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SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No. 201,088-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

JOE WICKERSHAM

Lawyer (Bar No. 18816)

REPLY BRIEF OF JOE WICKERSHAM

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 ORIGINAL

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**AMERICAN BAR ASSOCIATION STANDARDS FOR
IMPOSING ATTORNEY DISCIPLINE**

ABA Standard 1.1 1

I. INTRODUCTION

As discussed in Wickersham's opening brief, the primary purpose of attorney disciplinary proceedings is to protect the public and the administration of justice. *ABA Standard 1.1*. In this matter, it is undisputed that Wickersham "is working to ensure that his misconduct will not be repeated" (Board Decision, p. 5) and that he poses no current threat of harm to the public or the administration of justice. To the contrary, Wickersham's mental health counselor has recommended that he return to work (TR. 543), and he has continued his practice during the past two years with outstanding client satisfaction. (TR. 557, 558, 562).

It is also undisputed that the Washington State Bar Association ("Association") has taken no preliminary steps 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. The Association apparently found it unnecessary to prevent Wickersham from continuing his practice during the past two years, and does not present any reasonable basis for suspending his practice at this time.

Notwithstanding, the Association focuses upon certain unfortunate voicemails and demeanor caused by Wickersham's mental trauma over two years ago, and recommends excessive sanctions that are

disproportionate to other cases, without sufficient support in fact or law, and without regard to the public interest.

Accordingly, the Association's recommended sanctions should be declined, and Wickersham should be allowed to continue his practice without suspension or other discipline.

II. ARGUMENT

A. Wickersham Properly Challenged Erroneous Findings

The Association mistakenly contends that Wickersham failed to properly challenge the Hearing Officer's findings, or otherwise raise assignments of error. To the contrary, in Section II of his opening brief, Wickersham specifically identified each challenged finding by number, as required by RAP 10.3(g). Moreover, in *Conteh*, this Court recently rejected a similar argument, stating:

Because *Conteh*'s briefing makes his challenge clear, we waive any failure to strictly comply with the rule. *State v. Neeley*, 113Wn. App. 100, 105, 52 P.3d 539 (2002) (“[I]n appropriate circumstances the appellate court will waive technical violations of the RAP where the briefing makes the nature of the challenge perfectly clear, particularly where the challenged finding can be found in the text of the brief.” (citing *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10, 592 P.2d 631 (1979); RAP 1.2(a))).

B. Wickersham Did Not Abandon His Practice

During the five month time period that Wickersham allegedly abandoned his practice, August – December, 2010, he returned to Washington in September (TR 252), communicated with his clients FOF 30, 54, 56, 58; Board Decision, p. 3) and returned the balance of Ballard's retainer in October (Board Decision, p. 3). There is no evidence whatsoever that he missed a court appearance or otherwise failed to act on behalf of any other client at any other time. Neither the Hearing Officer nor the Board has cited any evidence, let alone substantial evidence, to prove any such failure by Wickersham during that or any other time. To the contrary, even with respect to Ballard, Griffin and Zimcosky, the Board struck the Hearing Officer's findings that Wickersham had abandoned Ballard and had engaged in a pattern of neglect.

With respect to the latter stricken finding, the Board found the Griffin and Zimcosky matters to be "[t]wo instances of neglect arising from one period of instability or emotional distress . . ." (Board Decision, p. 3). There is absolutely no basis for extrapolating those two isolated instances of neglect into abandonment of practice, and the Association mistakenly relies upon a few of Wickersham's voicemail messages, made during a time of extreme emotional distress, rather than his conduct and actions which contravene such voicemails.

Significantly, Wickersham closed his office after someone had broken in and caused damage inside his office and after graffiti had been painted on the outside. He asked his real estate broker, whose office was across the street, to enter Wickersham's office, pack up files and office equipment, and then deliver them to Wickersham's home. (TR. 486 - 493) Thereafter, Wickersham continued his practice from his home.

Far from abandoning his practice, Wickersham continued his practice during the past two years and it is undisputed that his clients have praised his representation. (TR. 557, 558, 562). The voicemails relied upon by the Association were made by Wickersham during a time of extreme emotional distress and were contravened by his actual conduct. Accordingly, there is no evidence that Wickersham abandoned his practice.

C. The Recommended Sanctions Are Excessively Disproportionate

The Association has failed to cite any case showing that the recommended sanctions are proportionate, and instead mistakenly relies upon the unanimity of the Board's recommendation. However, the Board did not even consider proportionality in making its recommendation and this Court has consistently declined a unanimous recommendation of the

Board where it may “articulate a specific reason to reject the recommendation.” *In re Disciplinary Proceeding Against Guarnero*, 152 Wn.2d 51, 59, 93 P.3d 166 (2004); *In re Disciplinary Proceeding Against Conteh*, 200,915-8; *In re Disciplinary Proceeding Against McLeod*, 104 Wn.2d 859, 865, 711 P.2d 310 (1985)). Here, in addition to the lack of substantial evidence discussed above, and in Wickersham’s opening brief, the Board’s failure to consider proportionality is a significant reason for declining its recommendation.

Wickersham’s opening brief establishes that in other cases involving more egregious misconduct than may be reasonably found in this proceeding, discipline ranging from censure to 6 month suspensions 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).

Wickersham emphasizes here that in *Miller*, this Court merely censured an attorney for "failing to either competently represent [his

client] or withdraw from his case," 99 Wn. 2d at 701, which is the gist of the Association's complaint in this proceeding. Further, in *Longacre*, this Court held that restitution was unwarranted where, as here, the attorney had performed retained services.

Accordingly, the Board's recommended sanctions should be declined as disproportionate to other cases involving far more egregious circumstances than are present in this proceeding.

III. CONCLUSION

The Association does not dispute that Wickersham has taken appropriate steps to avoid the alleged misconduct that briefly occurred over two years ago, or that it was unnecessary to seek interim suspension or other preliminary measures since that time. Nor does the Association dispute that Wickersham has continued his practice with outstanding client satisfaction, and that he presents no current threat of harm to the public or administration of justice. Nevertheless, the Association needlessly recommends that Wickersham's practice now be suspended for three years without any meritorious ground or regard for proportionality. Neither the record, nor the law support that recommendation and no justifiable purpose would be served by imposing such a harsh and extreme sanction.

Accordingly, Wickersham respectfully submits that the Board's recommended sanctions be declined and that he be allowed to continue his practice without suspension or other discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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 REPLY BRIEF OF JOE WICKERSHAM, filed in this matter, to: Allison Sato, Clerk of the Disciplinary Board at: email address: allisons@wsba.org; and to Joanne Abelson, Disciplinary Counsel at: email address: joannea@wsba.org; and to: Chair of the Disciplinary Board, Thomas A. Waite at: email address: tawaite@comcast.net.

Dated this 11th day of December, 2012.

Joe Wickersham _____

Joe Wickersham

Bar No. 18816

OFFICE RECEPTIONIST, CLERK

To: Jai Rho
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Attached for filing is the Reply Brief of Appellant Joe Wickersham in In re Disciplinary Proceeding Against Joe Wickersham, Case No. 261,088-1.

Respectfully,

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