Supreme Court No. 200,428-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

FERNANDO E. PEREZ PENA,

Lawyer (Bar No. 4858).

ANSWERING BRIEF OF THE WASHINGTON STATE BAR ASSOCIATION

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I. COUNTERSTATEMENT OF THE ISSUES

1. Rule 10.14(c) of the Rules for Enforcement of Lawyer Conduct (ELC) provides that the court record of a criminal conviction is conclusive evidence of guilt at a disciplinary hearing. Lawyer Fernando E. Perez Pena (Respondent) assaulted his client during a dispute over a refund of unearned fees, was later charged with criminal assault, and was convicted by a jury. After completing his deferred sentence, he sought to have the conviction vacated, but the court refused to vacate the guilty verdict. Did the Hearing Officer properly admit the verdict as conclusive evidence of Respondent's guilt?

2. The Disciplinary Board found Respondent violated Rule 8.4(b) and Rule 8.4(i) of the Rules of Professional Conduct (RPC) by committing the assault, and RPC 1.15(d) for refusing to refund almost $1,500.00 in unearned fees his clients had paid in advance. The Board unanimously recommended that Respondent be suspended from the practice of law for a total of six months for these violations. Should the Court affirm the Board's unanimous sanction recommendation?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

In July 2005, the Washington State Bar Association (Association) filed a two-count formal complaint alleging as follows:

> Count I: By assaulting Ms. Cameron, Respondent violated Rules for Lawyer Discipline (RLD) 1.1(a) (currently RPC 8.4(i)) (by committing an unjustified act of assault or other act which reflects disregard for the rule of law...and whether the same constitutes a felony or misdemeanor or not) and/or RPC 8.4(b) (by violating SMC 12A.06.010).
>
> Count II: By failing to refund unearned portions of his clients' advanced fee, Respondent violated RPC 1.15(d).
>
> Bar File (BF) 2.

In February 2006, the Association filed a motion seeking to establish the court record of Respondent's assault conviction as conclusive evidence of his guilt under ELC 10.14(e). BF 17. The Hearing Officer granted the motion, ruling that the jury verdict finding Respondent guilty of assault was conclusive evidence of his guilt despite his having received a deferred sentence and complying with its terms. BF 21.

The hearing was held on March 14, 2006. The Hearing Officer filed his Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation on March 22, 2006. BF 22. The Hearing Officer found, by a clear preponderance of the evidence, that Respondent violated RPC 8.4(b) and RPC 8.4(i) as charged in Count I, and recommended that Respondent receive an admonition. BF 22 at 6-9. The Hearing Officer recommended that Count II be dismissed. Id.

Both sides appealed. BF 25; BF 26. After briefing and oral argument, the Disciplinary Board issued its unanimous Order Modifying

Hearing Officer's Decision. BF 44 (attached as Appendix A). The Board adopted the Hearing Officer's conclusion that Count I had been proved, but reversed his dismissal of Count II. The Board recommended a three-month suspension for the assault violation charged in Count I; a six-month suspension for the fee violation charged in Count II, the suspensions to run concurrently; and that Respondent be required to satisfy the civil judgment obtained against him by his clients.

This appeal follows.

B. SUBSTANTIVE FACTS

In early March 2001, Cecilia Cameron Garcia and Arturo Garcia hired Respondent to represent them in an immigration matter. BF 44, Finding of Fact (FF) 4; TR 19, 53-55, 65-66, 87-88. On or about March 21, 2001, the Garcias met with Respondent and paid him an advance fee of $2,000.00 by check. BF 44, FF 4; EX 1; TR 23, 53-55. The check was written on an account belonging to Ms. Cameron Garcia's mother, Ruth Vchulek. EX 1. The Garcias also gave Respondent some original documents, including their recent marriage certificate. TR 24, 100.

Less than a week after meeting with Respondent, the Garcias decided not to pursue their case, terminated their relationship with him, and requested a refund of their $2,000.00 fee. BF 44, FF 5; EX 2; TR 27-29, 89-91. Respondent agreed to provide a partial refund, minus any fees

or costs already incurred. BF 44, FF 6; TR 30, 91; EX 3. On or about March 28, 2001, Respondent mailed a check to the Garcias for $1,500.00. EX 3, 4. When the Garcias tried to cash the check, the bank told them they needed their marriage certificate, which Respondent had failed to return. TR 30-31.

On March 30, 2001, the Garcias went to Respondent's office to retrieve their marriage certificate. BF 44, FF 6; TR 31-32; EX 5. An argument ensued and Respondent initially refused to return it. Ms. Cameron Garcia told Respondent she would report his conduct to the Association. Respondent gave the marriage certificate to the Garcias, but also stopped payment on the $1,500.00 check without notifying them. BF 44, FF 7; TR 32, 91-92, 101-02; EX 5.

A week later, the bank notified Ms. Cameron Garcia that Respondent had stopped payment on the check. EX 6. After additional communications, Respondent agreed that he would refund $1,600.00 by cashier's check ($100.00 more than before) in Ms. Vehulek's name if the Garcias returned the voided $1,500.00 check to him and gave him signed, notarized releases of any civil or ethical liability he might have. BF 44, FF 8; EX 7, 8; TR 70-71, 92-93.

On May 31, 2001, the Garcias went to Respondent's office to pick up the new check. An argument again ensued, and Respondent called the

police and said that he felt threatened by Mr. Garcia. The police arrived. While the police spoke to the Garcias, Respondent went to the bank and got the promised cashier's check. BF 44, FF 9; TR 41-43, 71-72, 105-07.

When Respondent returned to the office, Ms. Cameron Garcia asked to see the check. Respondent insisted on a simultaneous exchange of documents. During the simultaneous exchange, Respondent hit or pushed Ms. Cameron Garcia. The force of the blow caused her to fall backwards into Mr. Garcia. In the scuffle, the cashier's check ended up in Ms. Cameron Garcia's possession and the release was torn. BF 44, FF 10; TR 44-46, 60-61, 73-74, 77-78.

Ms. Cameron Garcia called the police and reported the incident. The police returned and took a report. EX 13.

The Garcias left Respondent's office, picked up Ms. Vehulek, and deposited the cashier's check at Ms. Vehulek's bank. TR 50. In the meantime, and unbeknownst to the Garcias, Respondent reported the cashier's check stolen, so the bank dishonored it. BF 44, FF 14; TR 96; EX 10. Respondent has never refunded any portion of the Garcias' $2,000.00 fee. BF 44, FF 15.

Respondent was charged with one count of assault under Seattle Municipal Code (SMC) 12A.06.010 for the assault of Ms. Cameron

Garcia.[1] EX 14. On January 30, 2002, a jury found him guilty. EX 15. On February 28, 2002, the court sentenced Respondent to one year in jail, but deferred the jail time subject to certain terms and conditions. BF 17, EX 5.

On July 3, 2003, the court found that Respondent had fulfilled the terms and conditions of his deferred sentence and dismissed the complaint against him. EX 17.

On May 9, 2005, Respondent filed a motion in Seattle Municipal Court that asked the court to "clarify" the docket for July 3, 2003, and, among other things, to vacate the jury verdict finding him guilty of assault because he had met the terms of his deferred sentence. EX 16. On June 3, 2005, the court agreed to modify certain entries in the docket, but refused to vacate the jury's guilty verdict. EX 17.

The Garcias filed an action in small claims court to recover the unearned portion of the fees they paid Respondent. The court entered judgment against Respondent for $1,392.75, plus court costs. EX 19. Respondent never satisfied that judgment. BF 44, FF 15; TR 108.

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[1] SMC 12A.06.010 provides that, "A person is guilty of assault when he or she: A. Intentionally assaults another person...."

III. SUMMARY OF ARGUMENT

1. The Hearing Officer properly admitted the record of Respondent's assault conviction as conclusive evidence of his guilt of that crime under ELC 10.14(c), which provides that if a formal complaint charges a lawyer with an act of misconduct for which the lawyer has been convicted in a criminal proceeding, the court record of the conviction is conclusive evidence at the disciplinary hearing of the lawyer's guilt of the crime. Respondent was convicted beyond a reasonable doubt by a jury. The court did not vacate the jury's verdict. Respondent should not now be allowed to relitigate the case. The existence of a statutory sentencing scheme that allowed Respondent to have the criminal complaint dismissed after he completed the terms of his sentence does not override ELC 10.14(c) or prevent use of the record of his conviction as conclusive evidence in this disciplinary matter.

2. Respondent's assault of a client seriously adversely reflects on his fitness to practice law. Suspension is the presumptive sanction for that violation. The Court should affirm the three-month suspension recommended by the Disciplinary Board for that violation.

3. Respondent knowingly refused to refund unearned fees to the Garcias. Suspension is the presumptive sanction for that violation.

The Court should affirm the six-month suspension recommended by the Disciplinary Board.

IV. ARGUMENT

A. STANDARD OF REVIEW

Respondent has not assigned error to the findings of fact made by the Disciplinary Board. Unchallenged findings of fact are verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005).

The Court reviews conclusions of law de novo, upholding them if supported by the findings of fact. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004). The Court generally affirms the Disciplinary Board's sanction recommendation unless it "can articulate a specific reason to reject" it. Id. (citation omitted). The Court hesitates to reject the Board's recommendation if it is unanimous. Id. Such deference is based on the Board's "unique experience and perspective in the administration of sanctions." In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 404-05, 98 P.3d 477 (2004) (quotations omitted).

B. THE HEARING OFFICER PROPERLY ADMITTED THE RECORD OF RESPONDENT'S ASSAULT CONVICTION AS CONCLUSIVE EVIDENCE OF HIS GUILT OF THAT CRIME

Respondent argues that the Hearing Officer erred in admitting the record of his assault conviction as conclusive evidence of his guilt of the crime. Respondent's Brief (RB) at 8. This, he claims, is because he received a deferred sentence and the complaint was subsequently dismissed after he completed the conditions of that sentence. This argument fails for several reasons.

ELC 10.14(c) specifically addresses convictions that form the basis of a violation of the RPC:

> **(c) Proceeding Based on Criminal Conviction.** If a formal complaint charges a respondent lawyer with an act of misconduct for which the respondent has been convicted in a criminal proceeding, the court record of the conviction is conclusive evidence at the disciplinary hearing of the respondent's guilt of the crime and violation of the statute on which the conviction was based.

While ELC Title 10 does not define the term "conviction," it is defined broadly elsewhere in the ELC. In ELC 7.1, regarding interim suspension of a lawyer for conviction of certain crimes, "conviction" is defined as occurring "upon entry of a finding or verdict of guilty unless defendant affirmatively shows that judgment was arrested or a new trial granted." ELC 7.1(a)(1).

Disciplinary rules are interpreted to "foster the purposes for which they are enacted." In re Disciplinary Proceeding Against McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). One of the primary purposes of ELC 10.14(c) is to avoid duplication of resources – namely, the retrial in a disciplinary proceeding of facts that previously led a jury to find the lawyer guilty beyond a reasonable doubt in a criminal proceeding. A lawyer found guilty under the higher standard of proof in a criminal case should not be able to relitigate the issue of guilt in the course of a disciplinary proceeding with its relatively lower standard of proof. ABA Model Rules for Lawyer Disciplinary Enforcement R. 19 cmt. (2001 ed.). ELC 10.14(c) should be interpreted to accomplish its purpose.

In this case, the jury's verdict form bearing the notation of "guilty" is the record of Respondent's conviction. EX 15. Under ELC 10.14(c), that verdict is conclusive evidence of his guilt. Since the municipal court docket shows that Respondent's post-trial motion to arrest the judgment or for a new trial was denied, Respondent cannot show that the judgment was arrested or a new trial granted. BF 17–EX 5 at 6.

Respondent argues that, since the municipal court deferred imposition of sentence, then vacated the judgment and sentence and dismissed the complaint under RCW 9.96.060 following his completion of the terms of the deferred sentence, his conviction was expunged and

cannot be considered. RB at 9. But his conviction was not expunged nor even vacated. RCW 9.96.060(1) states that the court may vacate a misdemeanor conviction by "setting aside the verdict of guilty; dismissing the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence." (emphasis added). Although the municipal court in Respondent's case did vacate the complaint and judgment and sentence, the unambiguous court record shows it did not vacate the verdict of guilty. BF 44, FF 19A; EX 17; EX 18. As a result, Respondent's conviction was not vacated.

Even if Respondent's conviction had been vacated under RCW 9.96.060, it was not expunged, despite Respondent's argument to the contrary. The operation of the statute does not mandate expungement or deletion of Respondent's conviction from his criminal record. State v. Gallagher, 103 Wn. App. 842, 844, 14 P.3d 875 (2000) (dismissal of jury conviction after compliance with deferred sentencing terms does not mean that conviction is deleted or expunged from criminal record); accord Att'y Gen. Op. 1997, No. 1, 3, 1997 WL 46935 (Wash. A.G.) (opining that under RCW 10.97.030 and RCW 10.97.045 a person's criminal record includes information as to a case where the person was convicted and where sentencing was deferred, even if the charges were eventually dismissed after the person successfully complied with the court's terms

and conditions); RCW 43.43.830(4) ("'Conviction record' means 'conviction record' information as defined in RCW 10.97.030 and RCW 10.97.050 relating to a crime committed by either an adult or a juvenile...[and] does include convictions for offenses for which the defendant received a deferred or suspended sentence, unless the record has been expunged according to law.").

This Court has previously held, in the context of a lawyer's petition for reinstatement, that guilt of a crime remained an established fact despite the fact that the lawyer had received a deferred sentence, been allowed to enter a plea of not guilty, and had the charge dismissed after completing his sentence. In re Disciplinary Proceeding Against Stroh, 108 Wn.2d 410, 739 P.2d 690 (1987). In that case, Stroh was convicted by a jury of witness tampering, then given a deferred sentence. After completing the terms of his sentence, he was allowed to enter a plea of "not guilty" and the conviction was vacated under RCW 9.95.240 (the felony counterpart to RCW 9.96.060). Stroh then failed to inform licensing authorities of his conviction, which became an issue in the reinstatement proceedings. Stroh argued that he was not required to disclose the conviction because of the language in RCW 9.95.240.

The Court held that the statute entitled Stroh to keep confidential the fact of his conviction after he obtained the "Order of Dismissal" of the

conviction from the trial court. Stroh, 108 Wn.2d at 417-18. But the Court nevertheless distinguished that issue from whether the prior conviction should be considered for purposes of reinstatement to the practice of law: "in considering reinstatement for disbarment resulting from a criminal conviction, this court must treat guilt of the crime as an established fact." Id. at 415. Stroh indicates that, for purposes of lawyer discipline, a jury conviction establishes guilt of the crime regardless of how the conviction is treated in other arenas under post-conviction sentencing statutes.

The result in Stroh is not surprising. This Court has long held that it, not the legislature, has the exclusive power to enroll lawyers, make rules and regulations governing the bar, investigate their conduct, and discipline them. See In re Disciplinary Proceeding Against Bruen, 102 Wash. 472, 475-76, 172 P. 1152 (1918); Hagan v. Kassler Escrow, Inc., 96 Wn.2d 443, 452-53, 635 P.2d 730 (1981). A legislative enactment may not impair this Court's functioning or encroach upon the power of the judiciary to administer its own affairs. Washington State Bar Ass'n v. State, 125 Wn.2d 901, 908-09, 890 P.2d 1047 (1995). To the extent that RCW 9.96.060 conflicts with ELC 10.14(c), the court rule will prevail. Id. The provisions of the statute that allow a conviction to be vacated post-sentencing do not prevent the Court from nevertheless using the record of

conviction to prove guilt of the crime under ELC 10.14(c) in a disciplinary proceeding.

The Hearing Officer properly admitted the record of Respondent's assault conviction as conclusive evidence that he committed that crime.

C. THE COURT SHOULD AFFIRM THE BOARD'S UNANIMOUS RECOMMENDATION OF A SIX-MONTH SUSPENSION

The Disciplinary Board modified the Hearing Officer's recommendation of an admonition for the count involving the assault and recommended a three-month suspension, reversed the Hearing Officer's dismissal of the count involving the refusal to refund unearned fees, and recommended a concurrent six-month suspension. BF 44 at 7–10. Respondent argues that he should only receive an admonition for his misconduct because suspension would be "unfairly extreme." RB at 13. The Board's unanimous sanction recommendation is appropriate.

The Court employs the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) "as a basic, but not conclusive, guide" to imposing sanctions. Whitney, 155 Wn.2d at 468. Under the ABA Standards, the Court first determines the presumptive sanction by examining the ethical duty violated, the lawyer's mental state, and the injury caused. In re Disciplinary Proceeding Against Boelter, 139 Wn.2d 81, 99, 985 P.2d 328

(1999). It then determines whether the presumptive sanction should be increased or reduced due to aggravating or mitigating factors. Id.

1. ABA Standard 5.12 (Suspension) Governs the Sanction for Respondent's RPC 8.4(b) Violation Proved in Count I

The Disciplinary Board concluded that Respondent violated RPC 8.4(b) and RPC 8.4(i), as charged in Count I, because he committed an intentional, unjustified act of assault on a client. BF 44 at 7. The Board disagreed with the Hearing Officer's conclusion that this conduct did not "seriously" adversely reflect on Respondent's fitness to practice law because the assault occurred "in the context of [Respondent's] law practice and that the victim was a client ...." Id. at 9. The Board applied ABA Standard 5.12 (suspension) to Respondent's violation of RPC 8.4(b). Id.

ABA Standard 5.1 provides:

> 5.11 Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
>
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

Respondent was found guilty by a jury of assaulting his client in violation of SMC 12A.06.010. EX 15. Respondent's assault was intentional, the most culpable mental state. ABA Standards at 9 (§ II. Theoretical Framework). This mental state was proved beyond a reasonable doubt as intent is an element of the crime of which he was convicted. SMC 12A.06.010(A). He also assaulted a client. This assault seriously adversely reflected on his fitness to practice because not only was the victim his own client, he lost control during a transaction where he was merely called upon to hand over a refund check. Suspension is the appropriate presumptive sanction for this type of conduct.

The Court should uphold the Disciplinary Board's application of ABA Standard 5.12 to Respondent's violation of RPC 8.4(b), and find that the presumptive sanction for the assault violation is suspension.

2. The Presumptive Sanction for Respondent's RPC 8.4(i) Violation is Suspension As Well

The Board concluded that Respondent also violated RPC 8.4(i) when he assaulted his client, but did not apply the ABA Standards to that violation. BF 44 at 9. This is because the ABA Standards do not apply directly to RPC 8.4(i). In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 770, 801 P.2d 962 (1990). "Because the ABA Standards track the ABA Model Rules, they do not provide direct guidance for violations of RLD 1.1(a) [now RPC 8.4(i)], which has no counterpart in the ABA Model Rules." Id.

In Curran, the lawyer drove while intoxicated and crashed his vehicle, which resulted in the deaths of his two passengers. The Court found that Curran did not intend to kill his companions, but chose to drive his car. Id. at 772. The Court found that the "unintentional dimension of his conduct" normally would warrant a minimal sanction. Id. It went on to hold that a violation of the "reflecting disregard for the rule of law" prong of RLD 1.1(a) [now RPC 8.4(i)] should normally result in a reprimand, but imposed a suspension in that case due to the extreme injury that was inflicted. Id. at 772-73.

But Curran did not address the "unjustified act of assault" prong of RPC 8.4(i) that Respondent was found to have violated. BF 44 at 7. For

such a violation, the presumptive sanction should be suspension. Respondent intentionally assaulted his client. The intentional dimension of Respondent's conduct warrants more than the minimal presumptive sanction he seeks. And Curran occurred outside the practice of law – he just happened to be transporting clients in his vehicle. Respondent was meeting his clients at his office to resolve an issue over unearned legal fees. Lawyer assaults on clients and other lawyers bring disrepute to the bar, affect the actual functioning of the bar, and merit strong discipline. See id. at 763, 774. Suspension is the appropriate presumptive sanction for Respondent's intentional violation of RPC 8.4(i) committed while he was practicing law and dealing with a client.

3. The Presumptive Sanction for Respondent's RPC 1.15(d) Violation, as Charged in Count II, is Suspension

The Disciplinary Board concluded that ABA Standard 7.2 applied to Respondent's violation of RPC 1.15(d), and that suspension was the presumptive sanction for that misconduct. BF 44 at 9-10.

ABA Standard 7.0 deals with violations of duties owed as a professional:

> 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

Here, Respondent admitted he did only $500.00 worth of work for the Garcias. Although he knew he had not done enough work to justify retention of the entire $2,000.00 paid him, he twice stopped payment on refund checks and has yet to refund any funds even after his clients obtained a judgment against him. BF 44, FF 7, FF 14; TR 91. He knew he remained in possession of unearned fees and should have known he was dealing improperly with the Garcias' property. He has now conceded this violation. RB at 15. His refusal to refund the unearned fees even after the Garcias obtained a judgment against him for those fees caused actual financial injury to his clients. Because Respondent's conduct was knowing and injured his clients, ABA Standard 7.2 applies to his violation of RPC 1.15(d), and the presumptive sanction is suspension. In re Disciplinary Proceeding Against DeRuiz, 152 Wn.2d 558, 581, 99 P.3d 881 (2004).

Respondent's argument that the Garcias' actions prevented him from refunding their money is preposterous. See RB at 15. All he had to do was allow the first check he gave them to clear the bank. Instead, he twice stopped payment on checks he gave them because he was angry and has still not satisfied the judgment they obtained against him. An admonition is an inadequate sanction for this misconduct.

4. The Aggravating and Mitigating Factors Support a Suspension.

After the presumptive sanction for the violations is determined, aggravating and mitigating factors are considered to decide whether the presumptive sanction should be increased or decreased. Boelter, 139 Wn.2d at 99. The Disciplinary Board found that the following aggravating and mitigating factors under ABA Standards 9.22 and 9.32 applied to Count I:

> Aggravating Factors
> (g) refusal to acknowledge wrongful nature of conduct;
>
> Mitigating Factors
> (k) imposition of other penalties or sanctions.

BF 44 at 9.

The Disciplinary Board found that the following aggravating and mitigating factors applied to Count II:

> Aggravating Factors
> (b) dishonest or selfish motive [retaining unearned fees];

(g) refusal to acknowledge wrongful nature of conduct;
(j) indifference to making restitution [failure to return unearned fees and failure to pay the judgment];

Mitigating Factors
(a) absence of a prior disciplinary record.

BF 44 at 10.

In addition to the aggravating factors found by the Board, the record supports two others. First, Respondent was charged with two separate violations and found to have committed both. The aggravating factor of multiple offenses found in ABA Standard 9.22(d) should be applied. Second, Respondent was admitted to the practice of law in 1973. The aggravating factor of substantial experience in the practice of law found in ABA Standard 9.22(i) should also be applied.

The Board found, and Respondent argues, that the mitigating factor of imposition of other penalties or sanctions should apply to Count I because Respondent was convicted of a crime. BF 44 at 9; RB at 14. But the goals of the criminal justice system are different from the goals of lawyer discipline. Respondent's conviction does not reduce the need for discipline. When a lawyer is convicted of a crime involving an unjustified act of assault, the purpose of disciplinary sanctions is to protect the public and maintain confidence in the profession. See In re Disciplinary Proceeding Against McGrath, 98 Wn.2d 337, 344-45, 655 P.2d 232

(1982). Although Respondent implies that the Curran court considered the lawyer's conviction as a mitigating factor (RB at 15), the case says no such thing. Instead when the Curran court cited "sanctions already imposed," it referred explicitly to the lawyer's 18-month interim suspension, not his prison term. Curran, 115 Wn.2d at 773-74. This mitigating factor should be deleted.

In summary, the aggravating and mitigating factors that should be applied to the misconduct in this case are as follows:

Aggravating Factors
(b) dishonest or selfish motive;
(d) multiple offenses;
(g) refusal to acknowledge wrongful nature of conduct;
(i) substantial experience in the practice of law; and
(j) indifference to making restitution.

Mitigating Factors
(a) absence of a prior disciplinary record.

The mitigating and aggravating factors should be examined to determine the length of the suspension. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 493, 998 P.2d 833 (2000). Generally, the minimum suspension is six months. Id. at 495; In re Disciplinary Proceeding Against Cohen, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003). The minimum suspension is warranted "where there are either no aggravating factors and at least some mitigating factors, or where the mitigating factors clearly outweigh any aggravating factors." Halverson,

140 Wn.2d at 497. Here, the aggravating factors clearly outweigh the mitigating factors and justify a suspension equal to or greater than the presumptive minimum, not the downward departure to admonition that Respondent suggests. RB at 15. Even if the aggravating and mitigating factors found by the Disciplinary Board are applied, the mitigators do not outweigh the aggravators. As a result, there is no reason to deviate below the minimum suspension.

5. The Disciplinary Board's Decision in This Matter Was Unanimous and Respondent Has Not Demonstrated Disproportionality

The Court has stated it "will generally adopt the Board's recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision." In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 339, 126 P.3d 1262 (2006). The Disciplinary Board's vote in this matter was unanimous. BF 44 at 2, n.2. It is Respondent's burden to demonstrate disproportionality, and he has not done so. In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 821, 72 P.3d 1067 (2003).

The Court should adopt the Board's suspension recommendation in this case.

V. CONCLUSION

The Court should uphold the admission of the record of Respondent's assault conviction under ELC 10.14(c) as conclusive evidence of his guilt of that offense because the conviction was not vacated and because this Court has previously held that guilt for purposes of lawyer discipline was established at the moment of conviction.

Respondent assaulted his client and refused to repay unearned fees paid to him, rather than simply refund the funds to which his clients are entitled. The Disciplinary Board's recommended six-month suspension and requirement that Respondent pay restitution is consistent with the ABA Standards. The Court should affirm.

RESPECTFULLY SUBMITTED this 23rd day of January, 2007.

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FILED AS ATTACHMENT
TO E-MAIL

Craig Bray, Bar No. 20821
Disciplinary Counsel

FILED

OCT 12 2006

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re	Proceeding No. 05#00038
FERNANDO E. PEREZ PENA Lawyer WSBA No. # 4858	DISCIPLINARY BOARD ORDER MODIFYING HEARING OFFICER'S DECISION

This matter came before the Disciplinary Board at its September 29, 2006 meeting on cross appeals of Hearing Officer James C. Lawrie's decision recommending an admonition following a hearing.

Having reviewed the documents designated by the parties, the briefs filed by both parties and heard oral argument[1]:

IT IS HEREBY ORDERED THAT the Board modifies the Findings of Fact, affirms the Hearing Officer's Conclusion that Count 1 was proven, reverses the Hearing Officer and finds that Count 2 was proven, and recommends a sanction of

[1] At the conclusion of oral argument, Respondent's counsel made an oral motion for leave to submit additional briefing to the Board. Disciplinary Counsel objected. The Board denies that motion.

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APPENDIX A

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suspension.[2]

The Board finds that some of the Hearing Officer's Findings of Fact are not supported by substantial evidence and makes the following amendments:

FINDINGS OF FACT[3]

Finding of Fact 4

The Garcias married. They hired Respondent in person by check on March 22, 2001. The check was for a flat fee of $2,000.00 (reduced from $3,500.00) for processing an application for illegal aliens to adjust their status under a limited-opportunity statute. There was no written fee agreement. Respondent provided needed information and forms so the clients could begin the process.[4]

Finding of Fact 5

The Garcias were distressed over paying the money (borrowed from the wife's mother), and unjustifiably concerned about matters such as whether Respondent was actually an attorney. Further, they received and believed bad advice (apparently from a nonlawyer) that Respondent had given them some "wrong" forms and failed to give them required forms for medical exams, which was not accurate. The clients could not find a financial sponsor for Mr. Garcia. Within a couple of days, they notified Respondent that they wanted a refund.[5]

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[2] The vote on this matter was unanimous. Those voting were McMonagle, Kuznetz, Bothwell, Andrews, Romas, Heller, Lee, Madden, Hollingsworth, Dickinson, Mina, Fine and Mosner.

[3] Any Findings of Fact not included in this order are unchanged. The Board did not move Findings of Fact that appear to be Conclusions of Law (such as Finding 17) to the Conclusions.

[4] The Board removed the words "non-refundable", because the record does not support that Finding. The Board also removed "Respondent believed the $2,000.00 was earned upon payment" because Respondent's belief is not relevant. The Board also added the word "fee" to clarify the Finding.

[5] The Board made only a slight revision to this Finding. The parenthetical "(not true)" was deleted and replaced with "(which was not accurate)".

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Finding of Fact 6

Respondent agreed to refund $1,500.00 of the clients' payment. He issued a check payable to both clients. The check was good and proper.[6] The Garcias could not cash the check because the bank only had the wife's maiden name and needed the marriage certificate. The clients returned to Respondent's office to obtain the marriage certificate. Their demeanor was hostile. Upon receiving the certificate, the Garcias threatened lawsuits and Bar Association complaints against Respondent.[6]

Finding of Fact 7

Based on the threats and what Respondent perceived as a lack of appreciation of his agreement to refund, Respondent stopped payment on the check. He did not notify the clients. The check bounced.[7]

Finding of Fact 8

More dealings, letters, and phone conversations occurred, marked by distrust by both sides. Respondent then agreed to issue a $1,600.00 cashier's check in exchange for the original bounced check and releases of liability.[8]

Finding of Fact 9

On March 31, 2001, the Garcias drove to Respondent's office with the releases and the bounced check. Mr. Garcia went inside and was disruptive, so Respondent

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[6] The Board removed the words "good faith" and "not refundable" from the first sentence. The record does not support these Findings. The Board also modified the word "demanding" and deleted the word "unreasonably". These Findings are not supported by the record.

[7] The Board changed the word "under" to "based on" and replaced the words "good faith" with "agreement to refund." The record does not support a Finding of good faith, but does establish that Respondent agreed to refund fees to the clients.

[8] The Board deleted the word "however" and added "then" to clarify the sequence of events. The Board also deleted the words "by all involved" after releases and added "of liability" to clarify that Respondent requested the clients agree to release him from future liability in exchange for replacing the bounced refund check.

called the police. Mr. Garcia left Respondent's office without argument. His testimony indicates that he was aggressive and disruptive.[9]

Finding of Fact 10

Eventually, the parties stood before each other. Respondent held the cashier's check. Mrs. Garcia held the releases. They simultaneously exchanged the documents (per Mrs. Garcia's original statement to police, exhibit 15). This version is contrary to testimony at the hearing by both Garcias, which [Hearing Officer] found not credible. Mr. Garcia gave at least two inconsistent versions of how they ended up with the check(s). During the simultaneous exchange, Mrs. Garcia tried to keep the check and grab the releases back. Some physical contact occurred. Respondent pushed or hit Mrs. Garcia, ultimately resulting in the assault conviction. Mrs. Garcia ended up with the check. She tore the release document in half. She left with the cashier's check and one half of the release document.[10]

Finding of Fact 11

Mrs. Garcia's conduct was aggressive and arguably violent. Although Respondent did not act in self defense, he did react to her behavior, in part. Respondent claims

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[9] The Board deleted the words "who settled things down" after police. There is no evidence in the record that the police settled things down. The Board also deleted "Mr. Garcia's reaction to the police visit" from this Finding. The record establishes that the police came and that Mr. Garcia left without argument. The Board deleted the Finding that Mr. Garcia's leaving the office without argument indicated that he was aggressive and disruptive.

[10] The Board deleted the words "in some manner" because they do not contain any factual information. The Board also deleted the words "any way" from the end of the second sentence. The Board is uncertain what these words were intended to convey. The Board also deleted the phrase "leaving Respondent without his part of the bargain." The record is not clear on what happened to the releases and whether Respondent obtained his part of the bargain. The Board also notes that Respondent's requirement that the Garcias and Mrs. Garcia's mother sign a release of liability appears to violate former RPC 1.8(h) prohibiting lawyers from making an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Respondent was not charged with any violations of RPC 1.8(h) and the Board did not consider this conduct in determining the sanction in this matter.

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that he was assaulted. [illegible] Garcia was [illegible] check [illegible]."[11]

Finding of Fact 12

The Garcias have given differing versions of how the check ended up in the wife's possession:

a. The Police Report reflects the version that there was a simultaneous exchange;

b. Mrs. Garcia's testimony reflects the version that her husband pushed her into Respondent (after the assault) and she grabbed it out of Respondent's hand;

c. Mr. Garcia's testimony reflects two versions; first that he pushed his wife into Respondent, then he testified that the check fell on the ground and he picked it up;

d. The Association's brief reflects the version that the check got torn and flew across the room; however, the check was not torn.[12]

Finding of Fact 13

It is established by a clear preponderance that the Garcias were paranoid, aggressive, and threatening in their dealings with Respondent. Similarly, Respondent failed to defuse the situation. He became angry and acted inappropriately, resulting in his assault on his client.[13]

---

[11] The Board deleted the language "it triggered a physical reaction (and assault) by Respondent". This statement suggest that Respondent acted in self defense. If Respondent had acted in self defense, then his conduct would not have satisfied the legal requirements for an assault conviction.

[12] The changes to this Finding are not substantive. The Board amended the word "husband" to "Mr. Garcia" and made similar changes for increased clarity.

[13] The Board deleted the word "overly" before paranoid. The record does not support that Finding. The Board also amended the words "not skilled in defusing the situation" to "failed to defuse the situation." The record does not support a Finding regarding Respondent's skill in this situation. The Board also deleted the parenthetical " (per jury verdict)" to eliminate

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Finding of Fact 14

Because he did not receive the releases he demanded, Respondent reported the cashier's check stolen [illegible] the cashier's check [illegible]

Finding of Fact 15

A civil suit by the Garcias resulted in a judgment against Respondent for $1,431.45. Respondent has failed to pay the judgment.

Finding of Fact 16

Deleted

Finding of Fact 17

Deleted

Finding of Fact 18

Deleted[15]

Finding of Fact 19

Respondent was convicted of the assault, satisfied the court with an anger management course and other requirements, and completed a deferred sentence.[16]

NEW Finding of Fact 19A

Upon petition by Respondent, the court vacated the assault judgment and complaint. The court declined to vacate the jury's guilty verdict. The court was

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possible confusion that the Hearing Officer was casting doubt as to whether the assault occurred.

[15] The Board amended this Finding to make clear that the record established that Respondent reported the cashier's check stolen because he did not have signed releases of his liability. Additionally, the Board deleted the parenthetical "(arguably accurate)". The record does not support a Finding that the clients stole the cashier's check.

[16] Findings 16, 17 and 18 are deleted because they are not supported by the record or are irrelevant.

[16] The Board deleted "and ultimate dismissal" from the end of Finding 19 and inserted a new Finding 19A that is supported by the record and explains what actually happened. The Board also deleted the word "prosecution" and replaced it with "sentence". The record establishes that

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advised of the disciplinary proceedings at the time of its ruling.

Finding of Fact 20

The conduct seriously reflects adversely on Respondent's fitness as to demeanor and handling of complex emotional clients confrontations. It does not reflect adversely on his honesty or integrity.[17]

CONCLUSIONS OF LAW

COUNT 1

Count 1 is proven. Respondent committed an unjustified act of assault on a client, violating RPC 8.4(d) and (b). Respondent argues that under RCW 9.96.060, the order vacating the conviction allows him to re-litigate, in this proceeding, whether the assault occurred. The Board disagrees. Disciplinary proceedings are *sui generis*. ELC 10.14(a). Pursuant to *In re Stroh*, 108 Wn.2d 410, 739 P.2d 690 (1987), The Board is entitled to consider the jury's verdict, which is a finding of an assault beyond a reasonable doubt, as conclusive evidence for purposes of this proceeding. Further, it appears that the municipal court judge was advised of these proceedings at the time she was asked to vacate the jury's verdict, and she declined to do so. Respondent's conduct was intentional. He caused potential injury or injury to his client.

COUNT 2

Count 2 is proven. Count 2 of the Formal Complaint charges Respondent with

---

Mr. Perez-Pena entered into a deferred sentence following a jury verdict, not a deferred prosecution.

[17] The Board reverses the Finding that Respondent's conduct does not seriously adversely reflect on his fitness to practice. The Board finds that allowing a fee dispute to end in the lawyer assaulting a client is conduct seriously adversely reflecting on the lawyer's fitness to practice law.

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failing to refund the unearned portion of his clients' advanced fee in violation of RPC 1.15(d). The evidence establishes by a clear preponderance that the fee was not fully earned at the time the representation ceased. Respondent testified as follows regarding his fee:

> Q: We learned from the exhibits that there was a demand for a refund and you agreed to give them back $1,500.00, is that correct?
>
> A: No. That's not correct. I did not agree to $1,500.00. I wrote them a letter telling them what my concerns were, and I thought, you know, I think you're silly, you're foolish to let this opportunity go by and –however, if you insist, then I'll charge you a flat 500 bucks for what I had done so far, which, isn't a whole lot, but it represented three perhaps four hours of labor on my part, and so I said then, a deal.

TR, page 91, lines 3-13. Respondent is required, under RPC 1.15 to provide a refund of the unearned portion of the fee. The record does not contain a written fee agreement or other evidence supporting finding a nonrefundable fee. The evidence shows that Respondent issued a $1,500.00 refund check to his clients and then cancelled that check. Then, Respondent issued a $1,600.00 cashier's check refund to the clients, but later reported it stolen. The clients then obtained a civil judgment against Respondent for $1,431.45 (this amount includes court costs), which he has not paid. Respondent repeatedly and intentionally prevented his clients from recovering the unearned portion of the fee. As of the date of the oral argument in this matter, September 29, 2006, Respondent had not satisfied the clients' judgment. Respondent's conduct caused actual injury to his clients.

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APPLICATION OF THE ABA STANDARDS

COUNT 1

Presumptive Sanction

The presumptive sanction for the RPC [illegible] in Count 1 is suspension pursuant to *ABA Standard* 5.12[18]. The presumptive sanction for the RPC 8.4(j) charge in Count 1 is also suspension, but is not determined by the *ABA Standards*. The Board finds that the facts that the assault occurred in the context of Mr. Perez-Pena's law practice and that the victim was a client lead to the conclusion that this assault seriously adversely reflects on the lawyer's fitness to practice.

Aggravating Factor

The Board finds the following aggravating factor:

(g) Refusal to acknowledge wrongful nature of conduct.

Mitigating Factor

(k) Imposition of other penalties of sanctions.

Recommended Sanction

The Board recommends a three-month suspension for Count 1.

COUNT 2

Presumptive Sanction

The presumptive sanction for Count 2 is a suspension pursuant to *ABA Standard*

[18] *ABA Standard* 5.12 states, "suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.1 and that seriously adversely reflect on the lawyer's fitness to practice."

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7.2[19]. Mr. Perez-Pena owed a duty as a professional to return unearned fees. Mr. Perez-Pena's conduct in stopping payment on the first check, reporting the cashier's check as stolen and failing to promptly satisfy the judgment entered against him constitutes an intentional violation of his duty to return unearned fees.

Aggravating Factors

The Board finds the following aggravating factors:

(b) dishonest or selfish motive [retaining unearned fees];

(g) refusal to acknowledge wrongful nature of misconduct;

(j) indifference to making restitution [failure to return unearned fees and failure to pay the judgment].

Mitigating Factor

The Board finds the following mitigating factor:

(a) Absence of a prior disciplinary record.

Recommended Sanction

The Board recommends a 6 month suspension for Count 2.

CONCLUSION

The Board finds that this record supports finding that Count 1 and Count 2 were proven by a clear preponderance of the evidence. The Board recommends that the Court impose a six-month suspension on Mr. Perez-Pena. The Board further recommends that the Court order Mr. Perez-Pena to satisfy the civil judgment within three months of the date of the Court's order. Mr. Perez-Pena should not be reinstated to the active practice of law until the civil judgment against him is fully

[19] *ABA Standards* 7.2 states, "suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."

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satisfied.

Dated this 11th day of October 2006.

Gail McMonagle
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Board Order Modifying Hearing Officer's Decision to be delivered to the Office of Disciplinary Counsel and to be mailed to Anthony Sarsozo, ~~Respondent~~/Respondent's Counsel at 1015 2nd Ave Ste 510 Seattle WA 98104 by first class mail, postage prepaid on the 2 day of October 2006.

Beebee Conley
Clerk/Counsel to the Disciplinary Board

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Fernando E. Perez Pena, Lawyer (Bar No. 4858)	Supreme Court No. 200,428-8 DISCIPLINARY COUNSEL'S DECLARATION OF SERVICE BY MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that he caused a copy of the Answering Brief of the Washington State Bar Association to be mailed by regular first class mail with postage prepaid on January 23, 2007 to:

Anthony Savage
Attorney at Law
615 Second Avenue, Suite 340
Seattle, WA 98104-2200

The undersigned declares under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

FILED AS ATTACHMENT TO E-MAIL

January 23, 2007, Seattle, WA
Date and Place

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