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Supreme Court No. ~~261-088-1~~

201088-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

JOE WICKERSHAM

Lawyer (Bar No. 18816)

OPENING BRIEF OF JOE WICKERSHAM

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 ORIGINAL

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I. INTRODUCTION

This is a proceeding against Joe Wickersham (“Wickersham”), a visually-impaired attorney in good standing who has been defending citizens of Washington in their legal matters for the past 22 years, and involves events related to four matters during the summer of 2010.

The first matter was a temporary period of mental trauma and stress that was found by the Hearing Officer to be a contributing factor to the alleged misconduct in this proceeding (FOF 112), as well as a mitigating factor by the Washington State Bar Disciplinary Board (“Board”) (Board Decision, pp. 4-5). This was caused by a series of events that included break-ins at Wickersham’s office and home (FOF 58), unusual encounters with police officers (FOF 60, 70, 77-78) and the unfortunate shooting of Wickersham’s service dog, at his home, by a Fish and Wildlife officer. (FOF 101).

Wickersham was subsequently diagnosed with a mood disorder, depressive disorder and post traumatic stress disorder. (FOF 93). He was also treated by two medical professionals, has attended at least 13 counseling sessions and has been taking medication. (FOF 92-93). According to the Board, Wickersham “is working to ensure that his misconduct will not be repeated” (Board Decision, p. 5) and his mental health counselor stated his recommendation that Wickersham return to

work in a slow, steady manner. (TR. 543) He also stated his opinion that Wickersham is not likely to have problems interacting with police and prosecutors, based upon the gains that he has made. (TR. 543).

Moreover, since the brief period of his alleged misconduct, Wickersham has continued his practice during the past two years with outstanding client satisfaction (TR. 557, 558, 562) and without any further allegations of misconduct.

The second matter was a grievance filed by a former client of Wickersham, Raymond Ballard (“Ballard”), in which the evidence of record vindicates Wickersham (Board Decision, pp. 2-3) and also negates numerous cumulative findings (e.g., FOF 103, 106, 107 and 111) and conclusions (e.g., COL 117-119, 122, 125, 126, 128, 129, 131, 132, 134, 135, 137, 138, 141, 145 and 146) relied upon by the Hearing Officer and the Board in making their recommendations for discipline.

The third matter was a grievance filed by Auburn City Attorney Daniel Heid (“Heid”), regarding Wickersham’s representation of Walter Zimcosky (“Zimcosky”) in a criminal proceeding for driving under the influence. (FOF 9-10). In that matter, Wickersham continuously sought a plea agreement with the prosecution for a lesser charge of reckless driving (TR. 340) and Zimcosky was allowed to plead to that lesser charge. (FOF 31). Zimcosky did not file a separate grievance and did not suffer any

injury as a result of Wickersham's alleged misconduct, which the Hearing Officer characterized as "hubris." (FOF 114). Significantly, an Auburn city prosecutor filed a motion in the Zimcosky criminal proceeding to disqualify Wickersham for alleged incompetence and ineffective assistance of counsel (FOF 20), and that motion was not granted. (FOF 21).

The fourth matter was a grievance filed by Judge Stonier with respect to a different criminal matter involving another former client of Wickersham, Jonathan W. Griffin ("Griffin"). That criminal matter was subsequently dismissed. (FOF 71). Again, Wickersham's client Griffin suffered no injury.

Upon proper application of the American Bar Association *Standards for Imposing Attorney Discipline* ("ABA Standards"), as well as proportionality, *See, In re Disciplinary Proceeding Against Conteh*, (Slip Opinion 200,915-8) (Aug. 23, 2012). Wickersham should not be disciplined, or at most reprimanded, for any inconvenience caused by his temporary mental condition.

However, the Hearing Officer erroneously concluded that Wickersham's mental condition did not excuse his alleged misconduct (FOF 114), and improperly recommended that Wickersham be disbarred. (COL 148, 151). Upon review, the Board struck findings of fact and

conclusions of law relating to the Ballard matter and rejected the Hearing Officer's recommendation of disbarment. (Board Decision, pp. 3-4).

Instead, the Board recommended that Wickersham be suspended from practice for a period of three years. (Board Decision, p. 5). In doing so, the Board apparently considered its recommendation to be lenient, but failed to fully consider the applicable ABA Standards and this Court's decisions regarding proportionality of sanctions.

Significantly, Wickersham has voluntarily undergone treatment for his prior mental condition and poses no current threat to the public or the legal profession. Neither the Hearing Officer, nor the Board have cited any decisions of this Court to support a three year suspension under the present circumstances, and the Disciplinary Counsel has not sought any additional measures to protect the public, such as interim suspension under ELC 7.2, an incapacity hearing under ELC 8.2, or appointment of custodian under ELC 7.7.

Accordingly, Wickersham respectfully requests that this Court decline the recommendation of the Board and allow Wickersham to continue his legal practice without suspension or other discipline.

II. ASSIGNMENTS OF ERROR

1. The Hearing Officer erred in finding knowing misconduct (FOF 103; COL 115, 125, 128 134).
2. The Hearing Officer erred in finding injury to Griffin and Zimcosky (FOF 38 – 40 and 70).
3. The Hearing Officer erred in finding abandonment of practice (FOF 88, 103).
4. The Hearing Officer erred in finding misconduct alleged in Counts 1, 2 and 4 – 7 of the Formal Complaint (Referenced FOF).
5. The Board erred in adopting the Hearing Officer's findings regarding the Griffin and Zimcosky matters and abandonment of practice.
6. The Board erred in recommending suspension for a period of three years, restitution and other discipline.
6. The Board erred by failing to consider proportionality in its recommendation.
7. The Hearing Officer and Board failed to find mitigating factors of remorse, reputation, remoteness of prior discipline and absence of dishonest motive.

III. STATEMENT OF THE CASE

A. Facts and Procedural History

Wickersham is a visually impaired attorney who began his practice on November 9, 1989. (FOF 8). According to the Hearing Officer, he is “intelligent” (FOF 114) and “over the years he has attracted many clients.” (FOF 114). Wickersham enjoys a strong reputation in his community, for retained as well as *pro bono* matters (TR. 556-58, 561-62). He is also highly respected among his colleagues, who have nicknamed him, “The Professor.” (TR. 556).

In August, 2010, Wickersham’s service dog was shot at his home by a Fish and Wildlife officer. (FOF 101). That incident was the culmination of a series of unusual encounters with law enforcement officers, as well as break-ins at his home and office. (FOF 58, 60, 70, 77-78). Those events led to a temporary period of mental trauma and stress, which was a contributing factor to the alleged misconduct in this proceeding (FOF 112), as well as Wickersham’s fear for the safety of both his son and himself.

Wickersham has subsequently been treated by two medical professionals, Mr. Jonathan Goodman and Dr. Seema Bassnett. (FOF 92). Mr. Goodman is a licensed mental health counselor who works in association with Dr. Bassnett at SeaMar (FOF 93), and began treatment of

Wickersham in April, 2011. He has diagnosed Wickersham with a mood disorder, depressive disorder and post traumatic stress disorder. (FOF 93). Wickersham has attended at least 13 counseling sessions with Mr. Goodman and has been taking medication prescribed by Dr. Bassnett. (FOF 93). According to the Board, Wickersham “is working to ensure that his misconduct will not be repeated.” (Board Decision, p. 5).

Mr. Goodman has stated his opinion that Wickersham has made gains and improvements which make it unlikely for problems to occur at present. (TR. 543). Mr. Goodman also recommended that Wickersham return to work in a slow and steady manner. (TR. 543). In fact, since the time of the alleged misconduct, Wickersham has continued to practice in a slow and steady manner, and provided outstanding representation of clients both inside and outside of court. Just to name a few of these clients Wickersham represented Douglas Roeder in a personal injury matter (TR. 561-62), as well as providing *pro bono* assistance in matters involving Jeffrey Nelson and Carolyn Boehm. (TR. 557).

Before the unfortunate shooting of his dog, Wickersham had been providing legal services and representation to Ballard, Griffin and Zimcosky, as discussed above. Regarding Ballard, Wickersham had arranged for an implied consent hearing with the Department of Licensing, but Ballard changed counsel before that hearing (Board Decision, p. 2-3)

and Wickersham subsequently refunded the balance of Ballard's retainer. (Board Decision, p. 3). While Ballard had filed a grievance against Wickersham, which was heavily relied upon by the Hearing Officer, the Board ruled that the substantive content of Ballard's grievance was not supported by the evidence of record and struck all findings of fact based on that content, as well as all conclusions of law relating to Ballard. (Board Decision, pp. 4-5).

With respect to Griffin, Wickersham had made at least two court appearances and filed a motion to suppress evidence before August, 2010. (FOF 53). After his dog had been shot, Wickersham informed Griffin that he could not attend the motion hearing (FOF 54) and Griffin retained new counsel. (FOF 70). All charges in that matter were subsequently dismissed.

As to Zimcosky, Wickersham had made several court appearances and filed a motion before the unfortunate shooting of his dog. (FOF 14, 19, 21, 24). Although the Auburn City Attorney considered Wickersham's demeanor in that matter to be inappropriate, and filed a motion to disqualify Wickersham, that motion was not granted. (FOF 20-21). Zimcosky subsequently pled to a lesser charge of reckless driving (FOF 31) and did not suffer any injury or file a separate grievance.

As discussed above, grievances had been filed by Ballard, Judge Stonier and Auburn City Attorney Heid. The grievances of Stonier and Heid primarily concern Wickersham's demeanor, which the Hearing Officer described as "hubris" (FOF 114), for which no intentional or knowing misconduct was found. Also, as discussed above, the Board correctly decided that the grievance of Ballard was unsupported by the evidence of record.

Notwithstanding, a formal complaint was filed by the Washington State Bar Association ("WSBA") containing seven counts based on the Ballard, Griffin and Zimcosky matters. Those counts alleged violations of Rules 1.1; 1.3; 1.4(b); 1.16(d); 8.4(d) and 8.4(n) of the Rules of Professional Conduct ("RPC"), which pertain to ABA Standards 4.4; 4.5; 6.0; 6.2; 7.0; 9.22 and 9.32.

A hearing was subsequently held in September, 2011 and the Hearing Officer issued his Findings of Fact, Conclusions of Law and Recommendation, in December, 2011. Wickersham sought review by the Board, which heard the matter on July 6, 2012 and issued its decision on July 16, 2012.

IV. ARGUMENT

A. Standard of Review

This Court bears the ultimate responsibility for lawyer discipline in Washington. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 329, 157 P.3d 859 (2007). The bar association must prove misconduct by a “clear preponderance of the evidence.” ELC 10.14(b). Challenged findings of fact must be supported by substantial evidence in the record. *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 208, 125 P.3d 954 (2006). Substantial evidence is evidence sufficient to convince a rational, fair-minded person. *Marshall*, 160 Wn.2d at 330. Conclusions of law are reviewed de novo and must be supported by the findings of fact. *In re Disciplinary Proceeding Against Van Camp*, 171 Wn.2d 781, 797, 257 P.3d 599 (2011).

Appropriate disciplinary sanctions are determined by reference to the American Bar Association’s *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992). *In re Disciplinary Proceeding Against Conteh*, (Slip Opinion 200,915-8) (Aug. 23, 2012). This involves a two-step process: first, the presumptive sanction is determined by considering (1) the ethical duty violated, (2) the lawyer’s mental state, and (3) the extent of actual or potential injury. *Id.* Second, aggravating and mitigating circumstances are considered to evaluate whether a departure from the presumptive sanction is warranted. *Id.* This Court additionally considers the

proportionality of the sanction. *In re Disciplinary Proceeding Against Ferguson*, 170 Wn.2d 916, 940 n.7, 246 P.3d 1236 (2011).

B. The Board’s Recommendation Should Be Declined

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice. ABA Standard 1.1. As discussed above, Wickersham has undergone treatment for his temporary mental condition and does not pose any current threat to the public. He has continued his practice in a slow and steady manner, as recommended by his mental health counselor, with excellent results. There have been no further allegations of misconduct against Wickersham and the Disciplinary Counsel has not sought an interim suspension under ELC 7.2, an incapacity hearing under ELC 8.2, or appointment of custodian under ELC 7.7.

In making its recommendation of suspension, the Board rejected the Hearing Officer’s recommendation of disbarment, and apparently believed its recommendation to be lenient. In doing so, the Board erroneously considered the presumptive sanction to be disbarment under ABA Standard 4.41(a), based upon its mistaken conclusion that Wickersham “abandoned his practice causing injury to two clients and potential serious injury to other clients.” (Board Decision, p. 3). However, as discussed

above, there is no evidence that any of Wickersham's clients were injured, or that he had abandoned his practice.

To the contrary, the Board struck Count 3 (Board Decision, p. 4, fn. 3) and related Findings of Fact and Conclusions of Law concerning the Ballard matter (Board Decision, p. 3), and did not find abandonment or injury in that matter. (Board Decision, p. 3).

Moreover, the Hearing Officer and Board found that Wickersham had communicated with his clients in the Griffin and Zimcosky matters (FOF 30, 54, 56, 58; Board Decision, p. 3); Griffin had retained other counsel (FOF 63; Board Decision, p. 3); all charges had been dismissed in the Griffin matter (FOF 71; Board Decision, p. 3); and Zimcosky pled to a lesser charge of reckless driving. (FOF 31; Board Decision, p. 3). Moreover, there is no evidence of abandonment involving any of Wickersham's other clients.

Further, the Board rejected the Hearing Officer's finding that a pattern of neglect was established under ABA Standard 4.41(c) by its contrary finding that "[t]wo instances of neglect arising from one period of instability or emotional distress do not establish a pattern." (Board Decision, p. 3). Far from finding facts to establish abandonment of practice, the Board merely found two isolated instances of neglect, which, under ABA Standard 4.43, rises to no more than reprimand:

Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

(ABA Standard 4.43).

Regarding the remaining allegations of misconduct, the applicable ABA Standards cited above require intentional or knowing misconduct to support a sanction of disbarment or suspension, and the record does not support a finding of intentional or knowing misconduct by Wickersham.

The ABA definitions for “knowledge” and “negligence” are as follows:

“Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Again, to the extent that Wickersham may have engaged in any negligent conduct, any potential sanction under the applicable ABA Standards should be no more than reprimand.

C. The Board’s Recommended Discipline is Excessive in Proportion to Other Cases

This Court compares the facts underlying alleged misconduct with the facts from similar disciplinary proceedings to ensure consistent and proportionate sanctions. *In re Disciplinary Proceeding Against Blanchard*, 158 Wn.2d 317, 334, 144 P.3d 286 (2006). In other cases involving more egregious misconduct than may be reasonably found in this proceeding, suspensions ranging from reprimand to 6 months were ordered. *In re Disciplinary Proceeding Against Conteh*, (Slip Opinion 200,915-8) (Aug. 23, 2012), *In re Disciplinary Proceeding Against Ferguson*, 170 Wn.2d 916, 940 n.7, 246 P.3d 1236 (2011), *In re Disciplinary Proceeding Against Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004), *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 122 P.3d 710 (2005), *In re Disciplinary Proceeding Against Miller*, 99 Wn.2d 695 , 663 P.2d 1342 (1983); *In re Disciplinary Proceeding Against Grubb*, 99 Wn.2d 690 , 693, 663 P.2d 1346 (1983). Further, in *Longacre*, this Court held that restitution was unwarranted where, as here, the attorney had performed retained services.

In *Miller*, this Court censured an attorney for "failing to either competently represent [his client] or withdraw from his case," and reprimanded the attorney for attempting to defraud a casino. 99 Wn. 2d at 701. Concerning the attempt to defraud, Miller was found to have entered into a "scam" where he would purchase cashier's checks from a

Washington bank, use the checks to purchase gambling chips at Nevada casinos, and once he lost the chips, return to Washington and attempt to stop payment on the checks. *Id.* at 700-01.

This Court found that "Miller seems to regard the law as a 'bag of tricks' which he may use at his pleasure to deceive and mislead others," and that Miller's explanations to the contrary were "utterly without ethical justification and completely reprehensible." *Id.* at 701. The Court concluded that Miller's activities were "an egregious violation of the Code of Professional Responsibility." *Id.* Yet this Court held that the appropriate sanction for Miller - who had earlier been reprimanded for entering into an unauthorized settlement agreement - was another reprimand. *Id.* at 696, 701.

In *Grubb*, this Court issued a reprimand where an attorney had (1) taken a client's ring worth \$24,000 to secure a \$500 nonrefundable retainer; (2) failed to give a receipt; (3) failed to return the ring when the client discharged him soon thereafter; (4) failed to put the ring in a secure place; (5) took it home and showed his wife; (6) "lost it"; (7) did not tell his former client for two years about the loss; and (8) led his former client to believe that he still had possession of the ring, which was a blatant lie. 99 Wn. 2d at 691-92. Grubb had previously been censured for neglecting a legal matter. *Id.* at 690-91.

This Court rejected the Board's unanimous recommendation that Grubb receive a 60-day suspension, stating that a 60-day suspension would be extremely harsh and out of proportion to the severity of the offense.”

Significantly, no decision of this Court was cited by the Hearing Officer or the Board in recommending suspension for a period of three years, and Wickersham is unaware of any such decision involving similar circumstances. Accordingly, the Board’s recommended discipline is excessive in proportion to other cases and should be declined by this Court.

D. The Hearing Officer and Board Failed to Find Several Mitigating Factors

ABA Standard 9.32 sets forth several mitigating factors, including remorse, reputation, absence of dishonest motive and remoteness of prior discipline. As discussed above, Wickersham enjoys a strong reputation in his community and among his colleagues, and his alleged misconduct was caused by his temporary mental condition rather than any dishonest motive. Although Wickersham had been previously reprimanded in 2006 for an unrelated fee matter, that prior discipline was remote in time and irrelevant to the alleged misconduct here.

Regarding remorse, Wickersham testified that he would have done things differently, stating:

“I just believe that then I had – I have a different state of mind today as I did then. So I would say that given the trauma and anxiety and panic and fear and everything else that was going on with me, I really wasn’t quite – quite my right state of mind.”

(TR. 287).

These mitigating factors, in addition to the personal and emotional matters found by the Board, should also be considered in declining the Board’s recommended discipline. Again, Wickersham poses no current threat to the public or administration of justice and his mental health counselor has recommended that he return to work.

V. CONCLUSION

For the foregoing reasons, the Board's recommended discipline should be declined and Wickersham should be allowed to continue to practice law without suspension or other discipline.

Respectfully submitted,

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I certify under penalty of perjury under the laws of the State of Washington that, on date stated below, I did the following: On this day, I emailed this OPENING BRIEF OF JOE WICKERSHAM, filed in this matter, to: Ronald R. Carpenter, Clerk of The Supreme Court of the State of Washington at: email address: supreme@courts.wa.gov; and to Joanne Abelson, Disciplinary Counsel at: email address: joannea@wsba.org

Dated this 11th day of October, 2012.

Joe Wickersham

Joe Wickersham

Bar No. 18816

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