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SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No. 200,428-8

MC
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

FERNANDO E. PEREZ-PENA,

Lawyer (Bar No. 4858).

REPLY BRIEF OF THE RESPONDENT

FERNANDO E. PEREZ-PENA

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ORIGINAL

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COUNT I

The Bar argues (Brief, pg 13) that ELC 10.14(c) prevails over any conflict it may have with RCW 9.96.060. Respondent's position on this has been put forth in his opening brief. Nevertheless, it must be stressed that ELC 10.14(c) does not purport to deal with the factual situation presented here where a successful completion of a deferred sentence has resulted in the dismissal of the underlying criminal conviction. Here the municipal court vacated the Judgment and Sentence involved and dismissed the complaint (Ex.18). There was no court record of Respondent's conviction to be used as conclusive evidence in the Bar hearing.

The Respondent was denied the opportunity of presenting a factual defense. The Bar, however, was allowed to present its version of the assault. The complaining witness testified as to the facts of the assault over objection (BF 29, pgs. 44-47). Thus the Bar gained the advantage of having Respondent muzzled in his defense, but being allowed to elicit testimony going to the heart of the incident. If ELC 10.14(c) controls, how, in the name of fairness, can evidence in addition to the court record be permitted, but only as benefits the Bar?

The Board, on October 11, 2006, (BF 44, pg. 21) found that on May 31, 2001, Respondent had committed an assault that "seriously adversely reflects on the lawyer's fitness to practice." (Emphasis supplied). A sanction of three month's suspension is recommended (BF 34).

This finding was entered despite the facts that:

1. Respondent had never been disciplined before May of 2001;
2. Respondent had not been disciplined since May of 2001; and
3. Between May 2001 and October of 2006 Respondent fulfilled all of the conditions of the deferred sentence imposed by the Seattle Municipal court.

It is urged that Respondent's history from the date of his admission in 1973 to the present time demonstrates his fitness to practice.

In listing mitigating factors the Board found only "(k) imposition of other penalties of sanctions." (BF 44, pg. 21).

In his listing of mitigating sanctions the Hearing Officer found (BF 22, pg. 8):

- (1) Absence of a Prior Disciplinary Record;
- (2) Absence of a Dishonest or Selfish Motive;
- (3) Full and Free Disclosure to Disciplinary Board or Cooperative Attitude
Toward Proceedings;
- (4) Interim Rehabilitation; and
- (5) Imposition of other Penalties or Sanctions.

The Bar did not address the first four mitigating sanctions found by the Hearing Officer. It just ignored them.

It is extremely odd that the Bar finds the absence of a prior disciplinary record to be a mitigating factor as to Count II, but not as to Count I (BF 44, pgs. 21-22).

COUNT II

In recommending a six month suspension the Board found three aggravating factors as set forth below.

The Board found a dishonest or selfish motive (BF 44, pg. 22). Respondent tried twice to return the money involved. He offered, on each occasion, to return more than a civil court found that he owed. How can his actions in this regard be said to be either dishonest or selfish?

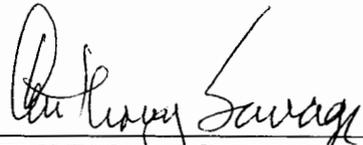
The Board found (BF 44, pg. 22) that Respondent refused to acknowledge the wrongful nature of his misconduct. It is submitted that the Respondent's willingness to return more than he owed can hardly constitute a refusal to acknowledge wrongful conduct in the first place.

The Board further found (BF 44, pg. 22) an indifference in making restitution. This is accurate. After five years (now approaching six) of involvement in criminal proceedings, bar complaints and a civil lawsuit at the instance of "hostile," "aggressive," "paranoid" clients, Respondent's enthusiasm for accomplishing restitution has reached a very low ebb. The complainants have a civil judgment that they can enforce at any time. The Bar should not be allowed to use its proceedings as if it were a collection agency.

CONCLUSION

As previously argued, the Board's Findings and Conclusions as to Count I should be reversed and its recommendation as to sanctions as to Count II should be reduced to an admonition.

Respectfully submitted this 12th day of February, 2007.



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