]" [3]

A fair reading of the entire *Smith* opinion leads to the conclusion that a disbarred attorney does have a burden of proof initially to show "a record of good behavior." There can be little doubt from our prior case law that we have always required applicants for reinstatement to carry the burden of establishing their fitness to resume the practice of law. This is the universal rule from other jurisdictions with only differences as to how clear the proof must be. *E. g. In re Reed*, 341 So.2d 774 (Fla.1977); *Lester v. Kentucky Bar Association*, 532 S.W.2d 435 (Ky.1976); *In re Braverman*, 271 Md. 196, 316 A.2d 246 (1974); *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975) (heavy burden); *In re Peterson*, 274 N.W.2d 922 (Minn.1979) (clear and satisfactory evidence); *Petition of Simmons*, 71 Wash.2d 316, 428 P.2d 582 (1967) (affirmative showing); 7 Am.Jur.2d *Attorney at Law* § 72 (1963); Annot. 70 A.L.R.2d 268, 297 (1960).

One of our earliest reinstatement case is *In re Daugherty*, 103 W.Va. 7, 136 S.E. 402 (1927), where the application for reinstatement was made in the circuit court where the attorney had been disbarred. The circuit court had declined to grant reinstatement and upon appeal we affirmed. This case was decided before the creation of the West Virginia State Bar under W.Va.Code, 51–1–4a, and as a consequence there were no Bar By-Law provisions covering reinstatement.[4] The Court in *Daugherty* analogized the right of reinstatement to the initial admission to the bar in that a disbarred attorney must "satisfy the court to whom the application is presented that he is a fit person to be intrusted with the office of attorney." Syllabus Point 1, in part, *In re Daugherty, supra.*

A similar situation existed in *In re Eary*, 134 W.Va. 204, 58 S.E.2d 647 (1950), involving an attorney disbarred by the circuit court who sought to regain admission to the bar by an application to this Court. We treated his application as an original application to practice law under W.Va.Code, 30–2–1, and determined that he did not prove he was of good moral character.[5]

Both *Daugherty* and *Eary* established a rather general standard for reinstatement, that the applicant must be "a fit person to be intrusted with the office of attorney" or that he possess "good moral character." Both cases are significant in their recognition that the courts do possess inherent power to formulate standards for reinstatement as a part of their larger power to regulate the practice of law.

Our next reinstatement case was *In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153

3. The interior quote from *In re Hiss*, 368 Mass. 447, 460, 333 N.E.2d 429, 437–38 (1975), was quoted and discussed earlier in the majority opinion in *In re Smith*, 270 S.E.2d at 770.

4. The annulment in *Daugherty* was done under a forerunner to W.Va.Code, 30–2–6 (1931), which permits any court before which an attorney is qualified to practice to annul his license on proof that he has been convicted of a felony. In 1931, this section was expanded to include "any other crime involving moral turpitude."

5. The material portion of W.Va.Code, 30–2–1, which is the same now as at the time of *Eary* except that the age was dropped from twenty-one to eighteen, provides:

"Any person desiring to obtain a license to practice law in the courts of this State shall appear before the circuit court of the county in which he has resided for the last preceding year and prove to the satisfaction of such court, or to the satisfaction of a committee of three attorneys practicing before such court, appointed by the court, that he is a person of good moral character, that he is eighteen years of age, ... The supreme court of appeals shall prescribe and publish rules and regulations for the examination of all applicants for admission to practice law, which shall include the period of study and degree of preparation required of applicants previous to being admitted, as well as the method of examinations, whether by the court or otherwise."

(1970), where Bar By-Laws did exist but contained no provision for reinstatement after disbarment. The issue was whether in the absence of a specific provision in the Bar By-Laws permitting reinstatement, a disbarred attorney could be reinstated. The Court concluded that it had inherent power to permit a reinstatement and relied on *Daugherty* and *Eary* as well as general law from other jurisdictions. The Court in *Daniel* did not discuss in any detail standards for reinstatement, but did state this general proposition in Syllabus Point 3:

> "A final judgment annulling an attorney's license to practice law does not preclude him subsequently from applying for a new license to practice law which may be granted if he meets requirements thereof and if he can satisfy the court that during the interval between licenses he has been rehabilitated and is now trustworthy."

Thus, *Daniel* implicitly recognized that a disbarred attorney must meet the following initial requirements to be readmitted to the practice of law: good moral character, professional competence, and in addition he must "satisfy the court ... he has been rehabilitated and is now trustworthy."

In *Committee on Legal Ethics v. Mullins*, W.Va., 226 S.E.2d 427 (1976), the Court indefinitely suspended an attorney who had been guilty of one charge of malpractice in failing to file his client's tort action before the statute of limitations expired. The Court held out the right to reinstatement "upon a satisfactory showing that his personal or emotional problems have been so satisfactorily resolved as to make it probable that he once again merits the confidence of the public and has a capacity to conform his professional conduct to the high standards expected of members of this privileged profession." 226 S.E.2d at 431 32.[6]

Woven throughout our disciplinary cases involving attorneys is the thought that they occupy a special position because they are actively involved in administering the legal system whose ultimate goal is the even-handed administration of justice.[7] Integrity and honor are critical components of a lawyer's character as are a sense of duty and fairness. Because the legal system embraces the whole of society, the public has a vital expectation that it will be properly administered. From this expectancy arises the concept of preserving public confidence in the administration of justice by disciplining those lawyers who fail to conform to professional standards.

It is for these reasons that most courts have held that reinstatement of a disbarred attorney must be determined in part by ascertaining its impact on public confidence in the administration of justice and the integrity of the legal system. *E. g. In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975); *In re Stump*, 272 Ky. 593, 114 S.W.2d 1094 (1938); *In re Barton*, 273 Md. 377, 329 A.2d 102 (1974); *McKinnon v. Disciplinary Board*, 264 N.W.2d 448 (N.D.1978). It is apparent the more serious the underlying offense that brought about disbarment, the

6. It appears that the Court in *Mullins* conceived that the attorney suffered from an emotional condition which created the malpractice problem. It cited a note entitled *Attorney-Disciplinary Action—Mental Incapacity and Drunkenness in Mitigation Thereof*, 69 W.Va.L.Rev. 341 (1967). Under Article VI, § 26 of the Bar By-Laws, a procedure is set up for the suspension of the license of attorneys who are found to be emotionally disabled to the extent they cannot effectively function in the practice of law. This section provides for reinstatement once they are found to have regained their emotional stability. In effect, the Court in *Mullins* adopted this approach.

7. This Court in *In re Eary*, 134 W.Va. 204, 208-09, 58 S.E.2d 647, 650 (1950), stated:

> "It is the duty of this Court to scrutinize carefully the qualifications of persons who seek to be admitted to practice before the courts of this State, in order that the public may be protected and the courts assisted in the discharge of the vital duties of the administration of law and the resolving of legal controversies. If this Court permits persons to enter the profession of the law who do not have the requisite moral qualifications, it would result in debasing the profession and would bring disrepute upon the administration of justice. Thereby, the confidence of the people in their courts would be destroyed. This we cannot permit."

more likely that public confidence will be impaired.

In addition to the public interest, there emerges from our prior cases a consistent recognition that a disbarred attorney must possess integrity, good moral character and legal competence.[8] Indeed, the standard could not be otherwise or it would conflict with the statutory standard for qualifications to the admission to the practice of law. W.Va.Code, 30–2–1.[9]

Where there has been a disbarment or annulment of the license to practice law other factors must be considered. The reason for this is that the original disbarment stands as a finding that the attorney has committed a serious breach of professional obligations or committed an offense which involves moral turpitude, and this fact continues to demonstrate a lack of fitness to practice law. As a consequence, there is a burden on the attorney who seeks reinstatement to overcome this finding of lack of fitness.[10]

[1] Thus, we arrive at the general rule for reinstatement which is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment, he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice, and in this regard the seriousness of the conduct leading to disbarment is an important consideration.

[2] The concept of rehabilitation cannot be framed around a set of specific principles but will vary depending on the particular facts of a given case. Rehabilitation, ultimately, 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.

It is generally agreed that 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.

At least one court has intimated that an original conviction of perjury and subsequent disbarment are "conclusive evidence of his lack of moral character at the time of his removal from office." *In re Hiss*, 368 Mass. 447, 451, 333 N.E.2d 429, 433 (1975). Other courts consider the seriousness of the original disbarment charge as an important factor on reinstatement. *In re Bennethum*, 278 A.2d 831 (Del.1971); *Petition of Wolf*, 257 So.2d 547 (Fla.1972); *In re Braverman*, 271 Md. 196, 316 A.2d 246 (1974); *Application of Sharpe*, 499 P.2d 406 (Okla.1972); *Petition of Simmons*, 71 Wash.2d 316, 428 P.2d 582 (1967).[11]

8. The Court in *Daugherty* used the term "fit person" while in *Eary* it spoke of "good moral character." The Court in *Daniel* stated: "In the case at bar there is no denial by the State Bar that the applicant has been rehabilitated and is of good moral character." 153 W.Va. at 844, 173 S.E.2d at 156.

9. See Note 5, *supra*. We, as well as most courts, have recognized that while this court has the inherent power to regulate the licensing of lawyers, the Legislature may in the exercise of its police power prescribe reasonable rules and regulations for admission to the bar. *In re Eary*, 134 W.Va. 204, 207, 58 S.E.2d 647, 649 (1950); *In re Application for License to Practice Law*, 67 W.Va. 213, 218, 67 S.E. 597, 599 (1910).

10. *E. g. In re Reed*, 341 So.2d 774 (Fla.1977); *Lester v. Kentucky Bar Association*, 532 S.W.2d 435 (Ky.1976); *In re Braverman*, 271 Md. 196, 316 A.2d 246 (1974); *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975); *In re Peterson*, 274 N.W.2d 922 (Minn.1979); *Petition of Simmons*, 71 Wash.2d 316, 428 P.2d 582 (1967).

11. Where the initial offense is the conversion of client's funds, inquiry will be made to see if there has been restitution. *Tardiff v. State Bar*, 27 Cal.3d 395, 612 P.2d 919, 165 Cal.Rptr. 829 (1980); *Petition of Simmons*, 71 Wash.2d 316, 428 P.2d 582 (1967).

Bearing on this question is the amount of time that has elapsed since disbarment. Time provides the applicant an opportunity to build a record of good character and integrity. Most courts hold that the mere passage of time alone is insufficient to warrant reinstatement. *E. g. In re Bennethum, supra; Williams v. Florida Bar*, 173 So.2d 686 (Fla.1965). However, as noted in Note 19 of *In re Hiss*, 368 Mass. 447, 460, 333 N.E.2d 429, 438, "a long time span between disbarment and petition for reinstatement during which the petitioner's conduct was exemplary, reinforce his claim to rehabilitation." Under Article VI, § 25 of the Bar By-Laws, there is a mandatory five-year waiting period after disbarment before the attorney may apply for reinstatement. Even at this point, reinstatement is not automatic since this section uses the phrase "may be reinstated."

Another factor to be considered on reinstatement is the maturity and experience of the practitioner at the time of his disbarment—a recognition that a youthful and inexperienced attorney may have blundered as a result of inexperience rather than as a result of deliberate calculation. *State ex rel. Florida Bar v. Calhoon*, 102 So.2d 604 (Fla.1958); *In re Krogh*, 93 Wash.2d 504, 610 P.2d 1319 (1980). A further important area of inquiry is the applicant's activity and conduct since the date of his disbarment, since it is upon this objective record that good character must be judged. *Tardiff v. State Bar*, 27 Cal.3d 395, 612 P.2d 919, 165 Cal.Rptr. 829 (1980); *Petition of Wolf*, 257 So.2d 547 (Fla.1972); *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975); *Petition of Harrington*, 134 Vt. 549, 367 A.2d 161 (1976).

[3] Finally, most courts will give some weight to the recommendations of the Ethics Committee that conducts the reinstatement hearing simply because the Committee, having heard the witnesses, is in a better position to evaluate their testimony. This does not mean that the court is foreclosed from making an independent assessment of the record but it does mean absent a showing of some mistake of law or arbitrary assessment of the facts such recommendations made by the Ethics Committee in regard to reinstatement of an attorney are to be given substantial consideration. *Tardiff v. State Bar*, 27 Cal.3d 395, 612 P.2d 919, 165 Cal.Rptr. 829 (1980); *In re Wigoda*, 77 Ill.2d 154, 32 Ill.Dec. 341, 395 N.E.2d 571 (1979); *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975); *In re Freedman*, 406 Mich. 256, 277 N.W.2d 635 (1979); *Petition of Harrington*, 134 Vt. 549, 367 A.2d 161 (1976).

Turning to the present case, we consider first the nature of the offenses leading to disbarment. These involved a conviction on three counts of conspiring to bribe and the bribery of a juror. Such offenses directly attack one of the most vital areas of our legal structure—the jury system. There can be no doubt as to the aggravated nature of such offenses, as we have stated in an early case involving the same charges. *In re Barron*, 155 W.Va. 98, 102, 181 S.E.2d 273, 275 (1971):

> "It is clear beyond question that each of the crimes of conspiracy to commit bribery and bribing a juror is a crime which involves moral turpitude. It is difficult to consider an offense which is more destructive or corruptive of the legal system of West Virginia than bribery of a juror, especially when such crime is committed by an attorney who is an officer of the Court. Bribery of a juror is a perversion of justice and strikes at the foundation of the judicial system of this State; manifestly the crimes of which Barron has been convicted upon his plea of guilty and for which he has been sentenced to imprisonment involve moral turpitude."

Much these same thoughts were expressed in another reinstatement case, *In re Keenan*, 314 Mass. 544, 548–49, 50 N.E.2d 785, 787–88 (1943), where the attorney had been disbarred for bribing a juror:

> "It is difficult to conceive of any offense that could strike a more direct and deadly blow at the administration of justice than the bribing of jurymen. An attorney at law can no more plainly demonstrate his

utter failure to comprehend his peculiar duty to society or his utter abandonment of the performance of that duty than by committing this offence. It has been intimated that there may be offences so serious that the attorney committing them can never again satisfy the court that he has become trustworthy. *Bar Association of City of Boston v. Greenhood*, 168 Mass. 169, 183, 46 N.E. 568; *Matter of Keenan*, 313 Mass. 186, 219, 47 N.E.2d 12. If there are such offences, this must be one of them."

We are not aware of any case where an attorney convicted of bribing a juror has been reinstated. *In the Matter of Ansley*, 241 Ga. 394, 245 S.E.2d 657 (1978), while the court did not identify the nature of the bribery conviction (whether a public official or juror), it denied reinstatement. There the applicant had received a pardon and had spent seven years in what the court characterized as commendable efforts toward rehabilitation.

The Maryland Supreme Court has denied reinstatement to a lawyer who was convicted of an attempt to bribe a member of the general assembly. The applicant had received a full pardon and for six years had done a capable job as a State hearing officer. *Matter of Raimondi*, 285 Md. 607, 403 A.2d 1234 (1979), *cert. denied*, 444 U.S. 1033, 100 S.Ct. 705, 62 L.Ed.2d 669 (1980).

Bribery of jurors had led to the original disbarment in *In re Keenan, supra*, and while the court declined to hold that such offense would forever preclude reinstatement, it did conclude:

"Without attempting to assert that all the other instances are necessarily to be classed with this one, and that there may not be substantial differences growing out of the nature of the offences committed or of the evidence offered, but confining our decisions to this case as outlined above, the answer is plain. It is impossible to come to any other conclusion than that the restoration to membership in the bar of the respondent Keenan would be harmful to the administration of justice, would lower confidence in the integrity of the courts ... and would be wholly incompatible with the public interest." 314 Mass. at 551, 50 N.E.2d at 789.

The attorney in *In re Sympson*, 322 S.W.2d 808 (Mo.1959), resigned from the practice of law before a hearing could be held to determine if he had induced two witnesses to testify falsely in an automobile accident case. Seven years later, he sought reinstatement but it was denied based primarily on the gravity of the underlying charge.

It is true that the Massachusetts court in *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975), was willing to reinstate an attorney convicted of perjury, but this was only after he had been disbarred for 22 years. Moreover, favorable findings had been made by the Massachusetts Board of Bar Overseers that he was presently of good moral character and that the granting of the petition would have no adverse effect upon the integrity of the bar.[12]

Beyond, however, the extremely serious nature of the original offenses which led to Mr. Brown's initial disbarment in 1973, we are confronted with the fact that, as a defendant in another criminal proceeding, he entered a plea of *nolo contendere* and was found guilty of violating Title 18, *United States Code*, Section 371, and conspiring to violate Title 18, *United States Code*, Section 1952, which charges involved conspiracy to bribe certain public officials of the State of West Virginia. We have previously held a violation of Title 18, *United States Code*, Section 1952, to be an offense involving moral turpitude warranting annulment of the license to practice law. *In re Robertson*, 156 W.Va. 463, 194 S.E.2d 650 (1973).

12. The Committee had refused to recommend reinstatement because the applicant had not expressed repentance but had maintained he was innocent of the underlying charge. The court concluded that while expressions of repentance were helpful, they were not critical for the reinstatement. *In re Hiss*, 368 Mass. at 455, 333 N.E.2d at 437, a position that we find to be reasonable and which other courts have adopted. *E. g. Petition of Albert*, 403 Mich. 346, 269 N.W.2d 173 (1978); *In re Barton*, 273 Md. 377, 329 A.2d 102 (1974); *Ex parte Marshall*, 165 Miss. 523, 147 So. 791 (1933); *In re Eddleman*, 77 Wash.2d 42, 459 P.2d 387 (1969).

The applicant had been disbarred for approximately two years at the time he was found guilty of this second offense involving moral turpitude.[13] While it might be argued that the 1975 conviction was for a crime committed prior to the date of disbarment, we do not view the inquiry on reinstatement as limited to the single issue of the precise offense that triggered disbarment. Most courts have concluded that applicant's prior and present record of infractions can be considered. *E. g. Tardiff v. State Bar*, 27 Cal.3d 395, 612 P.2d 919, 165 Cal.Rptr. 829 (1980); *Committee on Professional Ethics v. Wilson*, 290 N.W.2d 17, 23 (Iowa 1980); *Petition of Wolf*, 257 So.2d 547 (Fla.1972); *In re Sympson*, 322 S.W.2d 808 (Mo.1959).

[4] Because of the extremely serious nature of applicant's original offense of bribing a juror when coupled with the separate conviction of conspiring to bribe public officials, we cannot help but conclude that his reinstatement would have a justifiable and substantial adverse effect on the public confidence in the administration of justice. The nature of these crimes directed as they are to the core of the legal system and the integrity of governmental institutions demonstrates a profound lack of moral character on the part of the applicant.

We have held in *Smith* that the seriousness of the underlying offense leading to disbarment may, as a threshold matter, preclude reinstatement such that further inquiry as to rehabilitation is not warranted. The offenses involved in this case manifestly meet this test and for this reason applicant's petition for reinstatement is denied.[14]

Petition Denied.

13. It is recognized that a plea of *nolo contendere* is tantamount to a guilty plea in that both provide the basis for the imposition of criminal sentence. *Hudson v. United States*, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347 (1926); *see, e. g., Lott v. United States*, 367 U.S. 421, 81 S.Ct. 1563, 6 L.Ed.2d 940 (1961); *Sullivan v. United States*, 348 U.S. 170, 75 S.Ct. 182, 99 L.Ed. 210 (1954). Furthermore, a plea of *nolo contendere* is treated identical to a plea of guilty in disbarment proceedings. Article VI, § 25 Bar By-Laws.

14. Justice Harshbarger deeming himself disqualified did not participate in the decision of this case. Pursuant to the provisions of Article VIII, Section 2 of the West Virginia Constitution, the Honorable W. Robert Abbot, Judge of the 12th Judicial Circuit, was appointed to serve in his stead.

STATE ex rel. Detlev PREISSLER

v.

The Honorable Peter DOUGHERTY, Magistrate, etc., Respondent West Virginia Judicial Inquiry Commission.

No. 14889.

Supreme Court of Appeals of West Virginia.

Dec. 19, 1980.

Petitioner brought prohibition proceeding seeking to prohibit his trial in magistrate's court on misdemeanor charge unless certain subpoenaed documents were made available to him and his attorney, or, in the alternative, documents were made available for in camera evaluation as to whether there appeared to be any inconsistencies in statements of witnesses who were to testify on behalf of state. The Supreme Court of Appeals, Caplan, J., held that where motion to quash subpoena duces tecum was made on ground of privilege of confidentiality and where magistrate had not yet ruled on motion, trial would be prohibited pending magistrate's ruling.

Ordered accordingly.

1. Prohibition ⇐30

The Supreme Court of Appeals cannot and will not tell lower court how to rule on motion, but it can and will direct lower court to rule.

2. Prohibition ⇐9

Where motion to quash subpoena duces tecum was made on ground of privilege of

In re Bonn BROWN.

No. 13338.

Supreme Court of Appeals of West Virginia.

Jan. 29, 1980.

Disbarred attorney petitioned for reinstatement of his license to practice law. The Supreme Court of Appeals, Miller, J., held that committee on legal ethics was required to hold an evidentiary hearing to enable a record to be made on issue relating to petitioner's qualifications to have his license reinstated.

Remanded.

1. Attorney and Client ⇐57

An evidentiary hearing on disbarment or suspension of an attorney provides evidentiary record on which Supreme Court of Appeals bases its ultimate judgment. By-Laws of the West Virginia Bar, art. 6, §§ 4, 35.

2. Attorney and Client ⇐61

Disbarred attorney has heavy burden to demonstrate his fitness for reinstatement.

3. Attorney and Client ⇐61

In determining whether a disbarred attorney should be reinstated, ultimate question is whether he possesses integrity, high moral character and legal confidence to justify reinstatement of his license. By-Laws of the West Virginia Bar, art. 6, §§ 4, 35.

4. Attorney and Client ⇐31

Even though bar bylaws are subject to approval of Supreme Court of Appeals, upon their approval they do not become sole standard to define and control practice of law and regulate conduct of attorneys. Code, 51–1–4a.

5. Attorney and Client ⇐61

Provision of bar bylaws providing right for a disbarred attorney to petition Supreme Court of Appeals for license reinstatement and provision setting out powers of committee on legal ethics to investigate complaints, to hold hearings thereon, and to make findings and recommendations are to be read in pari materia to require that the committee shall hold an evidentiary hearing to enable a record to be made on issue relating to disbarred attorney's qualifications to have his license reinstated. By-Laws of the West Virginia Bar, art. 6, §§ 4, 35.

6. Attorney and Client ⇐61

Evidentiary hearing required to be held by committee on legal ethics on issue relating to a disbarred attorney's qualifications to have his license reinstated shall, except for good cause shown, be held within 60 days from date of receipt of the application for reinstatement, counsel for petitioning attorney and for the committee shall have right to introduce opposing evidence and shall have right of cross-examination, and, at conclusion of the hearing, the committee shall make findings and recommendations substantiated by the record and shall set forth its reasons. By-Laws of the West Virginia Bar, art. 6, §§ 4, 35.

Syllabus by the Court

1. In cases involving a petition for reinstatement where an attorney's license has been annulled, Article VI, Sections 4 and 35 of the By-Laws of The West Virginia State Bar must be read *in pari materia.*

2. In cases involving reinstatement proceedings, we require, under this Court's supervisory powers, that the Committee on Legal Ethics of The West Virginia State Bar shall hold an evidentiary hearing to enable a record to be made on the issues relating to the petitioner's qualifications to have his license reinstated.

3. Such evidentiary hearing shall be held within 60 days from the date of the receipt of the application for reinstatement, except that for good cause shown the time for hearing may be extended.

John R. Fowler, Charleston, for petitioner.

John O. Kizer, Charleston, for Committee on Legal Ethics.

DiTrapano, Jackson & Buffa and Rudolph L. DiTrapano, Charleston, for amicus curiae.

MILLER, Justice:

This case involves a request by a disbarred attorney for reinstatement of his license to practice law, pursuant to Article VI, Section 35 of the By-Laws of The West Virginia State Bar [herein Bar By-Laws] as amended by order of this Court on April 3, 1979. The license to practice law of Bonn Brown was suspended by this Court in *In re Brown*, W.Va., 197 S.E.2d 814 (1973), for the reasons set out therein. Upon the affirmance of his criminal conviction by the Fourth Circuit Court of Appeals, his license was annulled by this Court by order entered December 21, 1973.

Article VI, Section 35 of the Bar By-Laws provides the right for a disbarred attorney to petition this Court for license reinstatement after five years have elapsed since the date of his disbarment. Under this section, the following steps occur. Upon filing of a petition, a copy is submitted to the Secretary-Treasurer of the State Bar, who refers the petition to its Committee on Legal Ethics. This committee conducts an investigation of the matter and files its written report and any recommendations with this Court. The petitioner or the Ethics Committee may request a hearing before this Court. The decision to grant or deny the petition is then made by this Court. If a license is reinstated, it may be "upon such terms and conditions as the court may prescribe."

In another portion of the Bar By-Laws, Article VI, Section 4, the powers of the Committee on Legal Ethics are set out and encompass the broad right to investigate complaints "including petitions for reinstatement of an attorney at law in this State . . . and to hold hearings thereon and make . . . findings and recommendations . . . ."

[1] An evidentiary hearing on the disbarment or suspension of an attorney is routinely utilized and, in fact, provides the evidentiary record on which this Court bases its ultimate judgment. *Committee on Legal Ethics v. Mullins*, W.Va., 226 S.E.2d 427 (1976); *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975); *Committee on Legal Ethics v. Graziani*, W.Va., 200 S.E.2d 353 (1973); *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973); *Committee on Legal Ethics v. Smith*, 156 W.Va. 471, 194 S.E.2d 665 (1973).

Here, on this petition for reinstatement, no evidentiary hearing was held, and the matter is before us on the petition for reinstatement and an answer filed by the Committee on Legal Ethics.[1] The Committee apparently believed that Article VI, Section 35 of the Bar By-Laws contained the only applicable procedural requirements and that no evidentiary hearing was necessary.

[2, 3] Certainly, Article VI, Section 4 does not specifically mandate a hearing on a petition for reinstatement. However, it is incontestable that a disbarment results from the most serious ethical violations, and the courts have traditionally cast a heavy burden on the petitioning attorney to demonstrate his fitness for reinstatement.[2] *In*

1. A number of letters have been filed on behalf of the petitioner by attorneys, friends and community leaders. Many courts recognize that such *ex parte* material is of little evidentiary value on the difficult factual issues that must be resolved on a reinstatement. *In re Gaines*, 251 Ala. 329, 37 So.2d 273 (1948); *Hathaway v. The Florida Bar*, 184 So.2d 426 (Fla.1966); *Matter of Raimondi*, 285 Md. 607, 403 A.2d 1234 (1979); *In re Keenan*, 314 Mass. 544, 50 N.E.2d 785 (1943); *In re Harris*, 88 N.J.L. 18, 95 A. 761 (1915).

2. Article VI, Sections 23 and 24 of the Bar By-Laws makes this distinction between disbarment, which results in the attorney's license being annulled, and a suspension of the license, a lesser penalty enabling the attorney to apply for reinstatement under Section 32 in a shorter period than on a disbarment:

Section 23 in part:

"The license of any attorney shall be annulled and such attorney shall be disbarred upon proof that he has been convicted—(a) of any crime involving moral turpitude or professional unfitness; or (b) of receiving money for

re Reed, 341 So.2d 774 (Fla.1977); *Lester v. Kentucky Bar Association*, 532 S.W.2d 435 (Ky.1976); *In re Braverman*, 271 Md. 196, 316 A.2d 246 (1974); *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975); 7 Am.Jur.2d *Attorney at Law* § 72 (1963). The ultimate question is whether he possesses the integrity, high moral character and legal competence to justify the reinstatement of his license. Most courts have considered a number of factual inquiries in answering this question, as illustrated by *In re Hiss*, *supra*:

"In judging whether a petitioner satisfies these standards and has demonstrated the requisite rehabilitation since disbarment, it is necessary to look to (1) the nature of the original offense for which the petitioner was disbarred, (2) the petitioner's character, maturity, and experience at the time of his disbarment, (3) the petitioner's occupations and conduct in the time since his disbarment, (4) the time elapsed since the disbarment, and (5) the petitioner's present competence in legal skills. See *Application of Spriggs*, 90 Ariz. 387, 388, n. 1, 368 P.2d 456 (1962); *In re Barton*, 273 Md. 377, 379, 329 A.2d 102 (1974); *In re Application of Strand*, 259 Minn. 379, 381, 107 N.W.2d 518 (1961); *In the Matter of the Petition of Seijas*, 63 Wash.2d 865, 868–869, 389 P.2d 652 (1964). Cf. *In re Petition of Dawson*, 131 So.2d 472, 474 (Fla.1961)." [368 Mass. at 460, 333 N.E.2d at 437–38]

As we stated in *State v. Gary*, W.Va., 247 S.E.2d 420, 421 (1978), there are several reasons for requiring an evidentiary hearing where the operative facts are disputed:

"First, the requirement of a hearing not only affords the parties the opportunity to offer relevant information in support of their positions, but also provides the court with a mechanism to obtain the necessary facts on which to make an informed judgment on the question. Second, absent any hearing, there is no basis on which an appellate court can determine what facts motivated the decision of the circuit court.

. . . . . .

"Finally, there exists a larger purpose and that is to provide the parties and the public the opportunity to realize that there is a careful, reasoned and judicious decision-making process at work on an important judicial issue . . . ."

Apparently recognizing the necessity of an adequate factual record to determine a reinstatement question, many courts have evolved various hearing procedures in conjunction with their general supervisory power over the practice of law. *See, e. g., In re Hiss, supra*; *Petition of Sears*, 147 So.2d 522 (Fla.1962); *Application of Sharpe*, 499 P.2d 406 (Okl.1972); *Re Simmons*, 81 Wash.2d 43, 499 P.2d 874 (1972); Annot., 70 A.L.R.2d 268, 325 (1960); Machen, *The Law of Disbarment and Reinstatement in Maryland*, 36 Md.L.Rev. 703 (1977).

In *In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153 (1970), we recognized that, as an incident to this Court's inherent power to supervise the practice of law, it could reinstate an attorney's license that had been annulled. The dissent in *Daniel* argued that the Court's ruling was, in effect, an amendment to the Bar By-Laws, which could not be accomplished without following the amendment provisions of the By-Laws.

The dissent in *Daniel* overlooked W.Va. Code, 51–1–4a, which authorizes the creation of The West Virginia State Bar by this Court and makes it subject to this Court's supervision.[3] This section also ex-

his client as his attorney and failing to pay the same on demand, or within six months after receipt thereof, without good and sufficient reason for such failure, as in the statute provided."

Section 24:

"The license of any attorney shall be suspended for such time as the court may prescribe upon proof that he has been convicted of a felony not involving moral turpitude or professional unfitness. Whenever a judgment or decree shall be standing or rendered in any court against an attorney for money collected by him as such, such court shall suspend the license of such attorney until such judgment or decree shall be satisfied."

3. In pertinent part, W.Va.Code, 51–1–4a, provides:

plicitly recognizes our inherent rulemaking power,[4] a part of which is our historic role in defining the practice of law and regulating the conduct of attorneys. *State ex rel. Partain v. Oakley*, W.Va., 227 S.E.2d 314 (1976); *West Virginia State Bar v. Earley*, 144 W.Va. 504, 109 S.E.2d 420 (1959).

[4] Even though the Bar By-Laws are subject to the approval of this Court under W.Va.Code, 51–1–4a, this does not mean that upon their approval they become the sole standard to define and control the practice of law and regulate the conduct of attorneys. If this Court were to hold that the Bar By-Laws were the only source of power regulating the practice of law, it would abdicate its inherent responsibilities and the express mandate of W.Va.Code, 51–1–4a. This we decline to do.

[5, 6] In cases involving a petition for reinstatement where an attorney's license has been annulled, we conclude that Article VI, Sections 4 and 35 of the Bar By-Laws must be read *in pari materia* to require that the Committee on Legal Ethics shall hold an evidentiary hearing to enable a record to be made on the issue relating to the petitioner's qualifications to have his license reinstated. Such evidentiary hearing shall be held within 60 days from the date of the receipt of the application for reinstatement, except that for good cause shown the time for hearing may be extended.

As we have previously noted, the petitioner has the burden of demonstrating his fitness for license reinstatement at the hearing. Counsel for the petitioning attorney shall have the right to present evidence in favor of reinstatement, and counsel for the Committee shall have the right to introduce opposing evidence. Both sides shall have the right of cross-examination.

At the conclusion of the hearing, the Committee shall make findings and recommendations substantiated by the record, and shall set forth its reasons. On the basis of the record and the findings and recommendations of the Committee, this Court will determine the reinstatement question pursuant to Article VI, Section 35 of the Bar By-Laws.

In light of the foregoing, this case is remanded to the Committee on Legal Ethics for an evidentiary hearing. Such hearing shall be held within 60 days from the date of the mandate of this Court, unless for good cause shown the time for hearing is extended.

Remanded.

HARSHBARGER, J., did not participate in the decision in this case.

"The supreme court of appeals of West Virginia shall, from time to time, prescribe, adopt, promulgate, and amend rules:

. . . . .

"(d) Organizing and governing by and through all of the attorneys at law practicing in this State, an administrative agency of the supreme court of appeals of West Virginia, which shall be known as 'the West Virginia State bar.' The West Virginia State bar shall be a part of the judicial department of the State government and is hereby created for the purpose of enforcing such rules as may be prescribed, adopted and promulgated by the court from time to time under this section . . . ."

4. W.Va.Code, 51–1–4a, in material part:

"The inherent rule-making power of the supreme court of appeals is hereby declared."