

200,926-3
No. 200,296,3

IN THE WASHINGTON STATE SUPREME COURT

IN RE THE DISCIPLINARY MATTER
OF
THOMAS KAMB
WSB #16944

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SUPREME COURT
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APPEAL FROM THE DISCIPLINARY
HEARING BEFORE THE
WASHINGTON STATE BAR ASSOCIATION

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. **STATEMENT OF THE CASE**

Mr. Kamb adopts the statement of the case as set forth in his opening brief.

II. **ARGUMENT**

A. Mr. Kamb's Objects to the Findings of Fact not Supported by a Clear Preponderance of the Evidence.

With respect to Mr. Kamb's objections to the Findings of Fact, he stands by the objections set forth in his opening brief. In addition, he responds as follows to certain arguments raised by the Association.

1. Mr. Kamb Discussed Suppression of the BAC Results with Sloan Johnson

The Association takes issue with Mr. Kamb's discussion of suppressing the BAC results with Sloan Johnson before Ms. Magunson's May 13, 2008 court hearing. In the Association's brief at pgs. 13-15, the Association cites to certain parts of Mr. Kamb's hearing testimony. When reviewing Mr. Kamb's entire hearing testimony related to this issue, however, it is clear that Mr. Kamb's discussions regarding his negotiation approach with DUI cases is often general as opposed to specific, particularly with reference to suppressing BAC results. Although Mr. Kamb followed the general category of case discussion, he did not specifically recall speaking about Ms. Magnuson's case, but based upon his course of conduct in dealing with Mr. Johnson, he was certain that he spoke about his DUI clients whose primary language was not

English. Ms. Magnuson's case was one of those cases. See Transcript Vol. I at 159-160.

Further, considering the record, there is not a clear preponderance of evidence that Mr. Kamb failed to act diligently with respect to Ms. Magnuson or any other DUI client because the manner in which he dealt with Ms. Magnuson's case was comparable to the manner in which he dealt with other clients over the period of his practice. Significantly, Ms. Magnuson never testified she was disappointed in Mr. Kamb's representation. Respectfully, the record does not support that Mr. Kamb failed to act diligently in his representation of Ms. Magnuson. Accordingly, Mr. Kamb objects to Findings of Fact 3.6, 3.9 and 3.10.

2. Mr. Kamb did not Commit a Felony.

The Association asserts and the Hearing Officer found, that once Mr. Kamb wrote on the court order, he committed a felony in violation of RCW 40.16.010. This finding is clearly erroneous. Although the Association is correct that a criminal conviction is not a pre-requisite to imposing a disciplinary sanction for criminal conduct, there was no evidence to support, by proof beyond a reasonable doubt, that Mr. Kamb committed any felony offense. Significantly, Mr. Kamb was negotiating Ms. Magnuson's case with Sloan Johnson, the deputy prosecuting attorney. At no time, did Mr. Johnson report Mr. Kamb's actions to the elected prosecuting attorney, no criminal investigation was conducted, and there was no suggestion that Mr. Kamb engaged in or even contemplated engaging in criminal conduct. If a basis in fact existed to charge Mr. Kamb with a crime, he was in the right arena for that to occur. Clearly that did not

occur. Accordingly, Finding of Fact 3.26 stating Mr. Kamb committed a felony is clearly erroneous as the record does not support such finding.

B. There is Little or No Injury to Ms. Magnuson or the Legal Profession

The Association asserts that Mr. Kamb's conduct inflicted serious injury on both Ms. Magnuson and the legal profession. Association's Brief at 25-26. Respectfully, such assertion is not supported by the Hearing Officer's Findings of Fact and Conclusions of Law because no injury analysis was conducted. See FFCLR 3.23, 3.24.

Initially, the damages to Ms. Magnuson, if any, are speculative. Contrary to Findings of Fact 3.23 and the Association's argument, Ms. Provoe never testified that she would have found that the proposed suppression order would have collaterally estopped the Department of Licensing from suspending Ms. Magnuson's license. Rather, Ms. Provoe testified that she would have needed more information from Mr. Kamb about the criminal proceeding before she could make such determination. RP 83-84. This never occurred. As such, the damage to Ms. Magnuson is speculative. And as noted previously, Ms. Magnuson never testified she was damaged by Mr. Kamb or was disappointed in Mr. Kamb's representation.

Further, the Hearing Officer's finding that Mr. Kamb injured the judicial and administrative law system is not supported by the record. Mr. Kamb stated to Ms. Provoe what he believed, i.e. that he had a suppression order in Ms. Magnuson's case. Although this belief was incorrect, he never provided any false information, i.e. a document, to Ms. Provoe after his hearing on the Magnuson case. As such, the injury is speculative at best.

Pursuant to the ABA Standards, "'injury' is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious injury' to 'little or no injury'; a reference to 'injury' alone indicates any level of injury greater than 'little or no' injury." ABA Standards, Definition at 17.

Although the Hearing Officer found an "injury" to Ms. Magnuson and the judicial and administrative law system, he did not state what degree of injury existed. The Hearing Officer applied ABA Standard 5.11(b) and ABA Standards 6.11 to the conduct charged in Count 1. Under both Standards, there needs to be evidence by a clear preponderance to support a finding that the conduct seriously reflects on the lawyer's fitness to practice. (5.11(b)) and/or causes serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding. (6.11). With respect to Count 2, the Hearing Officer applied ABA Standard 5.11(a) which requires a finding of serious criminal conduct.

Here, Mr. Kamb engaged in a singular, isolated event. As set forth previously, the finding of serious criminal conduct is not supported by the record. Further, there is no evidence in the record to support a finding that the injury he caused, if any, amounts to the type of injury contemplated by ABA Standards 5.11 (a), 5.11(b) or 6.11. As such, given that serious or potentially serious injury was not established, disbarment is simply too harsh a sanction.

C. The Sanction Recommended is Disproportionate to Other Cases Heard by the Supreme Court.

Mr. Kamb relies upon his arguments set forth in his opening brief, and, in addition, urges this court to consider its recent decision in In Re Disciplinary Proceeding of Ferguson, 170 Wn.2d 916, 246 P.3d 1236 (2011).

There, attorney Ferguson received a 90 day suspension for knowing violations of RPC 3.4 (c), RPC 3.5 (b), 8.4 (c), 8.4(d), by appearing ex parte before a superior court in a contested matter without notice to opposing counsel, by failing to disclose all relevant facts to the court at the ex parte appearance, and by obtaining ex parte relief through misrepresentation and deceit. The Hearing Officer determined that the charges were proved and recommended that the lawyer be suspended from the practice of law for 30 days.

Upon review, the Supreme Court held that Ms. Ferguson should be suspended from the practice of law for 90 days. Significantly, the court found that the other party, the Bransfords, suffered actual harm as a result of Ms. Ferguson's conduct, which included increased legal expenses to them, delay, and an order finding the Bransfords in contempt of court. Ferguson, 170 Wn.2d at 933. The court also found that Ms. Ferguson's conduct was knowingly committed; thus warranting the longer suspension.

Importantly, this Court, has previously stated as follows when determining what type of discipline is appropriate:

The basic reason of all disciplinary action – reprimand, **suspension, or disbarment** – in broad. It is *for the protection of the public*. It is to preserve public confidence in the judicial system and protect it from misconduct. We said in *In re Little*, 40 Wn.2d 421, 431, 244 P.2d 255 (1952):

“The final adjudication should provide neither more nor less than the facts fairly require to penalize the offender, deter others, and indicate to laymen and members of the bar that proper discipline will be enforced and the standards of the profession maintained.” [Italics ours.]

In Re Disciplinary Proceeding of Hawkins, 77 Wn.2d 777, 778-79, 466 Pl.2d 147 (1970).

Here, the sanction of disbarment is more than the facts warrant to address Mr. Kamb's conduct. Given a proportionality analysis, if this Court determines that Mr. Kamb's conduct was more than negligent, then the only appropriate sanction would be a suspension. As such, this Court should reject the Disciplinary Board's disbarment recommendation and impose a sanction that is supported by a clear preponderance of the evidence.

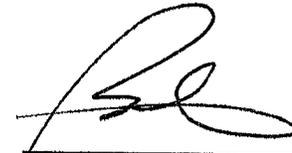
III. CONCLUSION

As stated in Mr. Kamb's opening brief, he is remorseful for the conduct he engaged in, which was a singular, isolated event. The sanction of disbarment is not supported by a clear preponderance of the evidence. Upon considering the facts set forth above, and applying the ABA standards and the case law, Mr. Kamb urges that this Court should impose a reprimand for his conduct as alleged in Counts I and II. If this Court finds that his conduct was more than negligent, then the only appropriate and greatest sanction would be that of suspension.

Respectfully submitted this 3rd day of August, 2011.

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By:



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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail, ABC-Legal Messengers, Inc. or via email, to the following:

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Signed at Tacoma, Washington, this 3rd day of August, 2011.


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Attached please find for filing

Reply Brief of Appellant Kamb

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