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SUPREME COURT

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CLERK FOR THE STATE OF WASHINGTON

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WASHINGTON STATE BAR ASSOCIATION,

Respondent,

vs.

JEFFREY K. DAY,

Appellant.

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APPEAL FROM THE DECISION OF THE  
WASHINGTON STATE DISCIPLINARY BOARD

Public #04-00070

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REPLY BRIEF

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## STATEMENT OF THE CASE

The appellant, Jeffrey K. Day, submits this reply brief in response to the answering brief of the Washington State Bar Association. The appellant request the Court impose a suspension, which is the presumptive sanction in this case.

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

## INTRODUCTION

The Hearing Officer's Findings, Conclusions and Recommendations were filed April 13, 2006. The Hearing Officer found that the presumptive sanction should be a suspension, but recommended disbarment. The Board affirmed the Hearing Officer's decision on October 12, 2006.

This brief addresses the Association's arguments by discussing the following issues:

1. The ABA Standards govern this case and indicate suspension as the appropriate sanction;
2. The mitigating factors, which should be considered, outweigh the aggravating factors; and

3. Based upon case law in this and other jurisdictions, suspension is the proper sanction to impose.

The disciplinary proceeding was based on a criminal conviction. The allegations supporting the charge were not litigated at the disciplinary hearing as the respondent concedes that a conviction supports a basis for discipline under ELC 10.14(c). However, Mr. Day has continued to maintain his innocence since the charge was made. His conviction remains on appeal. FFCL p. 22, 34.

#### ARGUMENT

##### **A. THE ABA STANDARDS APPLY TO THIS CASE AND INDICATE SUSPENSION IS THE PRESUMED SANCTION.**

The ABA Standards for Lawyer Discipline govern all disciplinary cases in Washington. In Re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 801 P.2d 962 (1990). The commentary to the Standards states that the presumptive sanction for offenses such as respondent's act is Standard 5.12 (suspension). FFCL p. 30, 32.

The Association's argument that the ABA Standards have become "archaic" is in error. As recently as 2003, this Court reaffirmed that the Standards "constitute a model setting forth a comprehensive

system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." In Re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 66 P.3d 1057 (2003).

The Court went on to note that the Standards are designed to promote (1) consideration of all factors relevant to imposing the appropriate level of sanction to an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and (3) consistency in the imposition of lawyer disciplinary sanctions for the same or a similar offense within and among jurisdictions. Id.

The Association, in effect, urges the Court to adopt a blanket sanction of disbarment to apply to a specific type of violation. Yet, this Court has never taken that approach in any disciplinary matter. As this Court has recognized, each disciplinary case involves unique facts and circumstances. The Court fashions an appropriate sanction for the unique facts and circumstances of each case. In Re Disciplinary Proceeding Against Romero, 152 Wn.2d 124, 94 P.3d 939 (2004).

The Association's argument that the ABA Standards do not apply to acts involving moral turpitude is also incorrect. This Court has

had no difficulty in using the Standards to apply a sanction for acts of moral turpitude. Further, that sanction has never automatically been disbarment as the Association suggests it should be.

In In Re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 801 P.2d 962 (1990), this Court noted that while our court rules may forbid all acts involving "moral turpitude", the court's adoption of the ABA Standards for Lawyer Discipline also adopted the "modern trend" of putting more emphasis on disciplining lawyers for violation of practice norms. This trend focuses lawyer discipline fairly tightly upon conduct which directly interferes with the administration of justice or occasions doubt about a lawyer's competence or honesty. The Court has recognized that acts of moral turpitude warrant sanctions, but that such sanctions should be flexible.

For example, a two-year suspension was imposed on an attorney who committed an act of moral turpitude as well as six violations of practice norms. In Re Disciplinary Proceeding Against Heard, 136 Wn.2d 405, 963 P.2d 818 (1998). Disbarment was considered primarily for violations involving the handling of a settlement agreement and fee. Even though serious financial misconduct was compounded by an act of moral turpitude, disbarment was not the result.

The Association argues, based on In Re Disciplinary Proceeding Against McGrath, 98 Wn.2d 337, 655 P.2d 232 (1982), that the presumptive sanction for any act of moral turpitude should be disbarment. But, if the ABA Standards are "archaic" as the Association suggests, McGrath is hardly relevant as it pre-dates the Standards. As discussed in Appellant's opening brief, McGrath was not decided using the Standards which now govern all attorney discipline cases. It has limited applicability in analyzing either the violation or the sanction to be imposed.

The approach at the time McGrath was decided was to presume that disbarment was warranted for an act of moral turpitude, the same approach urged by the Association. Justice Williams, in his dissent of the 5-4 decision, argued that this approach was too harsh and caused unfair results. He reasoned that a suspension with its inherent negative effects would often serve as a sufficient sanction. Justice Williams' reasoning is now reflected in the ABA Standards. That reasoning has also been adopted by the Court's analysis in Heard.

This Court should not turn the clock back to pre-ABA Standard analysis as the Association urges. This Court has adequately applied

The Standards to acts involving moral turpitude and has found that suspension for such an act is the appropriate sanction.

**B. SUSPENSION IS THE PRESUMED SANCTION.**

The Hearing Officer and the Board correctly determined that suspension is the presumptive sanction to be imposed under ELC 5.11.

The Hearing Officer correctly identified that a suspension is the presumptive sanction under ELC 5.11. Mr. Day's misconduct did not involve interference with the administration of justice, false swearing, misrepresentation, fraud, extortion or other conduct outlined in ELC 5.11, which makes disbarment the presumed sanction.

Under ELC 5.12, suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements cited in Standard 5.11, conduct that is a violation of a duty owed to the profession and which causes injury or potential injury to a client, the public or the legal system. In Re Disciplinary Proceeding Against Boelter, 139 Wn.2d 81, 985 P.2d 328 (1999).

The Hearing Officer also noted that the commentary to the ABA Standards indicates the presumptive sanction involving sexual offenses such as the respondent's act is a suspension.

As noted in Appellant's initial brief, this Court has only imposed suspensions for sexual misconduct. See Heard, supra, and In Re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 998 P.2d 833 (2000). Other jurisdictions have also imposed suspensions for such conduct. See Appellant's Brief, pages 23-23.

Based upon the ABA Standards and case law in this and other jurisdictions, the analysis starts with a presumption that a suspension should be imposed.

**C. AGGRAVATING AND MITIGATING FACTORS.**

The second step of the analysis requires the Board to determine if any factors justify a deviation from the presumptive sanction. Here, they do not justify a deviation.

The Hearing Officer found only one aggravating factor and one mitigating factor. At worst, they offset each other. However, the Hearing Officer minimized the affect of an additional mitigating factor.

**1. Criminal Sanctions are a Mitigating Factor which must be Considered.**

ELC 9.23(k) makes the imposition of other penalties and sanctions a mitigating factor.

The Washington Supreme Court has consistently ruled that criminal penalties properly serve as mitigating factors. In Re

Disciplinary Proceedings Against Vanderbeek, 153 Wn.2d 64, 101 P.3d 88 (2004); see also In Re Disciplinary Proceeding Against Immelt, 119 Wn.2d 369, 831 P.2d 736 (1992).

A key case to analyze when imposing sanctions for a criminal conviction is In Re Disciplinary Proceedings Against Curran, 115 Wn.2d 747, 801 P.2d 962 (1990). In Curran, the attorney was convicted of two counts of vehicular homicide. Curran was sentenced to 26 months in prison. Curran had no prior disciplinary action. The Court, in imposing a two-year suspension for causing two deaths, noted that the criminal penalties already imposed constituted a mitigating factor.

The Court, in imposing a two-year suspension for causing two deaths, noted that sanctions already imposed constituted a mitigating factor. These sanctions included an 18-month interim suspension and a 26-month prison term. The interim suspension was discussed primarily in terms of how long any additional suspension should run. Having found that Curran already had been suspended 18-months, the Court chose to add only six additional months.

Justice Williams' reasoning in McGrath, supra, provides justification for the reason why The Standards now embrace imposition of other sanctions as a mitigating factor. He argued that a sanction,

short of disbarment, may be sufficient if a criminal court has already dealt with an attorney's conduct by imposing criminal penalties. Even though it is said that lawyer discipline is not to be employed as a punishment, it is obvious that disbarment is and would be a significant punishment in this case, particularly where the misconduct is not directly related to the practice of law.

In addition to the damage caused to an attorney's reputation, an inherent result of suspension, disbarment prevents an attorney from earning a living by using the education and skill a lawyer has acquired.

In this case, disbarment will hinder Mr. Day's reintegration into society as a productive citizen when he is released from prison, and there is no need to create that problem when The Standards allow the creativity and flexibility to allow him to practice under supervision or under probation.

Disbarment is a punishment and, as Justice Williams reasoned, to impose a second, severe punishment without considering the criminal penalties imposed undermines the principals of fairness and proportionality embodied in criminal laws and disciplinary cases.

The criminal penalties must be considered in regard to both the punishment already imposed as well as the deterrent effect they will

have on Mr. Day to prevent any future misconduct. These penalties provide for greater deterrence than disbarment.

2. The One Aggravating Factor Found does not Justify Increasing the Presumed Sanction of Suspension.

The Hearing Officer found one aggravating factor, vulnerability of the victim. The Hearing Officer properly rejected two other factors the Association urges this Court to adopt; dishonest or selfish motive and substantial experience in the practice of law. There is no legal authority to adopt these as aggravating factors in this case.

The factor of a dishonest or selfish motive is generally found in cases where money is involved. Such cases include attorney abuses of client funds and trust accounts, conversion of property or mishandling of settlement proceeds. That factor does not apply to this case. The Association cannot point to any similar case where this factor has been included.

Substantial experience in the practice of law is also not an aggravating factor under those circumstances. The Association cites In Re Disciplinary Proceeding Against Lopez, 153 Wn.2d 570, 106 P.3d 221 (2005) as an example, but this case is irrelevant. Lopez was disciplined for failure to file an opening appellate brief in Federal Court and to take reasonable practicable steps to protect a client's interest

upon termination of representation. These failures were directly related to the practice of law. Lopez had practiced long enough to know the procedures he needed to follow in filing an appeal and in terminating legal representation. Where misconduct involves actions required by the Court or Bar in the direct representation of a client, the "substantial experience" factor may apply. Where the misconduct is not directly related to the representation of a client, the factor becomes irrelevant and, in this case, was properly rejected by the Hearing Officer.

The Association's argument that abuse of trust should serve to increase the sanction from suspension to disbarment fails because Mr. Day's trustworthiness related to the practice of law and his performance as an attorney is not in question.

See Brief of Appellant, p. 16-19.

Unlike other cases, the alleged abuse of trust was not related to the actual practice of law. For example, in Heard, supra, a client trusted her attorney to achieve a fair personal injury settlement. Heard was aware of his client's various physical and cognitive defects and her vulnerability. He had previously secured a guardian ad litem for her. In settling his client's claim, Heard inflated the value of properties that were included and calculated values, in some cases, which were non-

existent. Then he took all the cash available from the assets for his fee, leaving his client with little but overvalued or worthless property.

Heard then took his client to two bars knowing of her prior problems with drugs and alcohol, gave her alcohol and engaged in sexual relations with her.

All of Heard's actions took place while he represented his client and while that client depended on him to achieve a fair property settlement and charge a fair fee.

In Halverson, supra, an attorney engaged in sexual relations with a client at the time he was representing her in a divorce action. The client trusted Halverson to represent her interests. Halverson failed to tell his client that if their affair was discovered it would likely increase the costs and complexity of the case, and that it would also lead to Halverson's withdrawal as her attorney. Ultimately, Halverson had to withdraw when the sexual relationship was discovered. Halverson violated his client's trust while he represented his client. It was his actions, while in his role as her attorney, that made his conduct egregious.

The abuse of trust in those cases was directly related to the practice of law. Suspension resulted in both cases. In Mr. Day's case, his ability to effectively represent clients is not in question.

The misconduct allegedly took place in a "non-professional" relationship. Indeed, there is nothing to suggest Mr. Day's professional relationship with this or any other client has been anything but competent and positive.

Mr. Day's practice in the field of law has been exemplary and, as documents and testimony at the hearing showed, he has always placed his clients' welfare above monetary considerations. One attorney, who has known Mr. Day since 1992, testified at the hearing and described Mr. Day as "one of the brightest individuals and the best legal mind he had seen in thirty years of legal practice."

The Hearing Officer quoted in his Findings and Conclusions that:

It is clear ... that the respondent is an exceptionally intelligent, talented attorney on whom many clients justifiably relied for legal representation. It is equally clear that respondent acted admirably on numerous occasions when he agreed to continue to represent clients, even after such client's ability to pay for respondent's legal services had ended ... simply because such clients continued to require legal representation.

These qualities and demonstrated commitment to clients and the practice of law should count for something. Part of the record before

the Board includes letters from people who have witnessed Mr. Day's "many good acts" both as an attorney and member of the community. Mr. Day's service as an attorney has been valued by thousands of clients in his career, and the Board should impose a sanction that will allow Mr. Day to provide his talent and skill to clients in the future.

All considered, at worst the mitigating and aggravating factors found by the Hearing Officer offset each other. When considering the sanctions already imposed, the mitigating factors have greater weight and justify imposition of the presumptive sanction of suspension.

### 3. Suspension is the Proper Sanction Based on Case Law.

Suspension has been the sanction imposed in many cases where attorneys have been convicted of crimes or were involved in sexual misconduct.

#### *i. Criminal Convictions.*

In Curran, 115 Wn.2d 747, 801 P.2d 962 (1990), an attorney was convicted of two counts of vehicular homicide after being involved in an alcohol-related fatal car accident killing two of his clients. Curran was sentenced to 26 months in prison. The Court ultimately imposed a two-year suspension, which included his interim suspension for 1 1/2 years.

Prior to this discipline, Curran had been of good moral character and enjoyed a good reputation in the community for honesty and integrity just as Mr. Day has demonstrated in his practice.

In another case, In Re Disciplinary Proceeding Against Plumb, 126 Wn.2d 334, 892 P.2d 739 (1995), an attorney convicted of Theft in the First Degree was suspended three-years even though the presumptive sanction was disbarment. The Hearing Officer had recommended disbarment, but the Board recommended suspension dating back to the start of the interim suspension.

The Court, in concurring with the Board, restated the principle that discipline is not to be imposed as punishment for misconduct. However, it was noted that welfare fraud was a crime of dishonesty reflecting directly on Plumb's fitness to practice law.

There was no allegation that Plumb had been incompetent. Plumb submitted statements from clients praising his work, just as numerous people have praised Mr. Day's professionalism in documents presented to the Hearing Officer.

In imposing a suspension, the Court said, "The purpose of disciplinary sanctions is to ensure that reasonable attorneys appreciate the serious consequences of misconduct." The Court found that a three-

year suspension protected the integrity of the Bar and the welfare system. The Court was influenced by the fact that Plumb had successfully served his clients and gained respect from local attorneys and that the economic hardship imposed on Plumb by not being able to practice favored a suspension rather than the presumed sanction and recommendation by the Hearing Officer of disbarment.

Both the ELC and the Court generally reserve the ultimate sanction of disbarment for actions involving dishonesty such as fraud, forgery and misrepresentation as well as interference with the administration of justice. The Court has noted, for example, that perjury and tampering with evidence are "the most serious kinds of charges that can be made against a lawyer." In Re Disciplinary Proceeding Against Alotta, 109 Wn.2d 787, 748 P.2d 628 (1988).

These precedents support a suspension as the proper sanction in this case.

*ii. Sexual Misconduct.*

The most significant Washington case involving sexual misconduct was discussed in appellant's initial brief but merits further discussion here. See Brief of Appellant, pgs. 20-21.

In Heard, supra, this court imposed a two year suspension on an attorney who engaged in an act of moral turpitude with a client while grossly mishandling that client's personal injury settlement. Heard's client, Menz, was involved in a serious vehicular accident. She sustained severe head injuries. Heard had access to Menz's medical records and knew of her vulnerability. He also knew she had prior problems with alcohol and drug abuse.

Prior to conclusion of the settlement and while he represented Menz, Heard took her to a local lounge to "discuss her case." They drank and then visited another lounge. After more drinking, Heard had sexual relations with his client. Heard, 136 Wn.2d at 411-12.

As for the property settlement, Heard calculated the value of assets at \$150,000.00 of which only \$50,000.00 was cash, which he unilaterally chose to keep for himself. Heard never obtained Menz's consent to this arrangement and he never provided her an accounting of the settlement.

This Court found Heard committed six violations of the RPC. He knew that the supposed \$50,000.00 in real property he had used to calculate the asset value was worthless, but he failed to discuss that with his client.

He failed to provide an accounting outlining how the settlement had been determined. He failed to sufficiently explain matters to Menz to allow her to make proper decisions. He failed to represent his client with due diligence. In effect, said this Court, Heard put his own interests ahead of those of his client. He negotiated a settlement that largely reserved the tangible, cash benefits for himself and left Menz with illusory or inflated assets. Id. at 824.

As to engaging in sexual relations, this Court noted:

Heard used his professional relationship with Menz to initiate the social relationship (he went to her home and invited her to "go out" to discuss her case). As Menz's attorney, Heard had intimate knowledge of her vulnerabilities. Heard knew Menz had sustained a significant head injury for which she required multiple surgeries, and she was psychologically and physically impaired, undergoing a period of prolonged rehabilitation. Through access to her medical records, Heard knew Menz had an extensive history of alcohol and drug problems and had been sexually abused. He further knew that, as a result of her brain injury, Menz continued to have memory, reading, comprehension, auditory processing, attention, speech, problem solving and other cognitive deficits. He also knew her medical providers were concerned about her judgment, safety and ability to live independently. Despite this knowledge, Heard took Menz to two cocktail lounges and gave her alcohol beverages at both. When Menz informed Heard that she should not be drinking, he assured her that everything would be all right. Heard then took Menz to his apartment where they engaged in sexual relations. Heard sexually exploited a client with alcohol problems and who suffered the effects of serious head injuries.

Id. at 827.

Despite all of this, the Court concluded that "the combination of misconduct involving the settlement and attorney fees and the act of moral turpitude justify a two-year suspension." Id. at 828.

Heard speaks strongly for imposition of a suspension in Mr. Day's case. Unlike Heard, Mr. Day's representation of his client was exemplary. His representation resulted in a dismissal of a serious criminal charge. His actions with this client or any other have never been questioned. If the combined misconduct and an act of moral turpitude justified only a suspension in Heard, a suspension is proper here. Should the Court wish to find Mr. Day's conduct more egregious, then the proper action is to increase the suspension to three years, rather than the two year sanction imposed in Heard.

Halverson, supra, also discussed in Appellant's initial brief, merits further comment. When Halverson engaged in sexual relations with his client while representing her in a divorce action, he compromised his ability to adequately represent his client. He failed to advise his client that the relationship could increase the cost and complexity of the case or that he could be forced to withdraw as her attorney.

Unfortunately, he was forced to withdraw. This Court noted there was "substantial" testimony from mental health professionals that, as a result of Halverson's conduct, his client suffered personal harm in the form of depression and anxiety. In addition, Wickersham's relationship with Halverson had an adverse impact upon her relationship with her former husband, a relationship she described as "brutally adversarial; abusive and emotionally and financially difficult." Further, Wickersham, after her relationship with Halverson, was unable to trust her new attorney. Id., 140 Wn.2d at 839.

Despite these alleged injuries and a pattern of misconduct found by this Court because Halverson engaged in sexual relationships with six clients, this Court only imposed a one-year suspension. This case also strongly suggests that suspension is appropriate in Mr. Day's case.

Finally, as previously stated, the one Washington case on which the Association relies, McGrath, has been superseded by the ABA Standards. Its analysis and resulting sanction has little relevance in light of the "modern trend" embodied in the Standards.

As Justice Williams argued in McGrath, disbarment will not protect the public from an unscrupulous and dishonest lawyer, for McGrath, like Mr. Day, was neither. Justice Williams would have

imposed a two-year suspension on McGrath, rather than disbarment. Had McGrath been decided under the ABA Standards today, standards which embody much of Justice Williams' reasoning, it is likely a suspension would have been the sanction imposed.

Coincidentally, despite the concerns of the majority in McGrath quoted by the Association, McGrath was later entitled to be reinstated following adoption of the ABA Standards in Washington. In Re McGrath, 112 Wn.2d 481, 722 P.2d 502 (1989).

Given the precedents in this state, as well as other jurisdictions, suspension is the appropriate sanction to impose.

**D. CONSIDERING ALL FACTORS AND CASE PRECEDENT, THE PRESUMPTIVE SANCTION OF SUSPENSION IS APPROPRIATE.**

The Board should impose a three-year suspension as the appropriate sanction. A suspension is the presumed sanction for this conduct. The severity of the misconduct is best addressed by the length of suspension. The length of a suspension is dictated, to some extent, at least, by the seriousness of the misconduct and is aimed at assuring the public that professional misconduct is not to be lightly regarded. In Re Disciplinary Proceedings Against Greenlee, 82 Wn.2d 390, 510 P.2d 1120 (1973).

The Board can salvage some good from what was described as a "tragedy" at the hearing by imposing the longest suspension allowed under the rules, three years, and by imposing the further condition that Mr. Day not represent minors under the age of 18, but still allowing Mr. Day to practice. This sanction would both protect the public and preserve the integrity of the legal profession. This sanction is supported by prior disciplinary action when attorneys have been convicted of criminal acts occurring outside the practice of law.

#### CONCLUSION

This Court should impose a three year suspension on Mr. Day who has currently been suspended since October 18, 2004.

A suspension is the presumed sanction based on ABA Guidelines. The Supreme Court has limited its sanctions to suspensions for attorneys involved in sexual misconduct. The Court has also imposed suspensions for criminal conduct occurring outside the practice of law even in cases where the presumptive sanction has been disbarment.

The one aggravating factor identified by the Hearing Officer does not justify deviation from the presumptive sanction of suspension when weighed against Mr. Day's lack of prior discipline, his significant

record of providing excellent legal representation and the criminal penalties already imposed.

It is not necessary to impose the ultimate sanction of disbarment. A suspension, considering the penalties imposed, is sufficient to protect the public and to preserve the integrity of the legal profession. The criminal penalties imposed serve as the greatest deterrent to any possible future misconduct. The Board can provide no greater deterrent. Disbarment simply adds further punishment and is not necessary to protect the public.

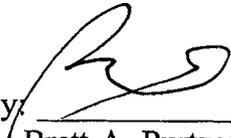
The Board has the authority to impose a variety of conditions on a disciplined attorney. In addition to suspension, the Board should prohibit Mr. Day from representing minors under the age of 18 in the future. This condition directly addresses the alleged misconduct while recognizing that Mr. Day can still provide high quality legal services to clients.

A three-year suspension is the most serious sanction that can be imposed short of disbarment. It is the presumptive and proper sanction for this case based on precedent. It is a sanction that adequately protects the public while allowing a talented attorney to continue to provide valuable and competent representation to clients in the future.

The Board should modify the Hearing Officer's recommendation  
and impose a three-year suspension.

RESPECTFULLY SUBMITTED this 20 day of February,  
2007.

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Lee Ann Mathews, <sup>CLERK</sup> 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 reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 20<sup>th</sup> day  
of February, 2007.

*Lee Ann Mathews*  
Lee Ann Mathews

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**To:** OFFICE RECEPTIONIST, CLERK

**Subject:** Jeffrey K. Day, #200,429-6

Attached please find Mr. Day's reply brief. Thank you. <<reply-brief.pdf>>

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