

SUPREME COURT NO. 200,388-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISABILITY PROCEEDINGS AGAINST

JOHN M. KEEFE,

Lawyer (Bar No. 18371).

REPLY BRIEF OF JOHN M. KEEFE

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TABLE OF CONTENTS

Issues Presented1
Failure to Object to Evidence2
Dr. Grant’s Testimony3
Ability to Practice Law5
Ability to Defend Even With the Assistance of Counsel.....10
Conclusion15

STATEMENT OF AUTHORITIES

CASES

In re Meade, 103 Wn.2d 374, 693 P.2d 173 (1985)7, 11, 13

In re the Matter of Gordon McLean Campbell,
74 Wn.2d 276, 444 P.2d 784 (1968).....6

In re Ryan, 97 Wn.2d 284, 644 P.2d 675 (1982)6

Schware v. Board of Bar Examiners, 353 U.S. 232,
1 L. Ed.2d 796, 77 S. Ct. 7532 (1957)15

COURT RULES

ELC 8.3(a).....12

ELC 8.3(d)(5).....1

ELC 8.3(d)(6)(A)2, 4

ELC 8.3(d)(7)(C)1

GR 24.....8

OTHER AUTHORITIES

Merriam-Webster’s Collegiate Dictionary, Eleventh Edition,
Published 20033

This is attorney John M. Keefe's Reply to the Association's Answering Brief in this matter.

Issue Presented: The issue presented by this matter is "When can the government stop a lawyer from practicing law based on an allegation of disability?" It is undisputed that the court can transfer a lawyer to disability status and stop him or her from practicing law where the evidence establishes that the lawyer cannot adequately practice law for others because of mental disability. The rules also permit such a transfer when the lawyer cannot defend a disciplinary matter even with the assistance of counsel. The Association concedes in its Answering Brief at page 16, citing ELC 8.3(d)(7)(C), that in order to transfer Keefe to disability status it needed to prove one of two things: 1) That Keefe is not adequately able to practice law because of mental disability; or 2) That Keefe was not able to defend the underlying disciplinary proceeding even with the assistance of counsel. The Association contends that it proved both of these and its Answering Brief is an attempt to show such proof. Keefe, in his Opening Brief, his pro se brief and in this Reply Brief asserts that the Association has not proved either test as a matter of law or fact.

The test to be applied to the Association's factual assertions is the sufficiency of the evidence supporting them. ELC 8.3(d)(5).

Failure to Object to Evidence: A repeated statement in the Answering Brief is that when evidence was presented at the hearing Keefe failed to object or that the evidence or testimony was uncontested. The Bar is essentially arguing that its evidence should be deemed sufficient since it came in by “default.” This might be a valid argument if this was an ordinary adversary proceeding but it is not. There is no default in these proceedings – if the attorney does not appear or argue or contest the proceeding, the Association must still put on its case. No matter what the lawyer does the Association must hold a hearing and present sufficient information to determine incapacity. ELC 8.3(d)(6)(A).

The lawyer need not participate, need not appear and need not make any objections. The failure to participate does not create a default situation and the Bar is still required to put on proof sufficient to prove the necessary elements for transfer to disability status. The lawyer can prevail and the proceeding must be dismissed even if he or she completely boycotts the proceeding. With or without the lawyer’s participation the Association must still independently prove its case. The evidence it presents must stand on its own. Either it is sufficient to prove the necessary elements or it is not. In such as situation the evidence is not

entitled to be treated as any more credible or to be given greater weight just because it was not contested.

Dr. Grant's Testimony: In support of its argument that it provided sufficient evidence to show mental disability the Association repeatedly asserts that Dr. Grant's testimony was to a "reasonable degree of medical certainty." While the Association certainly wishes that Dr. Grant had said this, he did not. Dr. Grant acknowledged that he was not opining on a specific diagnosis for Keefe but rather was "opining about a set of potential diagnosis." RP 121. When directly asked if he had an opinion to a reasonable degree of medial certainty about whether Keefe's ability to distinguish fantasy from realty is impaired initially he said "Yes" but he immediately backpedaled by saying that "it appears that he does have impairment..." RP 123 [Emphasis added.] The Bar did not follow up and did not clarify what he meant by "appears."

Appears means "to have an outward aspect: SEEM." "Seem" means "to give the impression of being." Merriam-Webster's Collegiate Dictionary, Eleventh Edition, published 2003. Dr. Grant only testified as to his impression of Keefe's mental condition. He could not give a definitive diagnosis because he never saw Keefe and never looked at any

medical records. He was basically making a best guess but a guess is not enough.

The WSBA says that it is “ironic” that the lawyer could prevail on a charge of mental disability where the lawyer refuses to appear or provide medical records. Answering Brief, FN 7, at page 20. It is far from ironic, it is a right. It must be remembered how this process got going - based solely on documents Keefe submitted in defense of a adversarial case, his opponents triggered a mental disability proceeding. When the Bar sought the disability proceedings it accepted the responsibility of having to provide the evidence and to meet the burden of proof. ELC 8.3(d)(6)(A). Based on nothing more than his pleadings, the WSBA then sought to force Keefe to take an IME and to submit his medical records. By doing so they improperly sought to shift to him the burden of proving he was not suffering from a mental disability, something he denied and which his opponents alleged. If Keefe had been the one to allege he was suffering from a mental disability, then it is appropriate to say to him “Prove it by attending an IME” but here the WSBA says “We claim you have a mental disability and yet we also seek to force you to come in and submit evidence against yourself.”

Certainly, the Bar's burden of proving mental disability might be made easier if an accused lawyer simply did everything they wanted him to do, but in the absence of his willingness to do so, the WSBA still has to meet its burden. It cannot shift the burden to him to prove he does not have a mental disability by insisting that he take an IME.

In the absence of the willingness of the lawyer to participate in an IME, if nonetheless the Association still wishes to use medical evidence to prove its case, that evidence must be of sufficient reliability to be given probative value. Such reliability cannot be given where, by the doctor's own testimony, it is "appropriate in my field, that it is ideal and proper to evaluate a person face to face, and not render an opinion on somebody that one has not evaluated and seen." RP 117 -- 118. The doctor admitted that it was not appropriate for him to give an opinion without having seen Keefe. For a more thorough discussion of the issue of the inappropriateness of Dr. Grant attempting to opinion on Keefe' mental condition see Keefe's Pro Se brief at pages 11 -- 17 and Appendixes to that brief.

Dr. Grant's best guess as to Keefe's mental condition, offered to please his WSBA client, is not entitled to be given any probative value.

Ability to Practice Law: One of the prongs upon which the Association can obtain the transfer of Keefe to disability status is that it

has been proven that Keefe lacks the ability to adequately practice law. In his Opening Brief Keefe identified that the cases in this area require a showing of some nexus between the alleged mental disability and the ability to practice law. *In re Ryan*, 97 Wn.2d 284, 644 P.2d 675 (1982). If this were not so then any lawyer with any sort of mental disability would need to be transferred to disability status. The valid state interest is not the disability but rather the impact of the disability on the practice of law. Unless the Bar can validly connect those two matters, it is none of the licensing authorities' business as to an attorney's beliefs no matter how unconventional or even irrational they maybe.

In *Ryan* there was direct proof that his beliefs impacted his clients when he claimed that matters referred to him were not properly filed by him and that his client's matters did not involve real cases or controversies. There is nothing like this in Keefe's case.

In *In re the Matter of Gordon McLean Campbell*, 74 Wn.2d 276, 444 P.2d 784, (1968) there was direct proof that the lawyer had brought lawsuits against others insisting that he had a constitutional right to be hired. The WSBA says this is similar to Keefe seeking to have his disciplinary case heard in the federal courts. The difference, of course, is

that Keefe's federal court case was filed in his own defense in this action and was part of some other case.

Similarly, the Disciplinary Board asserted that Keefe having sought to have his disciplinary case heard in another jurisdiction showed he could not adequately practice law. As discussed in the Opening Brief, the Board did not say why this was so and did not identify why a theory advanced by a lawyer on the issue of jurisdiction where he claimed bias in the system was so wrong as to demonstrate he could not practice law for others. Furthermore, the Board's assertion was not a basis of the case against Keefe at the hearing level and was not presented as part of the Bar's proof.

In *In re Meade*, 103 Wn.2d 374, 693 P.2d 173 (1985), there was direct testimony from his treating physician about how Meade would handle cases. This was based on the doctor's examination of Meade. In that instance, a standard was established and a foundation laid as to what the basis was for the doctor's opinion on Meade's present ability to handle cases for others. There is no such evidence in this case. Dr. Grant was asked if Keefe could adequately practice law and he said no but he had no basis for saying this. He had not looked at any cases handled by Keefe and he was not given any standard to apply. The practice of law can include many things including giving advice to others on legal rights, drafting

legal documents, representing others in proceedings, and negotiation of legal rights. GR 24. Which practice of law was Dr. Grant opining about? Was Dr. Grant saying that Keefe is not capable of doing any or all of these? What specific aspects of the practice of law are Keefe not capable of doing? We do not know.

The Association asserts that it has provided sufficient evidence of the necessary nexus between Keefe's alleged illness and his ability to adequately practice law for others because:

- Dr. Grant said so – His testimony is of no value since it is not based on any standard and he saw no evidence in regards to any other cases except for the case in which Keefe was defending himself.
- The hearing officer could make a judgment based on his own experience – If the hearing officer is going to bring in sue sponte his own judgment as to whether a lawyer can practice law, then at least the hearing officer has to identify that he has done so and the facts supporting such conclusion have to be identified otherwise Keefe has nothing to respond to on review. There is no such evidence in this case.
- Keefe's actions in defense of his own case showed he cannot adequately practice law because of "impaired reasoning." The problem with this argument is that they have not shown that when Keefe

acts for others any problems he may have as to his own case has or reasonably likely will show up in cases for others. The underlying disciplinary case against Keefe did not provide any such evidence and none was presented in the disability proceeding. Not to be trite about this but all lawyers and judges are familiar with the proverb "A lawyer who has himself for a client, has a fool for a client." The unsaid wisdom behind this bromide is that when someone represents himself or herself, his or her judgment maybe obscured because of the personal perspective through which the lawyer views the case. The fact that in representing himself Keefe may have taken actions or made statements which the Association contends lack wisdom or proper legal prospective does not prove that when he takes action for others that he is not entirely appropriate.

The Bar needs direct proof that any disability Keefe may have does, in fact, impact how he practices law for others. There is no such proof. What the Bar's argument boils down to is that Keefe appears to have a disability and, in the absence of any proof of actual harm to clients, we should speculate that this disability will in the future have negative impact on clients. Speculation is not proof.

The Association has not proven the necessary nexus between any illness Keefe may suffer and the ability to practice law for others.

Ability to Defend Even With the Assistance of Counsel: The other prong of the assertion that Keefe should be transferred to disability status is that he is not capable of defending himself in the underlying disciplinary proceeding even with the assistance of counsel. The Bar concedes that in the absence of proof that Keefe cannot adequately practice law for others that he can only be transferred if he was not able to defend the underlying disciplinary action even with the assistance of counsel. The Association's argument in this regard can be broken down into the phases: his actions during the hearing phase and his actions in the appellate phase.

To demonstrate his inability to defend himself during the hearing phase the Association asserts that he conducted discovery into matters having no relevance to the disciplinary proceedings. This is nothing more than Monday morning quarterbacking on discovery. Keefe explored issues which the Bar was free to seek to prevent by a limiting motion but it did not do so. The Bar now says "Keefe conducted discovery which we did not oppose and which he did not use at the hearing but now we assert that this shows that he could not defend himself at the hearing even with counsel." His actions show just the opposite, conducting broad ranging discovery

into a wide variety of areas testing the scope of the limits of discovery does not show an inability to defend but rather an ability to do so.

The Bar is also critical of the witness list Keefe filed because the hearing officer found several of the witness had no connection to the case. Keefe listed witness he did not use – that does not mean he was not capable of defending himself.

That is the sum total of the evidence presented by the Association for the contention that Keefe was not capable of defending himself even with the assistance of counsel at the hearing stage. He engaged in aggressive discovery which his opponents thought illogical and he listed some witnesses he did not use.

The *Meade* case says the test is not the defenses the lawyer raises which bring into question the issue of inability to defend but rather what defenses the lawyer is not able to raise due to his disability. The Bar has not pointed to single defense, or pointed to a single cross-examination which was inadequate or pointed out a single legal argument that Keefe could have raised at the hearing level which he did not present or argue as a result of his disability. That is the test provided in *Meade* – not what did he do in an affirmative way that others might not agree with but rather what didn't he do.

Furthermore, the Bar ignores that ELC 8.3(a) places an affirmative duty on the hearing officer and the Bar to stop the hearing and conduct supplemental proceedings if during the hearing it appears that the lawyer is not able to adequately defend himself. This is because the persons best suited to know if the attorney is adequately defending himself are those who are going through the process with him. In this case, neither the hearing officer nor the Bar Counsel who observed Keefe and defended against Keefe sought supplemental proceedings. This is strong evidence that during the hearing phase Keefe was fully capable of defending himself alone. If he was capable of defending himself alone, he certainly was capable of assisting counsel in his defense.

The Association also says that it proved that Keefe is not able to defend the disciplinary case even with the assistance of counsel because of his actions taken during the appeal phase. It was these actions which started this supplemental disability proceeding. Once again the Association points to affirmative matters raised by Keefe but does not point to any deficiency in the defense. It does not point to any defenses not raised or any legal arguments which reasonably should have been raised but were not. Instead the Bar says since Keefe discusses events which did not occur as part of his defense, this ipso facto proves he is not capable of defending

himself even with the assistance of counsel. Assertion of bizarre defenses and purportedly none existent events can be disregarded by those who review them. What the Bar seems to be saying is that in defending himself, Keefe is to be found incompetent because he raises defenses it finds not be logical or rational and, therefore, Keefe is not capable of defending himself. This is the exact trap *Meade* warns us to avoid. It not what the attorney asserts in his defense that shows he is not capable of defending himself, it is what he does not assert.

Even if affirmative assertions were to be taken into account, the Bar has not demonstrated that Keefe's assertions reduce his chances of success on the appeal to the Disciplinary Board – there was no testimony or exhibits to that effect. Just as with many arguments and assertions the Board will, if it finds them not persuasive, disregard them. Surely the WSBA cannot intend to be asserting that if Keefe's other arguments on the appeal have merit that an injustice will occur and those meritorious arguments will be disregarded because some of his other arguments and assertions are not meritorious. The rule concerning a lawyer not being sanctioned where he is not able to defend himself is designed to prevent an injustice from occurring where the lawyer could raise valid defenses but is

not capable of doing so because of mental disability. The WSBA has not proved in anyway that such defenses have not been raised.

As cited in its brief, in order to be transferred to disability status the WSBA must not only have proved that Keefe was not able to defend himself but that he was not able to assist an attorney in doing so. The Bar complete ignores this mandatory determination because there is no evidence to support such a finding. There was no evidence that Keefe could not assist counsel in presenting his case. The Bar alludes to the fact that Keefe did not readily take advantage of his appointed counsel in this disability proceedings as some evidence that he could not assist counsel in the underlying case but accepting counsel in a disability case can be seen as conceding that such counsel needs to be appointed in the first place. This does not prove that he could not assist his counsel in the defense of the disciplinary case.

The Association needed to put on definitive evidence from someone that showed that any disability Keefe had would prevent him from assisting his counsel in defending a case involving failure to comply with court rules and a conflict of interest. Dr. Grant did not say this was so and not one else did either. The Bar did not prove either that Keefe was

not able to defend himself of that he was not able to assist his counsel in a defense.

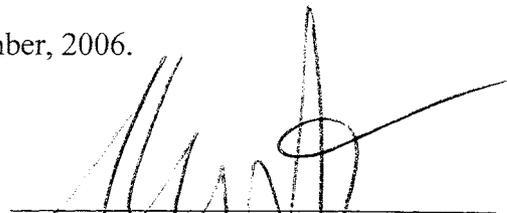
Conclusion: Whether the practice of law is a right or a privilege can be argued repeatedly but what is certain is that it is “not a matter of State’s grace” and “a person cannot be prevented from practicing except for valid reasons.” *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239, n. 5, 1 L. Ed.2d 796, 77 S. Ct. 7532 (1957). The WSBA seeks to prevent Keefe from practicing law. It asserts that its valid reason is Keefe cannot adequately practice law for others and that he cannot defend the underlying disciplinary proceeding even with the assistance of counsel. The Bar does not assert that even if it proved Keefe has a mental disability that this alone provides a valid reason to prevent him from practicing law. Everyone agrees, it takes more.

What the Bar showed at the disability hearing and presented in its brief to the court is that Keefe made assertions as to his beliefs and as to events he feels happened to him. The true essence of the Bar’s case is that Keefe’s assertions and beliefs are so strange, unconventional and delusional he should be prevented from practicing law. The Bar appears to hope that the pure “shock” value of these beliefs overcomes the weakness of the remaining requirements of a transfer to disability case. The Bar has

a very hard time making the leap from showing Keefe's beliefs to showing that these beliefs have an actual impact on how he practices law for others or that they prevent him from assisting counsel in his defense. In fact, the leap is so far that it has not made it.

The court must resist the Bar's efforts to have the shock value of Keefe's beliefs overcome its failure to prove all the elements required to transfer a lawyer disability status against his wishes. The Association's request for a transfer to disability should be denied.

Dated this 28th day of November, 2006.



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