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SUPREME COURT  
STATE OF WASHINGTON

2006 NOV 30 P 3:32

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No. 200,428-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re FERNANDO PEREZ-PENA,  
an Attorney at Law, WSBA No. 4858

NOV 3 2006  
U.S.D.A.

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FERNANDO PEREZ-PENA'S BRIEF IN OPPOSITION TO  
DECISION OF THE DISCIPLINARY BOARD OF THE  
WASHINGTON STATE BAR ASSOCIATION

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ORIGINAL

## INDEX

### TABLE OF CONTENTS

	<u>Page</u>
ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
STATEMENT OF THE CASE	3
ARGUMENT ON APPELLANT'S FIRST ASSIGNMENT OF ERROR.....	8
ARGUMENT ON APPELLANT'S SECOND ASSIGNMENT OF ERROR	13
CONCLUSION	16

### TABLE OF CASES

	<u>Page</u>
<u>Blevins v. Labor &amp; Industries</u> , 21 Wash App 366, 584 P 2d 992 (1978)	11
<u>Discipline of Curran</u> , 115 Wn.2d 747, 762, 801 P.2d 962 (1990)	14
<u>In re Stroh</u> , 108 Wn 2d 410, 739 P. 2d 690 (1987)	10
<u>State v. Walker</u> , 14 Wash App 348,353,541 P 2d 1239 (1978)	12

### STATUTES

RCW 9.95.240	10,11
RCW 9.96.060	9,10,11
RCW 35.20.255	8,9

DISCIPLINARY RULES and STANDARDS

ABA 5.12	13
ABA 7.12	14
ELC 10.14(c)	8,10
RPC 8.4(i)	3
RPC 8.4(b)	3

### **ASSIGNMENTS OF ERROR**

1. The Hearing Office and the Board erred in considering only the record of the Seattle Municipal Court as proof that Perez-Pena committed the assault.
2. The Board erred in its recommendation as to sanctions that should be imposed.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the successful completion of a deferred sentence followed by a dismissal of the charge allows a lawyer to factually defend himself on that charge in a disciplinary proceedings; and
2. Whether the recommendations of the Board as to sanctions to be imposed in this matter are just and fair under the circumstances of the case.

## STATEMENT OF THE CASE

### A. LEGAL BACKGROUND

On July 19, 2005, the Washington State Bar Association (hereinafter designated as the “Association”) filed a formal two count complaint (BF 002, pages 1-4) against Fernando Perez-Pena (hereinafter designated as “Perez-Pena”), attorney at law, Bar No. 4858. The complaint alleged as follows:

#### COUNT 1

By assaulting Ms. Cameron, Respondent violated Rules for Lawyer Discipline (RLD) 1.1(a) (currently RPC 8.4(i)) (by committing an unjustified act of assault or other act which reflects disregard for the rule of law...and whether the same constitutes a felony or misdemeanor or not) and/or RPC 8.4(b) (by violating SMC 12A.06.010).

#### COUNT 2

By failing to refund unearned portions of his clients’ advanced fee, Respondent violated RPC 1.15(d).

The complaint was duly answered (BF 005, pages 5-8) and the matter eventually proceeded to a hearing on March 14, 2006 (BF 029) before hearing officer James C. Lawrie.

On March 22, 2006, the hearing officer entered Findings of Fact, Conclusions of Law and a Recommendation (BF 022, pages 75-83). As to Count 1 he found that Perez-Pena had violated RPC 8.4(i) and (b) by committing an unjustified act of assault during a transaction with a client and recommended that

Perez-Pena be admonished (BF 022, page 80). As to Count II he found that it had not been proven and should be dismissed (BF 022, page 81).

On April 4, 2006, the Association filed a Notice of Appeal to the Disciplinary Board (hereinafter designated as the “Board”; BF 025, pages 87-88).

On April 10, 2006, Perez-Pena filed a Notice of Cross-Appeal to the Board (BF 026, page 89).

A hearing was then held before the Board on September 29, 2006 and an Order Modifying the Hearing Officer’s Decision was filed on October 12, 2006 (BF 44, pages 13-23). The Board affirmed the Hearing Officer’s conclusion that Count I was proven, reversed the Hearing Officer’s conclusion that Count II was not proven and recommended a suspension of three months on Count I and six months on Count II, to run concurrently (BF 44, pages 13-14, 21-22).

On October 19, 2006, Perez-Pena filed a Notice of Appeal from the Board’s Order (BF 46, pages 24-25).

#### B(I). FACTUAL BACKGROUND – COUNT I

On May 31, 2001, an altercation took place between Perez-Pena and his clients Cecilia Cameron Garcia and Arturo Garcia.

This led to the filing of a criminal complaint in the Seattle Municipal Court on July 20, 2001 charging Perez-Pena with assaulting Cecilia Cameron (Ex. 14).

A jury found Perez-Pena “Guilty” as charged on January 30, 2002 (Ex. 15).

On February 28, 2002, the Court granted Perez-Pena a deferred sentence subject to the following conditions, inter alia; (1) No contact with the “victim” except on civil or Bar related matters; (2) payment of a fine of \$1,000.00; and (3) completion of an anger management class (BF 40, page 70).

Perez-Pena appealed to the King County Superior Court.

On May 30, 2003, Perez-Pena’s appeal was remanded back to the Municipal Court by the Superior Court (BF 17, page 50), Perez-Pena having withdrawn his appeal (BF 20, page 67).

On July 3, 2003, the Municipal Court, finding that the conditions of the deferred sentence had been compiled with, vacated the Judgment and Sentence entered on February 28, 2002 and dismissed the complaint filed on July 30, 2001 (BF 17, page 57).

On May 9, 2005, (almost two years later) Perez-Pena filed a motion asking for clarification of the docket entries of July 3, 2003 (BF 17, page 51).

On June 3, 2005, the Municipal Court entered written Orders Clarifying Entries in Court Docket and Concluding Deferred Sentence, which vacated the Judgment and Sentence of February 28, 2002 and dismissed the complaint of assault as of July 3, 2003. They did not, however, vacate the jury verdict (Exhibits 17-18).

B(II). FACTUAL BACKGROUND – COUNT II

On March 22, 2001, Ms. Cameron and Arturo Garcia hired Perez-Pena by check in the amount of \$2,000.00 to help them with an immigration problem. The check was for a flat fee to handle the matter (BF 44, page 14).

Within a couple of days (for reasons not deemed material) the Garcias decided not to go forward and asked for a refund. Perez-Pena agreed to return \$1,500.00 which was acceptable to the Garcias. He gave them a check for \$1,500.00 payable to both of them which was good in all respects. The Garcias were unable to cash the check because the bank had only Mrs. Garcias maiden name and required their marriage certificate which was still in the possession of Perez-Pena. The Garcias returned to Perez-Pena's office to secure the certificate. Their demeanor was hostile and they threatened lawsuits and Bar Association complaints. They did not bring the check with them. Because of their manner and threats Perez-Pena stopped payment on the check until the issues between them could be resolved. The check bounced (BF 44, page 15).

After more dealings, marked by distrust on both sides, Perez-Pena agreed to issue a cashier's check in the amount of \$1,600.00 (one hundred dollars more than his first offer) in exchange for the original check and releases of liability (BF 44, page 15).

On March 31, 2002, the Garcias went to Perez-Pena's office with the bounced check and the releases. Perez-Pena went and procured the cashier's check. They were to simultaneously exchange the check and the signed releases (BF 44, pages 15-16).

During the exchange Mrs. Garcia tried to keep the check and grabbed the releases back. She managed to obtain the check and tore the releases in half. During this time some physical contact occurred which eventually led to the prosecution of Perez-Pena for assault [Perez-Pena always denied the assault, but the Board found he either pushed or hit her] (BF 44, page 16).

Perez-Pena then reported that the cashier's check had been stolen which caused it to bounce. Eventually the Garcias sued Perez-Pena which resulted in a judgment against him in the principal amount of \$1,392.75 (less than he had offered to refund on either occasion) plus costs for a total of \$1,431.45 (Ex. 19). This remains unpaid (BF 44, page 18).

## **ARGUMENT ON APPELLANT'S FIRST ASSIGNMENT OF ERROR**

1. The Hearing Office and the Board erred in considering only the record of the Seattle Municipal Court as proof that Perez-Pena committed the assault.

On March 9, 2006 (prior to the hearing) the hearing officer granted (BF 21) a motion of the Association (BF 17, pages 22-51) to Establish Record as Conclusive Evidence of Respondent's Guilt under ELC 10.14(c). The Board affirmed this decision (BF 44, page 19). The ruling, of course, deprived Perez-Pena of an opportunity to present a factual defense to the accusation before the hearing officer and the Board. It is submitted that this was error.

ELC 10.14(c) provides

...the court record of conviction is conclusive evidence at the disciplinary hearing of the respondent's guilt of the crime and violation of the statute...

ELC 10.14(c) does not, however, address the issue of the effect of a successfully completed deferred sentence and subsequent dismissal of the accusation and vacation of the Judgment and Sentence.

The authority of the Seattle Municipal court to defer the imposition of a sentence in a criminal case is contained in RCW 35.20.255.

RCW 9.96.060 provides for the expungement of the court records upon the successful completion of a deferred sentence and the effect and result of such an expungement. That statute reads:

(1) Every person convicted of a misdemeanor offense who has completed all of the terms of the sentence for the misdemeanor. . .

offense may apply to the sentencing court for a vacation of the applicant's record of conviction for the offense. If the court finds the applicant meets the tests prescribed in subsection (2) of this section, the court may in its discretion vacate the record of conviction by (a) (i). . . .  
or (II) if the applicant has been convicted after a plea of not guilty, the court setting aside the verdict of guilty, and (b) the court dismissing the . . . complaint, . . . against the applicant and vacating the Judgment and Sentence.

**XXX**

(3) Once the court vacates a record of conviction under subsection (I) of this section, the person shall be released from all penalties and disabilities resulting from the offense and the fact the person has been convicted of the offense shall not be included in the person's criminal history for purposes of determining a sentence in any subsequent conviction. For all purposes, including responding to question on employment or housing applications, a person whose conviction has been vacated under subsection (i) of this section may state that he or she has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later prosecution. (emphasis added).

RCW 9.96.060 is the authority and the Seattle Municipal Court Docket and subsequent orders in Perez Pena's case establishes there is no conviction of Perez Pena. The enforcement of Lawyer Conduct Rules, ELC 10.14(c), does not and cannot somehow revive Perez Pena's conviction. That rule relates to an existing criminal conviction.

This Court has enacted no court rule relating to the admissibility of a conviction in a disciplinary hearing of an attorney after the judgment and sentence has been vacated and the complaint has been dismissed. There is no Supreme Court rule that is in conflict with RCW 9.96.060(3).

Not only is there no court rule that conflicts with the deferred sentence statute, but this Court has recognized that a conviction does not survive the successful completion of the conditions imposed in granting a deferred sentence, except in a subsequent criminal proceeding.

In the case of In re Stroh, 108 Wn 2d 410, 739 P. 2d 690 (1987) Stroh had been disbarred from the practice of law in 1982. He had been convicted of witness tampering, a class C felony. He had been granted a deferred sentence, subject to his satisfying certain conditions. Having fulfilled the conditions, Stroh petitioned the sentencing judge to dismiss the criminal case, pursuant to RCW 9.95.240<sup>2</sup>.

An Order of Dismissal of the criminal case was then entered in the Superior Court.

Stroh then petitioned for his reinstatement to practice law. In the course of the reinstatement proceedings Stroh's answer of "no" to the question "Have you ever been convicted of a crime?" on his application for real estate salesperson and broker's licenses became an issue as to his "attitude, conduct and reformation" in the reinstatement proceeding. The application had been dated, signed and submitted after the criminal case against him had been dismissed, pursuant to RCW 9.95.240.

In its reinstatement decision, the Supreme Court recognized that Stroh's answer to the question was true and correct and was permitted under RCW 9.95.240, which provides:

. . . defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted..

These same words appear in RCW 9.96.060 (3).

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<sup>2</sup> RCW 9.95.240 was a deferred sentence statute pertaining to felonies and was in existence between 1957 and 1984.
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Blevins v. Labor & Industries, 21 Wash App 366, 584 P 2d 992 (1978), in discussing the effect of the felony deferred sentence statute RCW 9.95.240, stated, at pages 368-9:

[W]e hold the Washington legislature intended to restrict the use of prior conviction for impeachment purposes to defendants in subsequent prosecutions. . . . When so viewed, the proviso or exception is construed strictly; when a statute provides for certain exceptions, no other exceptions will be assumed by implication (Cases cited). Moreover, RCW 9.95.240 being a remedial statute, should be construed liberally so as to give effect to its purpose, 2A Sutherland Statutory Construction §57.12 (3<sup>rd</sup> red. Rev. 1973) that is, to treat an individual whose conviction has been expunged as a full fledged citizen unless the statute clearly intends to preserve some taint of the conviction.

In accord, State v. Walker, 14 Wash App 348,353,541 P 2d 1239 (1978).

In summary, the conviction of Perez Pena died on July 3, 2003. No argument can resuscitate that conviction. There is no court rule in existence that permits the Association to use the dismissed conviction, the Jury Verdict, the Judgment and Sentence, the Complaint, from the Seattle Municipal Court to establish that Perez Pena was convicted of a crime. There is no court rule that conflicts with RCW 9.96.060. This Court gave RCW 9.95.240, the felony deferred sentence statute, full force and effect in In re Stroh, supra. It should give RCW 9.96.060 full force and effect in the Perez Pena case.

## **ARGUMENT ON APPELLANT'S SECOND ASSIGNMENT OF ERROR**

The Board erred in its recommendations as to sanctions that should be imposed.

The Board has recommended a three month suspension for Count I and a six month suspension for Count II. It is submitted that under the circumstances of this case such punishment would be unfairly extreme. The hearing officer found that it would be a “great injustice to consider these episodes [the assault and the stopping of payment on the two checks] out of context (BF 22, page 2). This Finding was left undisturbed by the Board (BF 44, page 14).

The actions of Perez-Pena were done in response to the actions of his clients who the Board found to be “hostile”, “threatening”, “disruptive”, “aggressive”, “arguably violent” and “paranoid” (BF 44, pages 15-17). The Board further found that Perez-Pena’s actions did not reflect adversely on his honesty or integrity (BF 44, page 19).

ABA Standard 5.12 states

“suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.1 and that seriously adversely reflect on the lawyer’s fitness to practice.” (emphasis supplied).

ABA Standard 7.2 states

“suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.” (emphasis supplied).

Both standards are presumptive and not mandatory. Standard 5.12 requires that the conduct adversely reflect on the lawyer’s fitness to practice.

The Court is asked to consider the following:

1. Prior to March of 2001 Perez-Pena had no disciplinary record. He had been admitted to the Bar in 1973;
2. From March 2001 to date he has had no disciplinary record; and
3. After is “conviction” for the assault he fulfilled all of the conditions of his deferred sentence including the completion of an anger management course.

What, in the above, makes the Association think that in 2007 he is unfit to practice law?

Perez-Pena has already been punished by the Seattle Municipal Court and has followed the injunctions of that court. This was found to be a mitigating factor by the Board (BF 44, page 21). It is submitted that this is sufficient.

Discipline of Curran, 115 Wn.2d 747, 762, 801 P.2d 962 (1990) held,

In determining which criminal conduct reflects disregard for the rule of law requiring bar discipline to supplement criminal sanctions, the bar association should consider two factors – the frequency of violation, and the seriousness of the injury caused. Repeated violations of the law show the kind of disregard which sets such a poor example for the community at large that it may merit discipline under this rule.

There is no evidence of any injury flowing from the assault and Perez-Pena has no record of any other violations. There is absolutely no reason to supplement in 2007 the criminal sanctions imposed by the Seattle Municipal Court in 2002 and successfully complied with by Perez-Pena by 2003.

As to the “refund” matter it is conceded, of course, that the Garcias have never been repaid their money. What should be the sanction where on two occasions Perez-Pena tried to refund more than a civil court thought the Garcias were entitled to and was prevented from doing so largely by the actions of the Garcias? It is argued that an admonition would be more than sufficient.

**CONCLUSION**

The Board's Findings and Conclusions as to Count I should be reversed because Perez-Pena was not afforded an opportunity to factually defend himself throughout the proceedings.

The Board's Recommendations as to sanctions on both counts should be reduced to admonitions

Respectfully submitted this 29<sup>th</sup> day of November 2006.

  
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