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SUPREME COURT
STATE OF WASHINGTON

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No. 200,569-1

BY RONALD B. CARPENTER


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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

A. MARK VANDERVEEN.
An Attorney at Law

Bar Number 18616

OPENING BRIEF OF RESPONDENT VANDERVEEN

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This is an attorney disciplinary proceeding against attorney A. Mark Vanderveen (“Vanderveen”). Vanderveen failed to file a form when he received a large legal fee. He pled guilty to violation of a federal statute which required him to file the form. The Bar Association sought disbarment for this but the hearing officer recommended a three year suspension. The Disciplinary Board changed the recommendation to disbarment. Vanderveen brings this matter to this court for consideration of the appropriate level of sanction.

ASSIGNMENTS OF ERROR

1. The Board erred when it changed the recommended sanction from a three year suspension to disbarment.
2. The Board and the hearing officer erred when they used ABA Sanctions Standard 5.11(b) for analysis of the sanction.
3. The Board erred when it struck Finding 25 (Vanderveen action regarding White following Cornett), amended Finding 26 (changing Vanderveen’s level of understanding regarding his responsibilities to his client), struck Finding 29 and Conclusion 39 (Vanderveen’s character and reputation) and struck Conclusion 40 (Vanderveen’s intent.)
4. The Board erred when it failed to find other penalties and sanctions as a mitigator.
5. The Board and hearing officer erred when they found intentional misconduct by Vanderveen.
6. The Board and the hearing officer erred when the found a violation of RPC 8.4(c) regarding dishonesty.

**ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

1. Did the Board commit error when it rejected the three year suspension and recommended disbarment? (Assignments of Error 1 and 2.)
2. Did the Board commit error when it changed the findings of the hearing officer in regard to FFCLR 25, 26, 29, 39 and 40? (Assignment of Error 3.)
3. Did the Board commit error when it did not find the mitigator of other penalties and sanctions? (Assignment of Error 4 .)
4. Did the Board and hearing officer commit error in their determinations of Vanderveen's state of mind in reliance upon the automatic application of ELC 10.14(c)? (Assignment of Error 5.)
5. Did the Board and the hearing officer commit error when they determined that Vanderveen had acted dishonestly? (Assignment of Error 6.)

STATEMENT OF CASE

Factual Background

General Background: Respondent Mark Vanderveen generally accepts the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation ("FFCLR"). Decision Papers, Bar File Number 47, pages 1 – 13. As discussed below he does challenge FFCLR, paragraph 30, a portion of 35, 36, and 37 and challenges the changes to the FFCLR made by the Disciplinary Board in its decision ("Board Decision"). Decision Papers, Bar File Number 59, pages 14 – 19. Except as otherwise noted, citation to the record is to the FFCLR and the Board Decision.

The WSBA charged Vanderveen with an extensive allegation of conspiracy of involvement with a criminal drug ring. First Amended Formal Complaint, Clerks Papers,

Bar File Number 13, pages 10 -20. This was all dismissed by the hearing officer, FFCLR, paragraphs 31 – 34, and was not challenged by the WSBA at the review before the Disciplinary Board. Briefs, Bar File Number 50, pages 1 – 23. Accordingly, this factual recitation will focus on the facts related to the count that was proven; namely failure to file a form. FFCLR, paragraph 35.

Vanderveen was admitted to the practice of law in Washington in 1989. Pursuant to ELC 7.1 he was suspended from the practice of law on July 28, 2005, pending final disposition of this proceeding. Vanderveen remains suspended. FFCLR, paragraph 1.

In February 2005, Robert Kesling (“Kesling”), Wesley Cornett (“Cornett”) and Douglas Spink (“Spink”) were involved in a drug distribution ring. Cornett acted as courier for Kesling and was arrested by federal law enforcement on March 1, 2005. FFCLR, paragraphs 2, 3 and 4. He immediately obtained a public defender as his legal counsel, RP 19, lines 13 – 19, FFCLR, paragraph 6. Cornett agreed to become an informant for the federal government. FFCLR, paragraph 4.

Attorney James White (“White”) represented Kesling. On March 1, 2005, White asked Vanderveen if he would be willing to represent Cornett. White and Vanderveen had worked together in the past as counsel for co-defendants in the same matter. FFCLR, paragraph 5. Vanderveen discussed the representation with Cornett’s girlfriend and directly with Cornett and Cornett agreed to the representation. Cornett did not tell Vanderveen that he (Cornett) already had an attorney in the matter and that the alleged representation by Vanderveen was a sham designed by the federal prosecutors. FFCLR, paragraph 6.

Vanderveen was going to be paid by someone other than Cornett. Vanderveen made this clear to Cornett and explained that nonetheless his only responsibility was to Cornett and that Cornett was his client. Cornett agreed to have his fee paid by a third party. FFCLR, paragraph 7.

In March 2005, Vanderveen received an initial cash payment of about \$9,920, RP 456 and 460, and a later cash payment of \$10,000, RP 469, from White as the fee for representing Cornett. Vanderveen did not file IRS Form 8300, "Report of Cash Payments Over \$10,000 Received in a Trade or Business," as required by law. FFCLR, paragraph 8. It is this failure, the reasons for it and Vanderveen's state of mind in regards to that failure that are the heart of this disciplinary proceeding. This is discussed in more detail below.

Vanderveen proceeded to provide able, competent and unconflicted representation to Cornett. FFCLR, paragraphs 7, 9, 12, 14, 21, 25 and 26. Unknown to him Cornett continued to be actually represented by the federal public defender and was faking the entire representation. How Vanderveen conducted that representation and the reasons for his various decisions and actions consumed much of the hearing and related to the conspiracy allegations against him. At the end of the evidence the hearing officer concluded that none of the conspiracy and other allegations had been proven. FFCLR, paragraphs 31 – 34.

On May 17, 2005, Vanderveen met with the federal prosecutors regarding the alleged conspiracy between himself, White and Kesling. FFCLR, paragraph 22. On July 22, 2005, Vanderveen pled guilty to the felony crime of failure to file a currency transaction report (Form 8300), in violation of 31 USC § 5331(a) and § 5322. FFCLR,

paragraph 23 and Exhibit 21. He was sentenced to three months imprisonment, three months home detention and two years supervised release. He was fined \$10,000. While the parties thought the \$20,000 given to him by Whit could be forfeited under the statute it turned out it could not but Vanderveen nonetheless voluntarily gave the money to the federal government. He was required to perform 240 hours of community service. Ex. 22¹ and RP 474. He served his time at Atwater Detention Center in California where he was subjected to physical harm once the other inmates learned he was a former police officer. RP 478 – 479. By the time of hearing he had served his time in custody, done his home detention, paid his fine, done his community service and had given the \$20,000 fee to the government. All that remained was to finish up the supervised probation. RP 486. In the last six hours of his home detention he became upset so removed the monitoring bracelet early. He was sentenced to an additional 6 days of detention and an additional 30 days of home detention for this, which had also been completed by the time of the hearing. RP 484 – 486.

He had been a judge pro tem and as a result of his plea bargain he entered into a stipulation with the Commission on Judicial Conduct for a censure and agreed not to serve as a judge pro tem again and not to run for judge without the Commission's approval. RP 486 - 487.

Factual Background Regarding Receipt of Funds and Vanderveen State of Mind Regarding Form 8300: Vanderveen received one payment of slightly less than \$10,000 and another of \$10,000. He put these cash payments in his safe at his home. RP 456, 469. He did this because he had concerns about how the case was developing and the ultimate

¹ This exhibit is not part of the record forwarded to the court but will be forwarded to court as supplement to the record.

scope it could encompass. He felt he might just be giving the money back to White. He thought since White had given it to him in cash, if he returned the fee, it would be better to be able to say to White "This is what you gave me, I'm giving it right back to you." RP 459 – 461.

31 USC § 5331(a) requires that anyone in a trade or business who receives more than \$10,000 in cash in one transaction or two or more related transactions is required to file a form reporting receipt of the funds. When Vanderveen received the second \$10,000 cash payment as part of a related transaction he was required to file the necessary form, in this case IRS Form 8300. The reason he did not do so is because he was unaware that such form was required:

Q: (Bulmer) Prior to receiving this \$10,000 had you ever filed a Form "1083", I guess it is?

A: (Vanderveen) I think it's an 8300. No.

Q: Were you aware of the obligation to file an 8300?

A: No, I wasn't aware, but I agree that I should have been.

Q: When was the first time that you became aware of the 8300 form?

A: On the phone call that we listened to earlier that either occurred on that Saturday night or Sunday night was my recollection, from Jim [White] when he mentioned that.

RP 467.

Vanderveen went on to testify that based on the phone call he had with White, he called his accountant and learned about the form. She explained it to him and sent him a copy with instructions. He took that form and instructions with him when he met with the Assistant United States Attorney (AUSA) shortly thereafter. RP 467 – 468.

The phone call referenced by Vanderveen is a phone call taped by the federal prosecutors. Unknown to Vanderveen, White had agreed to cooperate with the federal prosecutors and left a message for Vanderveen. Vanderveen then called White back. This call happened shortly before Vanderveen went in to see the AUSA. RP 415 – 416. The transcript of the call is Exhibit 126B.² On pages 5 and 6 Vanderveen and White discuss the investigation which is apparently going on into them. Vanderveen asked White about the cash White had received:

Vanderveen: How much cash – how much cash were you given originally? Did you – I mean did you – did you put it – did it go through in such a way that it was reported and everything?

White: Well, ultimately it funneled mostly through the bank. You know, I gave some away, I paid some bills; but for the most part, yeah, it went into the bank.

And I – as I understand it there are rules now that govern that that I was unaware of, but Mestel was telling me that now there are rules that govern the receipt of cash that – you know, there are some requirements that I didn't meet.

Vanderveen: Like what?

White: There are some forms that have to be filled out and, you know – I didn't know. He gave me numbers and he said, you know, it doesn't matter now, I mean –

Vanderveen: Yeah, I'm just thinking I get cash from clients all the time. I don't fill out any forms.

White: Well, I think if the aggregate exceeds 10,000 in a 12-month period, as I understand it, you've got to fill out some forms.

Vanderveen: Really?

White: Yeah. That was news to me. But ---

² This exhibit was supposed to be sent to the court and it is identified on the list of exhibits provided to the court but from the copy of the record sent to the court received by Vanderveen's counsel it appears that the exhibits cover sheet was sent but not the exhibit itself. We will request it be forwarded to the court.

Vanderveen: So if somebody charged with a burglary walks in and pays you 15 grand in cash to represent them, you have to fill our forms?

White: Right, right, right. And if you don't, it's --- it's evidently a crime.

Vanderveen: Really?

White: Yeah.

Vanderveen: You'd think one of us would know that.

White: Well, yeah, you'd think so. I mean, I don't know -- I haven't really asked around, but I'd be willing to bet nine out of ten never heard of that one. But I am pretty aware of it now.

Vanderveen: Wow. Well, I got 20 grand, does that mean I should go fill out a form?

White: Yeah. I -- would think so....

Later the conversation, page 8, returns to the filing of forms:

Vanderveen: Well, I guess I have to call someone and ask them what this banking regulation is. I -- you know, because I can think of --- I can think of other people that have come to me with, you know \$10,000 or more, and I've never filled out any forms.

White: Yeah.

Vanderveen: Shoot, I've got that federal case I'm working on for -- with what's his name -- Greenberg, Todd Greenberg, right now in the pseudoephedrine case. You know, those people gave me 70 grand.

White: In cash?

Vanderveen: No, in a check. Well, that's true. It wasn't cash.

White: It's just cash. It's just cash.

Vanderveen: Oh, I see. Huh.

Vanderveen may have been aware that banks might have a reporting requirement, however, he was not aware of any obligation for someone other than a bank to file any forms when more than \$10,000 in cash was received.

Procedural History

The Association filed an Amended Formal Complaint charging Vanderveen with 5 counts of misconduct. First Amended Formal Complaint, Clerks Papers, Bar File Number 13, pages 10 -20. After the hearing the first 4 counts were dismissed. FFCLR, paragraph 43. The hearing officer found a violation of Count 5:

Count 5: By committing the acts which resulted in the guilty plea to failing to file a currency transaction report (IRS Form 8300), as set forth about, Respondent violated RPC 8.4(b), RPC 8.4(c) and/or RPC 8.4(i).

He determined that RPC 8.4(b) (acts which adversely reflect on honesty, trustworthiness or fitness) had been proven by the conviction since the test was very low, requiring only an “adverse” reflection. He determined that RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation) had been violated in that the failure to file Form 8300 was “dishonest” because it reflected untrustworthiness and lack of integrity. He specifically found that Vanderveen had not engaged in misrepresentation, deceit or fraud. He dismissed the RPC 8.4(i) (moral turpitude) allegation. FFCLR, paragraph 35.

The hearing officer reluctantly found that “willful” under the statute also means “intentional” so when Vanderveen pled guilty the hearing officer was constrained under the rules to find that Vanderveen’s state of mind was “intentional.” FFCLR, paragraphs 36 and 40. Accordingly, he found the presumptive sanction under ABA Standard 5.11(b) was disbarment. He found the aggravator of substantial experience in the practice of law, Standard 9.22 (i), and mitigators of absence of disciplinary record; full and free disclosure; character and reputation; and remorse. Standards 9.32 (a), (e), (g) and (l).

He then analyzed the meaning of the words “intentional” and “willful” and Vanderveen’s actions in the context of the plea agreement. He further considered the

purposes of sanctions and the Supreme Court's statements regarding the need to "ensure individualized justice is dispensed" and that justice "is not imposed in a vacuum." He concluded that justice in Vanderveen's case, was properly served by imposition of a sanction of a three year suspension with credit for the time Vanderveen has been suspended pursuant to ELC 7.1.

Upon consideration by the Disciplinary Board, it adopted the FFCLR except it struck Finding 25 dealing with what Vanderveen had done in regard to communications with White about White following Cornett when Cornett left Vanderveen's office; amended Finding 26 regarding Vanderveen's actions as an attorney by changing the sentence "Respondent clearly understood that his responsibilities were to Cornett" to "Respondent understood his responsibilities were to Cornett" and striking the sentence "He demonstrated that fact consistently"; striking paragraph 29 to the effect that Vanderveen had a good reputation; and striking the mitigator of character and reputation found at paragraph 39. Board Decision, pages 1 – 4.

The Board also struck paragraph 40 of the FFCLR. This paragraph contained the hearing officer's thinking on why, in the context of the ABA Standards, intentional could be differentiated from willful. The Board apparently recognized that whether Vanderveen actually acted intentionally was different than whether, under a legal analysis, he was deemed by reason of his conviction to have acted intentionally since in striking paragraph 40 it stated "..... [T]he Hearing Officer correctly found that Respondent's mental state for purposes of the disciplinary hearing was intentional." Board Decision, page 5.

By a vote of 10-1 the Board increased the sanction to disbarment concluding that the presumptive sanction was disbarment, that the aggravators and mitigators did not

justify decreasing the presumptive sanction and that disbarment was proportional to other cases. Board Decision, page 5.

Vanderveen timely appealed the decision and now brings this matter before the court for consideration. Decision Papers, Bar File Number 60, pages 20 – 21.

ARGUMENT

Standard for Review

The standard for review before this court in an attorney disciplinary matter is generally established law and was recently summarized in *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007):

This court bears the ultimate responsibility for lawyer discipline in Washington. *In re Disciplinary Proceeding Against Cohen (Cohen II)*, 150 Wn.2d 744, 753-54, 82 P.3d 224 (2004). However, we give considerable weight to the hearing officer's findings of fact. *E.g.*, *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 717, 72 P.3d 173 (2003). Unchallenged findings of fact are treated as verities on appeal. *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 735, 122 P.3d 710 (2005). Where challenged, we will uphold the hearing officer's findings if they are supported by substantial evidence. *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 208, 125 P.3d 954 (2006). Substantial evidence is evidence sufficient "to persuade a fair-minded, rational person of the truth of a declared premise." *Id.* at 209 n.2 (internal quotation marks omitted) (quoting *In re Disciplinary Proceeding Against Bonet*, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001)). "[W]e ordinarily will not disturb the findings of fact made upon conflicting evidence." *Longacre*, 155 Wn.2d at 736 (quoting *In re Disciplinary Proceeding Against Miller*, 95 Wn.2d 453, 457, 625 P.2d 701 (1981)). We also give great weight to the hearing officer's evaluation of the credibility and veracity of witnesses. *Longacre*, 155 Wn.2d at 735; *Whitt*, 149 Wn.2d at 717.

The Association must prove misconduct by a clear preponderance of the evidence. *Poole*, 156 Wn.2d at 209. The clear preponderance standard requires more proof than simple preponderance, but less than beyond a reasonable doubt. *Id.* The hearing officer's ultimate conclusion that misconduct occurred should be upheld on review if it is supported by substantial evidence in the record that the lower court could reasonably have found would meet the clear preponderance standard. *See Bay v. Estate of Bay*, 125 Wn. App. 468, 475, 105 P.3d 434 (2005) (citing *In re Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986)). Our substantial evidence review should therefore take into account the clear preponderance

burden of proof. We review conclusions of law de novo and will uphold them if they are supported by the findings of fact. *E.g., Cohen II*, 150 Wn.2d at 754.

An attorney challenging findings of fact must present argument as to why the specific findings are unsupported and cite to the record to support that argument. *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005). The attorney must do more than argue his or her version of the facts while ignoring the testimony of other witnesses. *Id.* We will not overturn findings based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer and Board. *Poole*, 156 Wn.2d at 212 (citing *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 133, 94 P.3d 939 (2004)).

Perhaps the most important point, however, on the standard of review is that “[W]hile we do “not lightly depart from the Board's recommendation,” we are “not bound by it.” *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 565, 9 P.3d 822 (2000) [Emphasis added.].

Discussion

Other Charges and Related Findings: At the hearing the WSBA sought to show that Vanderveen had engaged in a widespread and extensive criminal drug conspiracy. The hearing officer found that they did not prove these allegations and the Association did not seek review of those conclusions. We have not addressed these issues here since this case turns on the issue of what is the appropriate sanction for a lawyer who was convicted for failure to file a form and his state of mind when he did not do so. Any discussion by the Association of the alleged conspiracy is an improper attempt to taint Vanderveen in order to justify the disbarment recommendation. Such attempts should be rejected.

The Board made various findings about FFCLR 25 and 26 relating to whether Vanderveen acted appropriately as counsel. Vanderveen challenges those findings because the hearing officer correctly reached conclusions about what Vanderveen did

based on the hearing officer's experience and special knowledge. *In re Disciplinary Proceeding Against Susan Gail Diamondstone*, 153 Wn.2d 430, 440 105 P.3d 1 (2005), citing *In re Disciplinary Proceeding Against Brown*, 94 Wn. App. 7, 14, 972 P.2d 101 (1998) (noting that members of the dental disciplinary board could use their experience and specialized knowledge to evaluate and draw inference when evaluating unprofessional conduct.) However, we will not further discuss them since they appear to be related to dismissed charges but reserve the right to do so in the event the Association should assert the findings of the Board regarding FFCLR paragraphs 25 and 26 somehow relate to the issue regarding the sanction for Vanderveen's conviction on the failure to file IRS Form 8300.

Intentional Conduct: There are two primary issues in this case: 1) Does the fact that Vanderveen pled guilty to a crime which has an element "willful" conduct mean that for purposes of the ABA Standards he must be deemed to have acted "intentionally?"; and 2) Even if intentionally is used for the state of mind analysis under the Standards, does this necessarily result in disbarment?

The Bar's, and apparently the Board's, argument in regards to applying an intentional state of mind goes like this: Vanderveen pled guilty to a crime which included as an element "willful" conduct. Relying on *Ratzlaf v. US*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) they assert that "willful" means "intentional." They then turn to the ELCs and point to ELC 10.14 (c) providing:

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.

From this they argue that since Vanderveen is conclusively deemed as a matter of law to have acted intentionally, it follows that this intentional is the same as the intentional under the ABA Standards and, therefore, Vanderveen must be deemed to have had an intentional state of mind under the Standards. This is so despite the true fact that Vanderveen did not know about the requirement to file the form. The hearing officer is careful to provide that his finding of intentional is not fact based but rather is based on operation of law and the Board follows suit (mental state for purposes of disciplinary hearing was intentional, page 5 of Board's Decision.)

Having determined that as a matter of law, and relying upon the determination that Vanderveen acted "dishonestly," they conclude that the presumptive sanction is under Standard 5.11(b):

5.0 Violations of Duties Owed to the Public

5.1 Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(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.

At this point the hearing officer and the Board divide with the hearing officer finding that "willful" may as a matter of law be intentional, Vanderveen did not actually plead to intentional and that combined with the other mitigators justifies the lesser sanction of a three year suspension. The Board, having concluded that disbarment is the

presumptive sanction, discounts the hearing officer's discussion and concludes no reduction is to be made and recommends disbarment.

This argument rest upon the premise that "willful" means intentional, that ELC 10.14(c) requires that intentional be used for purposes of the sanction analysis, that intentional under the federal criminal statute is the same as intentional under the Standards and that Vanderveen acted dishonestly.

The Association relies principally on *Ratzlaf, supra*, for the proposition that "willful" means that Vanderveen knew of the reporting requirement and had as a purpose a plan to disobey the law when he failed to file Form 8300. *Ratzlaf* interprets a different subsection of Title 31 – namely, Section 5324 which prohibits the purposeful "structuring" of payments to avoid the reporting requirement. A necessary element of proof in such a case is that the defendant acted "on purpose" which would, of course, require that the defendant knew he was acting improperly and intended to disobey the law when doing so.

There is no "with the purpose" requirement in Section 5331(a) – all that is required is that the defendant be in business, have received the money and "willfully" have failed to report it. The Association recognizes that the "on purpose" requirement is not present as an element within Section 5331(a) but says that it is not required since the court in *Ratzlaf* cites language to the effect that the use of "willful" in Section 5322 to apply to a number of subsections should be interpreted as having an identical definition as to all sections to avoid malleability and individual interpretations. *Ratzlaf* at 143. The court, at that point, was arguing that since the willful language of Section 5322(a) had been interpreted to mean with specific knowledge of the law and the intent to disobey it

in regards to other sections of Subsection IV, Title 31, that there were policy reasons to do so in interpreting Section 5324. None of the sections cited for this argument involved the section at issue here, Section 5331, and the court did not find that at all times and in all circumstances the willful language of Section 5322 were to be applied the same.

In fact, what the court stated was that “Willful ... is a word of many meanings and ... its construction [is] often influenced by its context.” *Ratzlaf* at 141. If the WSBA is correct that actual knowledge of the law and the intent to violate it is required for a Section 5331 violation than consistent with that ignorance of the law would be a defense when a business person received \$10,000 or more in cash in a single or related transaction and failed to file Form 8300. This would effectively vitiate the “venerable principle that ignorance of the law generally is no defense to a criminal charge” even in the absence of the “on purpose” language found in Section 5324. *Ratzlaf* does not presume to impose any definition of “willful” to apply to every section of Subsection IV, Title 31 and where, as here, the requirement of the section being interpreted by the court is an “on purpose” element, it does not provide binding precedent as to what the term “willful” means as it is applied to Section 5331.

Because there is no actual interpretation of willful as it applies to Section 5331, its application in an attorney discipline case should be given an expansive definition rather than the narrow one advanced by the Association. The very reason *Ratzlaf* went to the Supreme Court was because there were very different interpretations of the scienter element required for a Section 5324 conviction with different circuits holding differently. *Ratzlaf* at 136. Given that it is not certain how Section 5331 would be interpreted and absent a specific case with a specific determination regarding it Vanderveen should be

given the benefit of possible alternate interpretations of the definition of “willful” as applied to Section 5331. The court should conclude that for purposes of attorney discipline in this case that “willful” under Section 5331 either does not mean the same as intentional or that given the vagueness of the statute at this point it is not appropriate to apply it as a matter of law in a disciplinary proceeding.

The court should also reject the argument that even if “willful” in Section 5331 does mean intentional that ELC 10.14 (c) requires that as a matter of law this element be deemed conclusively proven for purposes of analysis under the Sanctions Standards. What ELC 10.14 does is prevent the attorney from coming to the bar hearing and saying “I am not guilty of the crime.” The rule states that the conviction is only proof of the conviction. It does not state that the elements of the crime are deemed conclusive proof of the elements used in a Standards analysis. This case proves why there can and must be a difference between the determination that a crime has occurred and any sanction for the crime. Certainly it makes the job easier for the WSBA if it can assert that where a crime includes an intentional element no matter what the truth is that intent element will be deemed as a matter of law to be the same as the intent element found in the Standards. Making it easy for the Bar does not make it right to.

The issue the hearing officer was trying to deal with is what do you do when the literal application of the law results in too harsh a sanction? He recognized that Vanderveen had failed to file a form and that the WSBA had not proven that this was for any reprehensible purpose – the statute requires none. What happened here is clear – Vanderveen did not know about the need to file the form so did not submit it. When confronted with a plea bargain or having to go to trial on substantially more significant

charges he elected to accept the plea bargain. The question presented to the hearing officer was whether under such circumstances disbarment was the appropriate individualized justice called for by the Supreme Court. He rejected such determination, as the court did in the felony convictions of *Curran*, *Plumb* and *McLendon*, see below. He recognized that the most the Association proved was that a lawyer received more than \$10,000 in cash and did not file a form. It did not prove that he did so with the intent to hide the money or other improper motive. In fact, they proved no motive since they did not prove the conspiracy allegations against him. Under these circumstances a three year suspension is a sufficient sanction for the failure to file a form where there was no showing of improper motive.

The hearing officer also found that Vanderveen had acted “dishonestly” stating that “The failure to file Form 8300 violated RPC 8.4(c), because it constituted “dishonesty” in that it reflected untrustworthiness and lack of integrity.” FFCLR 35. It does not follow, just because someone does not file a form, that they are acting untrustworthy or showing a lack of integrity. There is no factual finding to support a statement that Vanderveen lacked integrity and was untrustworthy – the hearing officer’s statement is simply a circular argument going back to his finding of misconduct under RPC 8.4(b) as shown by his reference to “reflected.”

There is no proof that Vanderveen lacked integrity. Even if the conviction is conclusive proof of the RPC 8.4(b) (conviction of a crime) allegation, there is nothing under the sections of the USC at issue here that requires that Vanderveen acted dishonestly. The Bar was required to prove independently that he did. There is no substantial evidence in the record showing that he did. Even if his testimony about why

he did not file the form is not considered in connection with intentional element of RPC 8.4(b) it must be considered in connection with the RPC 8.4(c) allegation since the conviction does not self-prove that Vanderveen acted dishonestly. Vanderveen's testimony shows that he did not know about the requirement to file the form and that he did not act dishonestly when he did not do so.

The finding of dishonesty must be rejected as unproven and as such the finding that there was a violation of RPC 8.4(b) which requires such find cannot be sustained.

For purposes of the Standards, the Court should conclude that ELC 10.14(c) does not mean that the state of mind element under the Standards has been conclusively proven by a conviction and that independent evidence can be received for consideration of the state of mind analysis under the Standards. When that is applied in this case, it is clear that Vanderveen did not act intentionally and acted either knowingly or negligently. As such the presumptive sanction is not disbarment.

Additionally, because there was no dishonesty which "seriously adversely reflects on the lawyer's fitness to practice," Standard 5.11(b), analysis under the disbarment section of Standard 5.1 is not appropriate because that section requires that level of dishonesty.

The appropriate presumptive sanction is Standard is 5.12 or 5.13 calling for suspension or reprimand. Because Vanderveen has been suspended pending resolution of this proceeding since July 2005 and likely will remain suspended until more than three years has passed he does not argue for a sanction of reprimand or for less than three years. He does argue that the disbarment recommendation should be rejected and he a

suspension be imposed for the time he has actually been suspended with credit for that time.

Individualized Justice: Basically what the Association and the Board seek to do is to use the legal fiction that when a plea bargain is entered for a crime that involves “willful” conduct that as matter of law this proves that this is identical to the word “intentional” in the ABA Standards. Other than statements that the hearing officer’s reasoning is “illogical” there is no reason why the hearing officer’s decision, which saw through this fiction, should be rejected.

The hearing officer’s decision is not illogical but rather reflects the thoughtful considerations of a decision maker seeking to balance the various interests involved while providing for the individualized justice that is to be expected in a bar proceeding. A careful reading of his decision shows that he gave a great deal of thought to the concept of “justice” in these proceedings and refused to simply blindly plug in a formulistic interpretation of the Standards but rather heeded the Supreme Court’s admonishment that “[t]he action appropriate in a given case can only be determined by its particular facts and circumstances....” and that the goal in each case is to “ensure that individualized justice is dispensed.” *In re Livesey*, 85 Wn.2d 189, 193 532 P.2d 274 (1975).

The ABA Standards also provide that attorney discipline is a case-by-case matter, not something that is imposed in order to simply conform to other cases:

[T]he standards provide a theoretical framework to guide courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards thus are not analogous to criminal determinate sentence, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

Theoretical Framework, page 6, Standards for Imposing Lawyer Sanctions, ABA Center for Professional Responsibility, Copyright 1986.

The hearing officer recognized that a sanction of disbarment, under the circumstance of this case and for what Vanderveen actually did, was too harsh. He properly determined that the Standards do not require automatic application of the presumptive sanction and allow for, and in fact require, recognition of the unique factors of each case. In this case, justice requires a sanction of less than disbarment.

Felony Disbarment Rule and Proportionality: The determination that each case must be based on its own facts and circumstances, *see* discussion above, is consistent with Washington's rejection of a rule that provides for "automatic disbarment" upon a felony conviction. *In re Disciplinary of McGrath*, 98 Wn.2d 337, 344, 655 P.2d 232 (1982) ("There is no automatic felony disbarment in this state."); cited with approval in *In re Discipline of Curran*, 115 Wn.2d 747, 761, 801 P.2d 962 (1990). In its briefing below the Association listed cases where there has been disbarment for felony convictions. Briefs, Bar File Number 50, page 22 and 23. This was little more than an attempt to show that there is effectively a felony disbarment rule in this state but that is, of course, not correct.

The *Curran* case was a felony vehicular homicide case in which two people were killed which resulted in a six month suspension. The WSBA acknowledges that *In re Discipline of Plumb*, 126 Wn.2d 334, 892 P.2d 739 (1995) (felony conviction for welfare fraud) and *In re Discipline of McLendon*, 120 Wn.2d 761, 845 P.2d 1006 (1993) (theft) both resulted in less than disbarment. These cases show that even in intentional dishonesty cases that a sanction of less than disbarment can be appropriate. The rest of

the cases in their list all involve felony larceny, perjury, theft, mail fraud, child molestation and the like.

The only case that involves filing of forms is *In re Seijas*, 52 Wn.2d 1, 318 P.2d 961 (1957) in which the lawyer pled guilty to intentionally filing fraudulent tax returns which the court determined showed a lack of moral turpitude. He was disbarred based on a lack of moral turpitude, something not present in this case. There is nothing which compels disbarment in a felony case, whether the lawyer acted intentionally or not, and simply putting forth a list which shows that thieves, child molester and liars are disbarred does not show that Vanderveen should be disbarred.

The Disciplinary Board asserted that disbarment was proportional to other cases but did not identify any and we submit that there are no cases which are similar to the unique facts of this case. While certainly in the most global of senses there are cases where there are disbarments for felony convictions, these are not “similarly situated cases in which the same sanction has either been approved or disapproved.” *In re Discipline of VanDerbeek*, 153 Wn.2d. 64, 97, 101 P.3d 88 (2004). The Board appears to have done little more than simply apply a felony disbarment rule, which is not the law of this state.

There is no case which is similar in facts to this one. As such “there are no directly analogous cases to guide this court in determining the proportionality of the sanction” and there were none for the Board either. *In re Disciplinary Proceedings against Dann*, 136 Wn.2d 679, 83, 60 P.2d 416 (1998)

Mitigators: The hearing officer found the mitigator of good character and reputation. Standard 9.32 (g). The Board struck this mitigator stating there was nothing in the record to support it. This is not correct, Vanderveen testified that he had been a

judge pro tem in several different courts. RP 486 - 487. Furthermore, the hearing officer had before him Ex. 101 which was the Stipulation, Agreement and Order of Censure before the Commission on Judicial Conduct.³ That stipulation provided that Vanderveen had no history of prior judicial misconduct, that Vanderveen had not exploited his judicial position for personal gain, that he had acknowledged his behavior and accepted responsibility. Hearing officers are allowed to draw reasonable inferences from the record. *In re Disciplinary Proceeding Against Cohen*, 149 Wn.2d 323, 333, 67 P.3d 1086 (2003). It was a reasonable inference for the hearing officer to conclude that Vanderveen would not have been permitted to sit as a judge pro tem in several courts unless Vanderveen had a good character and reputation. The determination by the Board to strike this mitigator should be reversed and the original finding restored.

Vanderveen seeks the mitigator of "Other penalties and sanctions" under Standard 9.32 (k) – Vanderveen has served three months in prison, been on house arrest, paid \$10,000 in fines and voluntarily turned over the \$20,000 to the government. The prison time was hardly done at a "country club" – he was physically harmed by the other inmates because he used to be a police officer. Additionally, he has been sanctioned by the Commission on Judicial Conduct and may not serve as a judge again without its permission. Vanderveen has also been the subject of considerable adverse publicity much of it related to the unproven conspiracy charges. Ex. 35 – 43. *In re Disciplinary Proceedings against Dann*, 136 Wn.2d 679, 83, 60 P.2d 416 (1998) (Hearing examiner taking publicity into consideration as a mitigating factor.) Vanderveen has been subject to other penalties and sanctions and this mitigator should be given consideration.

³ This exhibit is not part of the record forwarded to the court but will be forwarded to court as supplement to the record.

CONCLUSION

The hearing officer in this matter concluded that no trier of fact had concluded that Vanderveen knew of the form and, despite knowing of it, failed to file it. What he did was look to what the WSBA really proved which was that Vanderveen failed to file a form. His findings rejected the concept that even if the conduct was "intentional" this failure, where there was no proof of any improper motive, merited the pro forma imposition of disbarment. We ask that the Court reject the concept of literalism when determining individualized justice; reject the Bar's argument that it has "automatically" proven intent within the meaning of the Standards just because a lawyer pled guilty; reject the argument that a single instance of the failure to file a form merits disbarment where that failure was not shown to be based on improper motives; reject the argument that Vanderveen did not have good character; and accept that Mr. Vanderveen did suffer other penalties and sanctions. We ask that the court either determine that a suspension or reprimand is the appropriate presumptive sanction or after consideration of the mitigators and the justice of the situation adopt the sanction recommendation of the hearing officer.

Dated this 8th day of May, 2008.

**FILED AS ATTACHMENT
TO E-MAIL**

Kurt M. Bulmer, WSBA # 5559
Attorney for Respondent Vanderveen

OFFICE RECEPTIONIST, CLERK

To: Kurt Bulmer
Cc: Chris Gray
Subject: RE: Respondent's Opening Brief - Vanderveen Sup. Ct No. 200,569-1

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From: Kurt Bulmer [mailto:kbulmer@comcast.net]
Sent: Thursday, May 08, 2008 4:40 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Chris Gray
Subject: Respondent's Opening Brief - Vanderveen Sup. Ct No. 200,569-1

Attached for filing is the Respondent's Opening Brief in this matter.

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