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Supreme Court No. 200,429-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DISCIPLINARY PROCEEDING AGAINST

JEFFREY K. DAY,

Lawyer (Bar No. 22867).

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**ANSWERING BRIEF OF THE  
WASHINGTON STATE BAR ASSOCIATION**

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**I. COUNTERSTATEMENT OF THE ISSUE**

Respondent Jeffrey Day was convicted of molesting an 11-year-old former client. The hearing officer found that he violated Rule 8.4(b) of the Rules of Professional Conduct (RPC) (prohibiting criminal conduct) and RPC 8.4(i) (prohibiting conduct involving moral turpitude and unjustified act of assault), and recommended disbarment. A unanimous Disciplinary Board affirmed. Should the Court disbar Day?

**II. COUNTERSTATEMENT OF THE CASE**

**A. PROCEDURAL FACTS**

The Washington State Bar Association (Association) charged Day with violating RPC 8.4(b) and/or RPC 8.4(i) based on his conviction of first degree child molestation (RCW 9A.44.083). Clerk's Papers (CP) 1-3.<sup>1</sup>

A disciplinary hearing was held in January 2006. On April 17, 2006, the hearing officer filed his Findings of Fact, Conclusions of Law and Recommendation (FFCL), finding that Day violated both RPC 8.4(b)

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<sup>1</sup> RCW 9A.44.083(1) provides: "A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." For purposes of the statute, "sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

and RPC 8.4(i) and recommending that he be disbarred. Decision Papers (DP) 1-13. A copy of the FFCL is attached as Appendix A.

On October 12, 2006, the Disciplinary Board affirmed the hearing officer's decision and disbarment recommendation unanimously. DP 14-15. The Board's order is attached as Appendix B.

**B. SUBSTANTIVE FACTS**

Day was admitted to the practice of law in Washington on October 22, 1993. At all relevant times, he also served as a judge pro tem. FFCL ¶¶ 1-2.

In or about February 2002, Day began representing D.J., who was then nine years old, in a criminal matter. Day learned facts about D.J. and his family during the course of the representation, including that D.J. was being raised by a single mother who had limited financial means. Day's representation of D.J. ended in or about September 2002. FFCL ¶¶ 3-4.

Day subsequently befriended D.J. and his mother. FFCL ¶ 5. He took D.J. to sporting events, bought him meals and gifts, and twice had him spend the night at his home. FFCL ¶ 6. Although D.J.'s mother generally did not approve of her son having relationships with other adults, she approved of his relationship with Day, "mainly because of [Day's] position." FFCL ¶ 5; TR 14-15. As she put it, "He was a lawyer

and a judge and somebody that I thought I could really trust.” Transcript (TR) 15. Day knew that both D.J. and his mother trusted him. TR 67.

D.J.’s second overnight visit with Day occurred on February 14 - 15, 2004. FFCL ¶ 7. That night, D.J. fell asleep while watching a movie at Day’s house. While D.J. was asleep, Day removed D.J.’s pants, leaving him clad only in his T-shirt and boxer shorts, placed a blanket over him and went to bed in his bedroom. FFCL ¶¶ 8-9.

D.J. awoke in the middle of the night. Because it was dark and he was cold, he went to Day’s bedroom, got into bed with him and fell asleep. FFCL ¶ 10. D.J. felt comfortable getting into Day’s bed with him because he “felt like [Day] was family, so I felt like I could trust him.” FFCL ¶ 11; EX 6 at 31.

When D.J. awoke early in the morning of February 15, 2004, he felt Day’s hand inside his boxer shorts, rubbing his genitals. FFCL ¶ 12. Day acted intentionally. FFCL ¶ 19.

The Pierce County Prosecutor charged Day with first degree child molestation (RCW 9A.44.083), a felony. Day was convicted following a jury trial and sentenced to a prison term of 60 months to life. FFCL ¶¶ 15-17.

D.J. suffered a variety of difficult emotional issues as a result of Day’s conduct, including anger, hurt, disgust, embarrassment and

confusion, including confusion about his sexual orientation. FFCL ¶ 20; TR 19-20. He entered counseling to address these issues, which “helped him express his feelings . . . but it didn’t make them go away.” TR 20. Ultimately D.J. moved to California to live with his aunt so that he could have a fresh start. FFCL ¶ 20. Additionally, D.J.’s mother was devastated by Day’s conduct and her inability to protect her son. She lost her ability to trust people. FFCL ¶ 21.

### **III. SUMMARY OF ARGUMENT**

When this Court licenses a lawyer, it does more than represent to the public that the individual is skilled in the law. It also represents that the individual possesses the moral character worthy of the public trust.

The issue in this case is whether Day’s conviction of molesting his young former client should result in his disbarment. Day’s conduct demonstrates his untrustworthiness and unfitness to practice law. The Court should affirm the Board’s unanimous recommendation of disbarment.

In addition, to provide guidance for future cases, the Court should reevaluate the application of the ABA Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) in this case. The hearing officer and Board concluded that the presumptive sanction was suspension under ABA Standard 5.12, but aggravated the sanction to

disbarment due to the vulnerability of the victim and Day's egregious abuse of trust. But the ABA Standards are outdated with respect to sex crimes and do not apply at all to crimes involving moral turpitude. Thus, while we agree with the Board's recommendation that disbarment is the appropriate sanction, we ask the Court to clarify that when a lawyer commits a sex crime of this nature, disbarment is the presumptive sanction as well.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

Unchallenged factual findings are verities on appeal. See, e.g., In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005). In addition, where, as here, a disciplinary proceeding is based on a criminal conviction, "the court record of the conviction is conclusive evidence at the disciplinary hearing of the respondent's guilt of the crime and violation of the statute on which the conviction was based." Rule 10.14(c) of the Rules for Enforcement of Lawyer Conduct (ELC).

The Court reviews conclusions of law de novo, upholding them if supported by the findings of fact. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004).

While the Court has plenary authority over lawyer discipline (ELC 2.1), it generally affirms the Disciplinary Board's sanction

recommendation unless it “can articulate a specific reason to reject” it. Guarnero, 152 Wn.2d at 59 (quotations omitted). The Court hesitates to reject the Board’s recommendation if it is unanimous. Id.

**B. THE COURT SHOULD AFFIRM THE BOARD’S UNANIMOUS RECOMMENDATION OF DISBARMENT**

The Court employs the ABA Standards “as a basic, but not conclusive, guide” to imposing sanctions. Whitney, 155 Wn.2d at 468. Under the ABA Standards, the Court first determines the presumptive sanction by examining the ethical duty violated, the lawyer’s mental state and the injury caused. In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 331, 144 P.3d 286 (2006). It then determines whether the presumptive sanction should be increased or reduced due to aggravating or mitigating factors. Id.

**1. Day Violated Duties Prohibiting Criminal Conduct Involving Violence and Breach of Trust, and Acts of Moral Turpitude**

The Board affirmed the hearing officer’s conclusions that Day violated both RPC 8.4(b) and RPC 8.4(i). Day has not assigned error to these conclusions.

a. RPC 8.4(b)

RPC 8.4(b) provides that it is misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” The rule applies

when criminal conduct indicates “lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category.” In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 766, 801 P.2d 962 (1990). The hearing officer found that Day violated RPC 8.4(b) because first degree child molestation, a Class A felony, is by definition a “violent offense” (RCW 9A.44.083(2), 9.94A.030(48)(a)(1)), and because Day’s criminal act involved “an enormous violation of trust as to D.J. and his mother”:

D.J.’s mother testified at the disciplinary hearing that she allowed Respondent to pursue a relationship with her son because of his position as a lawyer and a judge and someone she believed she could trust. D.J. trusted Respondent as well. Respondent clearly abused both D.J.’s trust and his mother’s trust by his criminal act.

FFCL ¶ 25 (emphasis added).

b. RPC 8.4(i)

RPC 8.4(i) provides that it is misconduct for a lawyer to “[c]ommit any act involving moral turpitude . . . or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise.” The hearing officer found that Day violated RPC 8.4(i) because his molestation of D.J. constituted an unjustified act of assault and involved moral turpitude. FFCL ¶¶ 27-28.

An act involves moral turpitude if the “inherent nature of the act committed . . . violate[s] the commonly accepted standard of good morals, honesty, and justice.” In re Disciplinary Proceeding Against Heard, 136 Wn.2d 405, 418, 963 P.2d 818 (1998) (quotation omitted). In In re Disciplinary Proceeding Against McGrath, 98 Wn.2d 337, 342-43, 655 P.2d 232 (1982), the Court held that the crime of second degree assault involved moral turpitude based on factors such as the presence of an intent element, serious injury to the victim, and the seriousness of the offense as reflected by the imposition of a significant sentence. Here, the hearing officer found that Day’s crime involved moral turpitude based on the factors identified in McGrath. FFCL ¶ 28; see McGrath, 98 Wn.2d at 343; see also In re Lesansky, 25 Cal. 4th 11, 17 P.3d 764, 104 Cal. Rptr. 2d 409 (2001) (crime of attempting to commit a lewd act on a child involved moral turpitude).

## **2. Day Acted Intentionally**

Under the ABA Standards, intent exists “when the lawyer acts with the conscious objective or purpose to accomplish a particular result.” ABA Standards at 6, 17. The hearing officer found that Day acted intentionally. FFCL ¶¶ 19, 31. This finding was compelled by the elements of the crime Day committed: child molestation requires “sexual contact” (RCW 9A.44.083(1)), which is a touching of the sexual or

intimate parts “done for the purpose of” sexual gratification. RCW 9A.44.010(2).

### **3. Day’s Conduct Injured D.J., D.J.’s Mother, and the Profession**

Under the ABA Standards, “injury” means harm to a client, the public, the legal system or the profession that results from a lawyer’s misconduct. ABA Standards at 7. Injury may be actual or potential. Id. “[A] disciplinary proceeding does not require a showing of actual harm. . . . The rationale is the need for protection of the public and the integrity of the profession.” In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 486, 998 P.2d 833 (2000) (quotation omitted).

The hearing officer found that Day’s conduct caused actual injury to D.J. FFCL ¶ 20. Among other things, D.J. suffered emotional damage for which he sought counseling, and ultimately moved to another state to get a “fresh start.” Id. In addition to the injury articulated by the hearing officer, injury to the child-victim is inherent in the crime Day committed. See Grange Ins. Ass’n v. Authier, 45 Wn. App. 383, 386, 725 P.2d 642 (1986) (inferring an intent to inflict injury and harm to the victim from child molestation as a matter of law); accord Lesansky, 17 P.3d at 768.

The hearing officer also found that Day’s conduct caused emotional injury to D.J.’s mother, who felt she should have been able to

protect her son and lost her sense of trust. FFCL ¶ 21.

Finally, Day's conduct injured the legal profession. The image of the profession suffers when a lawyer abuses a child and former client for purposes of gratifying his sexual needs. See generally ABA Standards at 36 (“[p]ublic confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct”).

**4. The Presumptive Sanction for Day's Violations of RPC 8.4(b) and 8.4(i) Is Disbarment**

The hearing officer and Board found that suspension under ABA Standard 5.12 was the presumptive sanction in this case. FFCL ¶¶ 30, 32, DP 14. Day asks the Court to affirm this finding. Respondent's Brief (RB) at 6-8. But, as set forth below, the ABA Standards reflect archaic notions regarding the seriousness of sex crimes and do not apply to acts involving moral turpitude. Thus, while the Association supports the Board's ultimate sanction recommendation, we ask the Court to examine the Board's decision regarding the applicable presumptive sanction to provide guidance in future cases.

a. The Application of ABA Standard 5.12 to Sex Crimes is Questionable

ABA Standard 5.1 states in relevant part:

5.1 Failure to Maintain Personal Integrity:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

As noted by the hearing officer, the Commentary to ABA Standard 5.12 indicates that it applies to felonies involving sexual assault. FFCL ¶ 30; see ABA Standards at 37. But, on this issue, the ABA Standards are limited by their methodology.

The ABA Standards were developed by the ABA's Joint Committee on Professional Discipline (Committee) following a review of reported disciplinary cases from 1974 to 1984. ABA Standards at 2. The Committee analyzed the cases to "identify the patterns that currently exist among courts imposing sanctions and policy considerations that guide the courts." Id. at 3. From this data the Committee synthesized a series of principles to apply to myriad misconduct, looking to the duty violated,

mental state and injury caused to determine the hierarchy of sanctions. Id. Under the ABA Standards, disbarment generally is appropriate in a variety of situations if a lawyer acts intentionally for his or her own benefit and causes serious harm. See, e.g., ABA Standard 4.21 (failure to preserve confidences), ABA Standard 4.31 (conflicts of interest), ABA Standard 4.61 (lack of candor), ABA Standard 5.21 (failure to maintain public trust), ABA Standard 6.11 (false statements to a tribunal), ABA Standard 7.1 (duties owed as a professional).

The Committee took a different approach with respect to criminal conduct, however, finding disbarment generally appropriate if the lawyer commits certain crimes or engages in intentional conduct that includes certain elements, generally related to dishonesty. Among the enumerated crimes are interference with the administration of justice, fraud, theft and “sale, distribution or importation of controlled substances.” ABA Standard 5.11. Other criminal conduct is subject to the presumptive sanction of suspension. ABA Standard 5.12.

The crimes enumerated in ABA Standard 5.11 necessarily reflect the cases that the Committee reviewed, which, in turn, reflect policy decisions made decades ago. From the vantage point of 2007, it is difficult to understand why a lawyer who sold marijuana to his neighbor would be subject to presumptive disbarment whereas a lawyer who raped

his neighbor would be subject to presumptive suspension. The ABA Standards are frozen in time, notwithstanding the dramatic changes in attitudes towards sexual assault crimes over the past 20 to 30 years.

The statutes regulating sexual assaults against minors provide an example. During the years in which the Committee conducted its case analysis, the crime Day committed would have been indecent liberties, a Class B felony punishable by no more than 10 years in prison.<sup>2</sup> The crime of first degree child molestation was enacted in 1988, still as a Class B felony. But in 1990, was elevated to a Class A felony, punishable by up to life in prison.<sup>3</sup>

The case law reviewed by the Committee also has changed in ensuing years. For instance, the Commentary cites a California case, In re Safran, 18 Cal. 3d 134, 554 P.2d 329, 133 Cal. Rptr. 9 (1976), in which the lawyer was suspended for three years for child molestation. ABA Standards at 37. But, subsequent to Safran, the California Supreme Court held that a conviction for attempting to commit a lewd act on a child warranted summary disbarment because such conduct demonstrated

such a serious breach of the duties of respect and care that all adults owe to all children, and it showed such a flagrant

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<sup>2</sup> See former RCW 9A.88.100 (recodified in 1979 as RCW 9A.44.100); RCW 9A.20.020(1)(b) (applicable to crimes committed before 1984).

<sup>3</sup> See Laws of 1988, ch. 145 § 5; Laws of 1990, ch. 3 § 902(2); RCW 9A.44.083(2); RCW 9A.20.021(1)(a).

disrespect for the law and for societal norms, that continuation of petitioner's State Bar membership would be likely to undermine public confidence in and respect for the legal profession.

Lesansky, 17 P.3d at 768.

Consistent with evolving societal norms, this Court should reevaluate the presumptive level of discipline for conduct involving sexual assault convictions. Because Day intentionally sexually assaulted a child and former client for his own gratification, with ensuing serious harm to the child, the child's mother, and the legal profession, the presumptive sanction should be disbarment.

b. The ABA Standards Do Not Apply to Acts Involving Moral Turpitude

The prohibition in RPC 8.4(i) against acts involving moral turpitude is not in the Model Rules of Professional Conduct, but has been found in Washington's rules for nearly 70 years.<sup>4</sup> In Curran the Court noted that, with respect to the prohibitions contained in former RLD 1.1(a), our rules "do not fully embrace the modern trend." Curran, 115 Wn.2d at 757.

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<sup>4</sup> See former Rules for Discipline of Attorneys XI(1) (1938). The prohibition was reenacted in 1969 as former Discipline Rules for Attorneys 1.1(a), in 1983 as former Rule 1.1(a) of the Rules for Lawyer Discipline (RLD), and, finally, in 2002 and 2006 as RPC 8.4(i). The language of former RLD 1.1(a) and RPC 8.4(i) is the same.

The Curran court examined the presumptive sanction for one of the prohibitions set forth in former RLD 1.1(a), disregard for the rule of law, based on the lawyer's conviction of vehicular homicide. In so doing, the Court recognized the inapplicability of the ABA Standards in this context: "Because the ABA Standards track the ABA Model Rules, they do not provide direct guidance for violations of RLD 1.1(a), which has no counterpart in the ABA Model Rules." Id. at 770. Thus, the Court determined its own presumptive sanction, looking at the purpose of the rule, the mental state and injury. Id. at 771-73. The Curran court held that "in most cases violation of the phrase of RLD 1.1(a), which we are discussing, should result only in a reprimand or censure," although in that case it determined that the presumptive sanction was a two-year suspension based on the degree of injury inflicted. Id. at 772-73.

Day urges that, under Curran, the presumptive sanction should be suspension here. RB at 6. But the portion of then-RLD 1.1(a) considered in Curran is different from the portion at issue in this case,<sup>5</sup> and the reasons for imposing discipline differ as well. As described in Curran, conduct involving disregard for the rule of law merits discipline because it

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<sup>5</sup> The Curran court explicitly declined to address moral turpitude because the Association had not raised that issue below. Id. at 764.

demonstrates willingness to break the law, which sets a poor example to members of the public:

The legal system relies more heavily, but less obviously, on voluntary compliance with the law than it does on enforcement or even dispute resolution. The respect which our legal institutions command makes this possible. . . . Unfortunately, violations of the law by lawyers contribute to erosion of respect for legal institutions and the law.

Id. at 761-62. Thus, imposing discipline for disregard of the rule of law “preserves confidence in the legal system.” Id. at 762.

Imposing discipline for acts involving moral turpitude, in contrast, protects the public from lawyers who lack the basic fitness to practice law, thereby preserving confidence in the legal profession. As the California Supreme Court explained, “Professional competence demonstrated by education and examination and good moral character are required for admission to practice. . . . Commission of acts manifesting moral turpitude may establish unfitness even if the attorney's professional competence is not disputed.” Lesansky, 17 P.3d at 766 (quotation omitted, emphasis in original); see also McGrath, 98 Wn.2d at 345-46.

Because acts of moral turpitude implicate the lawyer’s basic fitness to practice, the presumptive sanction for the commission of such acts should be disbarment. See McGrath, 98 Wn.2d at 345 (disbarring lawyer convicted of assault involving moral turpitude). Application of this

presumptive sanction here is supported further by the hearing officer's finding that Day acted intentionally for his own self interest. FFCL ¶ 19. This mental state is more culpable than was found in either Curran or McGrath. See Curran, 115 Wn.2d at 763, 772 (lawyer lacked intent to kill); McGrath, 98 Wn.2d at 343 (lawyer acted knowingly); ABA Standards at 6, 17 (the "most culpable" mental state is intent).

**5. Even if the Presumptive Sanction Were Suspension, the Hearing Officer and Board Properly Aggravated the Sanction to Disbarment**

Day claims that the hearing officer and Board erred in recommending disbarment because the aggravating factors are insufficient to support an increase in the sanction, and because additional mitigating factors exist. To the contrary, even if the presumptive sanction were suspension, the hearing officer and Board properly found that the aggravating factors outweigh the mitigating factors and support disbarment.

a. The Record Supports the Aggravating Factors Found by the Hearing Officer and Board, as well as Two Others

"[A]ggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed." ABA Standard 9.21. ABA Standard 9.22 sets forth a non-exhaustive list of aggravating factors.

Here, the hearing officer and Board found the enumerated aggravating factor of vulnerability of the victim. FFCL at 9, § IV(B); see ABA Standard 9.22(h). As Day does not challenge this factor, it is a verity on appeal. In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 681, 105 P.3d 976 (2005).

As an additional aggravating factor, the hearing officer and Board found that Day was allowed access to D.J. because of his position as a lawyer, and that he abused the trust granted to him because of that position:

Respondent's criminal act as to a highly vulnerable young victim, a former juvenile client, coupled with the enormous breach of trust associated with that act . . . justifies a deviation from the presumptive sanction of Suspension to the more appropriate sanction of Disbarment. . . . The Respondent's criminal act here clearly suggests that his trustworthiness as a lawyer in any future matters would, at best, remain suspect, and at worst, be legitimately questioned at every turn – especially when one views the extreme vulnerability of D.J. and the resulting abuse of the trust that D.J. and his mother had placed in him – trust that had been engendered based on his positions as an attorney and as a judge.

FFCL ¶ 44 (emphasis in original); see also FFCL ¶¶ 5, 39-41.

Day argues that his abuse of trust should not be considered as an aggravating factor because it was unrelated to the practice of law. RB 15-16. Not so. Day met D.J. in his professional capacity, and D.J.'s mother allowed him access to her son after the representation ended because of his

position as a lawyer. FFCL ¶¶ 3, 5, 44; TR 14-15. The point is not, as Day suggests, that the sanction is being increased because of his status as lawyer but, rather, because he used his status as a lawyer to gain access to his vulnerable young victim.<sup>6</sup>

Although these two aggravating factors suffice to support a departure from the presumptive sanction, the record supports another two aggravating factors. First, ABA Standard 9.22(b), dishonest or selfish motive, applies because, by definition, the crime of child molestation requires “sexual contact,” which is a touching of the sexual or intimate parts done for the purpose of sexual gratification. See FFCL ¶ 19, 31; RCW 9A.44.083(1), RCW 9A.44.010(2). Second, ABA Standard 9.22(i), substantial experience in the practice of law, applies because Day was admitted to practice in October 1993, more than 10 years before the misconduct occurred. See FFCL ¶¶ 1, 12; In re Disciplinary Proceeding Against Lopez, 153 Wn.2d 570, 580, 597, 106 P.3d 221 (2005) (affirming hearing officer’s application of “substantial experience” aggravator when lawyer had practiced for 10 years at the time of the misconduct).

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<sup>6</sup>The RPC recognize that lawyers enjoy a position of trust with respect to their clients and therefore regulate their ability to use this position of trust in their interactions with clients. See e.g., RPC 1.8(a) (business transactions); RPC 1.8(c) (gifts); RPC 1.8(j) (sexual relations).

b. The Hearing Officer and Board Properly Rejected Day's Proposed Mitigating Factors

The hearing officer and Board found only one mitigating factor: absence of a prior disciplinary record. FFCL at 9 § IV(C); see ABA Standard 9.32(a). They explicitly rejected the other mitigating factors Day proffered, including character or reputation and imposition of other penalties and sanctions. FFCL ¶¶ 33, 36, 40-44; see ABA Standards 9.32(g), (k). These decisions were correct.

First, although Day correctly notes that his competence to practice law was not challenged (RB at 19), competence is irrelevant when the underlying misconduct reflects moral turpitude. McGrath, 98 Wn.2d at 345-46; Lesansky, 17 P.3d at 766. Additionally, contrary to Day's claim (RB at 15), his "trustworthiness related to the practice of law" was challenged, both by the nature and circumstances of his crime and by the testimony of D.J.'s mother, who stated, "I don't think he has a character. I think he is a phony. I don't think he should be trusted ever." TR 22-23. The hearing officer weighed the testimony of Day's character witnesses against all the evidence and declined to apply the mitigator in this case. FFCL ¶ 44. This determination should not be disturbed.

Second, Day argues that his criminal sanctions "must" be considered (RB at 14), but neither this Court nor the ABA Standards

require that a mitigating factor be given weight. See In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 721, 72 P.3d 173 (2003) (weight given to a mitigating factor is determined by the totality of the circumstances); ABA Standard 9.1 (aggravating and mitigating factors “may be” considered in determining sanction). The goals of the criminal justice system are different from the goals of lawyer discipline. Day’s prison term reflects the seriousness of his crime. It does not reduce the need for disbarment. When a lawyer is convicted of a crime involving moral turpitude, the purpose of disciplinary sanctions is to protect the public and maintain confidence in the profession. McGrath, 98 Wn.2d at 344-46; Lesansky, 17 P.3d at 766. It would frustrate that purpose to mitigate the sanction when the crime is so serious that it results in a prison sentence. Indeed, the McGrath court cited the severity of the criminal sanction as a factor supporting disbarment in that case. Id.<sup>7</sup>

Although Day suggests that the Curran court considered the lawyer’s prison term as a mitigating factor (RB at 14), the case says no such thing. Instead when the Curran court cited “sanctions already

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<sup>7</sup> Notably, neither of the published cases cited by the Commentary to the ABA Standards on this point involved mitigation based on criminal sanctions. See ABA Standards at 51 (citing In re Lamberis, 93 Ill. 2d 222, 443 N.E.2d 549, 66 Ill. Dec 623 (1982) (sanction for plagiarism mitigated because disciplinary sanctions were imposed by University); Matter of Garrett, 399 N.E.2d 369 (Ind. 1980) (sanction for neglect mitigated because prior disciplinary suspension was extended).)

imposed,” it referred explicitly to the lawyer’s 18-month interim suspension, not his prison term. Curran, 115 Wn.2d at 773-74. The Court essentially “credited” the time the lawyer spent on interim suspension by reducing the length of the suspension from two years to six months. Id. at 774. Likewise, under the applicable Admission to Practice Rules (APR), if Day were disbarred he would receive credit for his interim suspension when applying for reinstatement. See APR 25.1(b).

**6. The Remaining “Noble Factors” Support the Board’s Recommendation of Disbarment**

Finally, the Court reviews the two remaining “Noble factors” of unanimity and proportionality. “The court will generally adopt the Board's recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision.” In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 339, 126 P.3d 1262 (2006).

a. The Board’s Disbarment Recommendation was Unanimous

The Board voted 13-0 for disbarment. DP 19. The Court gives “great deference to the decisions of a unanimous Board[.]” Whitney, 155 Wn.2d at 469. Such deference is based on the Board’s “unique experience and perspective in the administration of sanctions.” In re Disciplinary

Proceeding Against Egger, 152 Wn.2d 393, 404-05, 98 P.3d 477 (2004)

(quotations omitted).

b. Day Fails to Meet his Burden of Proving that Disbarment is Disproportionate

In proportionality review, the Court compares the case at hand with “similarly situated cases in which the same sanction was either approved or disapproved.” In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 97, 101 P.3d 88 (2004) (quotation omitted). The respondent lawyer bears the burden of proving that the recommended sanction is disproportionate. Id.

Day relies on two Washington cases, Heard, 136 Wn.2d 405, and Halverson, 140 Wn.2d 475, in which the Court suspended lawyers who engaged in sexual relations with their clients. RB at 20-22. In Heard the lawyer also committed misconduct related to his fee. But neither Heard nor Halverson is “similarly situated” to this case. Neither case involved a child or nonconsensual sexual relations, and in neither case was the lawyer charged with, much less convicted of, a felony sexual assault. Moreover, in neither case did the Court reduce the sanction recommended by a unanimous Board. Indeed, in Heard the Court noted that disbarment arguably was appropriate but explicitly chose not to deviate from the Board’s unanimous recommendation. Heard, 136 Wn.2d at 424-25.

Neither Heard nor Halverson provide grounds to deviate from the Board's recommendation here.

More applicable to this case is McGrath, in which this Court disbarred a lawyer convicted of an assault involving moral turpitude:

[W]e find it repugnant to the basic standards of our legal profession to allow one who is serving a 10-year probation sentence for a felony conviction, for an act involving moral turpitude, to practice law and to represent clients in the courts of this state.

McGrath, 98 Wn.2d at 345. Disbarment is proportionate to the result in McGrath and should be imposed here.

Day argues that the Court should "scrutinize" the applicability of McGrath because it was decided before the Court adopted the ABA Standards and has been superseded. RB at 9. But it is immaterial that McGrath predates the ABA Standards since the Standards do not apply to acts involving moral turpitude. Curran, 115 Wn.2d at 770. Moreover, this Court regularly cites pre-ABA Standards cases when determining sanction,<sup>8</sup> and in Heard cited McGrath on the issue of the sanction for an act involving moral turpitude. Heard, 136 Wn.2d at 425. McGrath remains good law and should not be disregarded.

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<sup>8</sup> See, e.g., Blanchard, 158 Wn.2d at 333-34; In re Disciplinary Proceeding Against Romero, 152 Wn.2d 124, 134, 94 P.3d 939 (2004); In re Disciplinary Proceeding Against Anschell, 141 Wn.2d 593, 615-17, 9 P.3d 193 (2000).

Day also claims suspension is consistent with the sanctions imposed in other jurisdictions, citing In re Kimmel, 322 N.W.2d 224 (Minn. 1982), In re Lyons, 266 Wis. 2d 55, 670 N.W.2d 550 (2003), Iowa Bd. of Prof'l Ethics v. Blazek, 590 N.W.2d 501 (Iowa 1999), and In re Strigenz, 185 Wis. 2d 370, 517 N.W.2d 190 (1994). RB at 22-23. These cases are all distinguishable. In Strigenz, unlike here, the victim was not a child, and in Kimmel, Blazek and Lyons the victims were not current or former clients. Moreover, in Kimmel and Blazek, unlike this case, the lawyers were rehabilitating themselves by undergoing treatment, a fact found highly relevant to sanction. Kimmel, 322 N.W.2d at 225-227; Blazek, 590 N.W.2d at 504. In any event, many other jurisdictions find disbarment appropriate for sexual assaults involving children. See, e.g., Lesansky, 17 P.3d at 768, In re Bewig, 791 A.2d 908, 909 (D.C. 2002) (disbarring lawyer convicted of misdemeanor sexual contact with minor); In re Hudgins, 540 N.E.2d 1200, 1203 (Ind. 1989) (disbarring lawyer convicted of child molestation); People v. Grenemyer, 745 P.2d 1027, 1029-31 (Colo. 1987) (disbarring lawyer convicted of sexual conduct with child).

In sum, Day has failed to meet his burden of demonstrating that disbarment is a disproportionate result in this case.

**V. CONCLUSION**

Members of the public should feel secure that lawyers licensed by this Court are worthy of the public trust. Day's sexual molestation of his young former client demonstrated a colossal breach of that trust and a flagrant disregard of the law and societal norms. To protect the public and preserve public confidence in the profession, the Court should adopt the Disciplinary Board's unanimous recommendation of disbarment.

RESPECTFULLY SUBMITTED this 19th day of January, 2007.

WASHINGTON STATE BAR ASSOCIATION

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Joanne S. Abelson, Bar No. 24877  
Senior Disciplinary Counsel

**FILED AS ATTACHMENT  
TO E-MAIL**

# APPENDIX A

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DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re:

JEFFREY K. DAY

Lawyer (WSBA No. 22867).

PUBLIC NO. 04-00070

HEARING OFFICER'S FINDINGS  
OF FACT, CONCLUSIONS OF LAW  
AND ORDER RE: SANCTIONS

Pursuant to Rule 10.13 of the Rules For Enforcement of Lawyer Conduct (ELC), a disciplinary hearing was held before the undersigned Hearing Officer on January 20, 2006. Respondent Lawyer Jeffrey K. Day has been represented in this matter and at the hearing by Brett Purtzer, his attorney. The Washington State Bar Association has been represented in this matter and at the hearing by Joanne Abelson, Senior Disciplinary Counsel. At the outset, the Hearing Officer determined that the hearing would not be bifurcated, i.e., that, following a determination of whether a violation or violations of the Disciplinary Rules as alleged had occurred, and depending upon the outcome of that determination, a recommendation as to discipline would be determined, if appropriate.

I. FORMAL COMPLAINT

The Formal Complaint filed by Senior Disciplinary Counsel alleged the following misconduct:



1           6.       Respondent took D.J. to sporting events, bought him occasional meals and  
2 gifts, and twice had him spend the night at Respondent's home.

3           7.       The second overnight visit by D.J. at Respondent's home occurred on February  
4 14-15, 2004.

5           8.       On the evening of February 14, 2004, Respondent and D.J. watched a movie at  
6 the Respondent's house, during which D.J. fell asleep.

7           9.       While D.J. was asleep, Respondent removed D.J.'s pants, leaving him clad  
8 only in his boxer shorts and a tee-shirt. Respondent then placed a blanket over D.J. while he  
9 slept in the movies room, whereupon Respondent went to his bedroom and went to bed.

10          10.       D.J. awoke in the middle of the night. Because it was dark and he was cold,  
11 D.J. went to Respondent's bedroom, got into bed with him and fell asleep.

12          11.       D.J. felt comfortable getting into Respondent's bed with him because he "felt  
13 like he was family, so I felt like I could trust him." Association's Exhibit 6 at 31.

14          12.       When D.J. awoke early in the morning of February 15, 2004, he felt  
15 Respondent's hand inside his boxer shorts, touching his testicles. Id. at 32.

16          13.       On February 15, 2004, D.J. was eleven years old and not married to  
17 Respondent.

18          14.       On February 15, 2004, Respondent was more than 36 months older than D.J.

19          15.       On April 14, 2004, the Pierce County Prosecuting Attorney filed an  
20 Information charging Respondent with First Degree Child Molestation under RCW  
21 9A.44.083, a Class A felony, based on the Respondent's actions on February 14-15, 2004.

22          16.       On October 7, 2004, a jury convicted Respondent of First Degree Child  
23 Molestation as charged in the Information.

24          17.       On November 5, 2004, Respondent was sentenced to a minimum term of 60  
25 months confinement for his offense, and a maximum term of Life. Association's Exhibit 3 at  
26 4.

1 18 When a disciplinary proceeding is based on a criminal conviction, "the court  
2 record of the conviction is conclusive evidence at the disciplinary hearing of the Respondent's  
3 guilt of the crime and violation of the statute on which the conviction was based." ELC  
4 10.14(c).

5 19. The Hearing Officer finds that the Respondent acted intentionally when he  
6 committed the above offense. Under the American Bar Association (ABA) Standards, the  
7 mental state of intent exists "when the lawyer acts with the conscious of objective or purpose  
8 to accomplish a particular result." ABA Standards at 16. Here, the crime of child molestation  
9 requires "sexual contact," which is defined as "any touching of the sexual or other intimate  
10 parts of a person done for the purpose of gratifying sexual desire of either party or a third  
11 party." RCW 9A.44.010(2).

12 20. The evidence at the Respondent's Disciplinary Hearing established that  
13 Respondent's conduct caused D.J. a variety of difficult emotional issues, including confusion  
14 as to his sexual orientation, embarrassment, disgust, general confusion, hurt, lack of  
15 comprehension, and anger. Based on such emotional issues, D.J. was placed in counseling for  
16 a period of 28 weeks. Ultimately, D.J. moved to California to live with his aunt so that he  
17 could have a fresh start away from persons who were aware of what had transpired between  
18 D.J. and the Respondent.

19 21. D.J.'s mother testified that the effect of the incident between D.J. and the  
20 Respondent was devastating, that she would never trust anybody again, and that she was very  
21 angry at the Respondent and regretted putting D.J. in the position of having contact with the  
22 Respondent, believing that as his mother, she should have protected him.

23 22. Respondent has filed a Notice of Appeal of his Pierce County Superior Court  
24 criminal conviction. His appeal remains pending at this time.

1 III. CONCLUSIONS OF LAW

2 The Hearing Officer finds that the Association has proved, by a clear preponderance of  
3 the evidence, the misconduct set forth below:

4 23. That by committing the acts that resulted in his conviction for Child  
5 Molestation in the First Degree, a Class A felony, Respondent violated RPC 8.4(b) and RPC  
6 8.4(c). ELC 10.14(5). Therefore, Count One, as set out in the Association's Formal  
7 Complaint, has been proven by a clear preponderance of the evidence.

8 24. RPC 8.4(b) provides that it is misconduct for a lawyer to "commit a criminal  
9 act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in  
10 other respects." RPC 8.4(b) applies when criminal conduct indicates "lack of those  
11 characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of  
12 trust, or serious interference with the administration of justice or in that category." In re  
13 Disciplinary Proceeding Against Curran, 115 Wn. 2d 747, 766, 801 P.2d 962 (1990)

14 25. Respondent's criminal conduct falls within RPC 8.4(b) for several reasons.  
15 First, because Child Molestation in the First Degree is a Class A Felony, and by definition a  
16 "violent offense," such criminal conduct clear calls into question the Respondent's fitness as a  
17 lawyer. See RCW 9A.44.083(2); see also RCW 9.94A.030(48)(a)(1). Second, the  
18 Respondent's criminal act also implicates his trustworthiness. D.J.'s mother testified at the  
19 disciplinary hearing that she allowed Respondent to pursue a relationship with her son  
20 because of his position as a lawyer and judge and someone that she believed she could trust.  
21 D.J. trusted Respondent as well. Respondent clearly abused both D.J.'s trust and his mother's  
22 trust by his criminal act. His abuse of this trust greatly calls into question his ability to create  
23 and maintain such attorney-client relationships in the future, given his enormous violation of  
24 trust as to D.J. and his mother, and given that attorney-client relationships implicitly require  
25 that trust, an essential component of that relationship, be placed, to some degree, in the  
26 attorney by the client.

1           26.     RPC 8.4(i) provides that it is misconduct for a lawyer to "commit any act  
2 involving moral turpitude...or any unjustified act of assault or other act which reflects  
3 disregard for the rule of law, whether the same be committed in the course of his or her  
4 conduct as a lawyer, or otherwise."

5           27.     Respondent concedes, and the Hearing Officer so finds, that Respondent's  
6 criminal conduct falls within RPC 8.4(i) because the Respondent's criminal act constituted an  
7 unjustified act of assault. See State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (1988) (the  
8 definition of assault includes "an unlawful touching with criminal intent").

9           28.     The Hearing Officer also finds that Respondent's criminal conduct involved  
10 moral turpitude, in violation of RPC 8.4(i). See In re McGrath, 98 Wn.2d 337, 342-43, 655  
11 P.2d 232 (1982). McGrath is a pre-ABA case, which apparently has not been overruled. The  
12 Washington Supreme Court held in McGrath that moral turpitude "must be determined from  
13 'the inherent immoral nature of the act, rather than the degree of punishment which the statute  
14 law imposes.'" In re McGrath, 98 Wn.2d at 342, quoting In re Hopkins, 53 Wn. 569, 572,  
15 103 P.2d 804 (1909). The Washington Supreme Court again quoted Hopkins when it looked  
16 "to the inherent nature of the act committed by the attorney to answer the following question:  
17 [D]o the acts found against the appellant, and for which he was convicted...violate the  
18 commonly accepted standard of good morals, honesty and justice?" In Discipline of Heard,  
19 136 Wn.2d 405, 418, 963 P.2d 818 (1998), quoting Hopkins, 54 Wn. at 572. See also In re  
20 Lesansky, 25 Cal. 4<sup>th</sup> 11, 17, 17 P.3d 764, 104 Cal. Rptr.2d 409 (2001) (concluding that  
21 committing the crime of attempting to commit a lewd act on a child constituted moral  
22 turpitude).

23           The Respondent contended in his pre-hearing brief that the case of In re Safran, 18  
24 Cal 3d 134, 554 P.2d 329 133 Cal.Rptr.9 was consistent with his own case. To a limited  
25 degree, the Respondent's contention has merit, as the petitioner in Safran, like the  
26 Respondent, was convicted of criminal conduct involving illegal sexual activity with a child.

1 In significant contrast to the Respondent's case, however, the petitioner in Safran conceded  
2 that his crime of annoying or molesting a child under 18 involved moral turpitude, unlike the  
3 Respondent, who did not so concede. In re Safran, 18 Cal 3d at 134. Moreover, the petitioner  
4 in Safran engaged in a program of psychiatric consultation; there was no indication during the  
5 Respondent's hearing that he was similarly participating or even had sought psychiatric  
6 treatment. Ultimately, the court in Safran ultimately imposed a three year suspension, the  
7 same sanction recommended by the Respondent here.

8 The Hearing Officer finds that the Respondent's conduct constituted moral turpitude  
9 within the meaning of RPC 8.4(i) because: (1) his conviction for First Degree Child  
10 Molestation under RCW 9A.44.083 is an extremely serious offense, a Class A felony,  
11 punishable by a maximum term of life in prison (RCW 9A.20.021(1)(a)); (2) his criminal  
12 conduct under RCW 9A.44.083 required an intent to gratify the sexual desire of the  
13 perpetrator, the victim or a third party (RCW 9A.44.010(2)); (3) the victim here, D.J., was  
14 substantially younger than the Respondent (RCW 9A.44.083(1)); and (4) conviction of a  
15 crime with an intent element of "knowingly" is some evidence, although not conclusive, that  
16 moral turpitude was involved. In re McGrath, 98 Wn.2d at 343.

#### 17 IV. RECOMMENDED SANCTION

##### 18 A. PRESUMPTIVE SANCTION.

19 The purpose of lawyer disciplinary proceedings is to protect the public and the  
20 administration of justice from lawyers who have not discharged, will not discharge or unlikely  
21 properly to discharge their professional duties to clients, the public, the legal system, and the  
22 legal profession. ABA Standards for Imposing Lawyer Sanctions at Section A 1.1. Sections  
23 9.2 and 9.3 of the ABA Standards for Imposing Lawyer Sanctions set out a number of factors  
24 which may be considered as aggravating or mitigating the violations found.

25 29. The following standards of the American Bar Association Standards for  
26 Imposing Lawyer Sanctions are applicable in this case:

1 5.11 Disbarment is generally appropriate when:  
2 (a) a lawyer engages in serious criminal conduct, a  
3 necessary element of which includes intentional  
4 interference with the administration of justice, false  
5 swearing, misrepresentation, fraud, extortion,  
6 misappropriation, or theft; or the sale,  
7 distribution or importation of controlled substances; or  
8 the intentional killing of another; or an attempt or  
9 conspiracy or solicitation of another to commit any of  
10 these offenses; or  
11 (b) a lawyer engages in any other intentional conduct  
12 involving dishonesty, fraud, deceit, or misrepresentation  
13 that seriously adversely reflects on the lawyer's fitness  
14 to practice.

15 5.12 Suspension is generally appropriate when a lawyer  
16 knowingly engages in criminal conduct which does not  
17 contain the elements listed in Standard 5.11 and that  
18 seriously adversely reflects on the lawyer's fitness to  
19 practice.

20 30. The commentary to the ABA Standards indicates that the presumptive  
21 standard involving sexual offenses such as the Respondent's criminal act is Standard 5.12  
22 (Suspension).

23 31. As to the Respondent's mental state when committing the criminal act, it is  
24 clear to this Hearing Officer that he acted intentionally when doing so. RCW 9A.44.083  
25 states that "[A] person is guilty of child molestation in the first degree when the person has,  
26 or knowingly causes another person under the age of eighteen to have, sexual contact with  
another who is less than twelve years old and not married to the perpetrator and the  
perpetrator is at least thirty six months older than the victim." RCW 9A.44.010(2) defines  
"sexual contact" as "any touching of the sexual or other intimate parts of a person done for  
the purpose of gratifying the sexual desire of either party or a third party." ELC 10.14(c)  
states that the court record of a criminal conviction "is conclusive evidence at the disciplinary  
hearing of the respondent's guilt of the crime and violation of the statute on which the  
conviction was based." The Hearing Officer finds that the definition of "sexual contact"  
clearly requires an intentional act on the part of the perpetrator, since the purpose of the  
perpetrator when performing such act is, per statute, to gratify sexual desire of either the

1 perpetrator, the victim or a third party. Based on the above, the Hearing Officer concludes  
2 that the Respondent acted intentionally when he committed the criminal act for which he was  
3 convicted and sentenced.

4 32. Based upon Standard 5.12, which sets out that Suspension is generally  
5 appropriate when a lawyer knowingly engages in criminal conduct which does not contain  
6 the elements listed in Standard 5.11, and that serious adversely reflects on the lawyer's  
7 fitness to practice, the presumptive sanction in the Respondent's case is Suspension.

8 **B. AGGRAVATING FACTORS**

9 In this case, the following aggravating factor exists: vulnerability of the victim  
10 (9.22(h)).

11 **C. MITIGATING FACTORS**

12 In this case, the following mitigating factor exists: absence of a prior disciplinary  
13 record (9.32(a)).

14 33. Three other mitigating factors cited by Respondent, specifically, cooperative  
15 attitude toward the proceedings (Standard 9.32(e)), character (Standard 9.32(g)), and other  
16 penalties and sanctions (Standard 9.32(k)), do not apply in this case.

17 34. Although the Respondent cites his cooperative attitude toward these  
18 proceedings, and while the ABA Standards list this factor as a mitigating factor, the  
19 Washington Supreme Court has held that it is not, as lawyers are expected to cooperate with  
20 disciplinary proceedings. See In re Disciplinary Proceeding Against Dymal, 152 Wn.2d 601,  
21 622, 98 P.3d 444 (2004); see also In re Disciplinary Proceeding Against Whitt, 148 Wn.2d  
22 707, 721, 72 P.3d 173 (2004). The record should reflect that the Respondent has continued to  
23 maintain his innocence of the crime for which he was convicted. As noted above, his appeal  
24 of his criminal conviction, currently remains pending.

25 35. The evidence considered by the Hearing Officer in this case was the  
26 following: the pre-hearing briefs submitted by both parties; the testimony taken at the

1 disciplinary hearing and the transcript of that hearing; and the exhibits offered by both the  
2 Association and the Respondent, the latter of which included many supportive letters from  
3 co-workers and associates within the legal profession, who spoke glowingly of the  
4 Respondent's character and competence as an attorney.

5 36. The relevant criminal sentencing statutes required that the Respondent be  
6 subjected to certain mandatory conditions of sentence as a result of his conviction for Child  
7 Molestation in the First Degree, such as the prohibition against contact with minors for the  
8 rest of his life and the requirement that he register as a sex offender. Association's Exhibit 3  
9 at 5 and 7. The minimum term imposed by the Pierce County Superior Court in his case, 60  
10 months confinement, was subject to the Court's discretion. The Respondent's standard range  
11 at sentencing in Superior Court was 51-68 months. The deputy prosecuting attorney  
12 recommended the high end of the range to the Court, while Respondent's defense counsel  
13 recommended the low end. The Court imposed what was essentially a mid-range sentence of  
14 60 months. Regardless of the criminal penalties and sanctions imposed by the Pierce County  
15 Superior Court, however, the Respondent's criminal sentence does not serve to mitigate any  
16 sanction that might be imposed by the Hearing Officer in this disciplinary proceeding.

17 37. As noted above, the presumptive sanction in this case is Suspension. The  
18 Association recommends that the Respondent be disbarred. The Respondent recommends  
19 that a three-year suspension is the appropriate sanction that should be imposed.

20 38. The Washington Supreme Court has made clear that Washington attorneys  
21 can be sanctioned for misconduct occurring outside the practice of law. As that Court has  
22 held:

23 Attorneys in Washington are subject to the rules of  
24 Professional conduct at all times, regardless of whether  
25 they are acting as an attorney at the time of the alleged  
26 misconduct. The Rules of Lawyer Discipline  
specifically provide that a lawyer must be subjected to  
discipline for [t]he commission of any act involving  
moral turpitude, dishonesty, or corruption, or any  
unjustified act of assault or other act which reflects

1 disregard for the rule of law, whether the same be  
2 committed in the course of his or her conduct as a  
3 lawyer or otherwise...

4 RLD 1 1(a) (emphasis added). In the past, we have not  
5 hesitated to impose appropriate sanctions upon attorneys  
6 engaging in misconduct outside the practice of law,  
7 provided that such conduct reflected adversely upon that  
8 attorney's ability to practice law. *Curran*, 115 Wn 2d  
9 757 (1190) (vehicular homicide); *Plumb*, 126 Wn.2d 334  
10 (1195) (theft).

11 In re Discipline of Huddleston, 137 Wn 2d 560, 577-78, 974 P.2d 325 (1999) (emphasis in the  
12 original).

13 39. As noted above, the Hearing Officer does not find that the Respondent initially  
14 sought to place himself in the role of a father-figure or mentor to D.J. when he commenced his  
15 post-representation relationship with D.J. and his mother. D.J.'s mother testified during the  
16 hearing that D.J. "lit up" when he knew that the Respondent was coming around or called.  
17 Respondent testified that he had some sympathy for D.J. as a child of a single mother, given  
18 his own experience in that regard when he was a child. The ultimate result, however, was that  
19 such a relationship did in fact come to exist between D.J. and the Respondent, based on  
20 numerous social interactions between them. Such interactions occurred with the approval of  
21 D.J.'s mother, who trusted the Respondent based on his position as a lawyer and judge.

22 40. The criminal act for which the Respondent was convicted establishes with  
23 conclusive evidence that the Respondent was in fact found guilty of that crime and the  
24 violation of the statute on which the conviction was based. ELC 10.14(c). The Respondent's  
25 criminal act was an extreme abuse of the trust that both D.J. and D.J.'s mother had placed in  
26 the Respondent. Both of these people trusted the Respondent to a significant degree, and their  
trust was thoroughly abused based upon the Respondent's criminal conduct as to D.J.

41. As the Washington Supreme Court has held, attorneys are required to comply  
with the Rules of Professional Conduct at all times, regardless of whether they are acting as an  
attorney at the time of the alleged misconduct. The Respondent's abuse of trust of a former

1 juvenile client during the course of the non-professional social relationship that was ultimately  
2 formed between the Respondent and D.J., with the approval of D.J.'s mother, was aggravated,  
3 as noted above, by the vulnerability of D.J., given his young age.

4 42 The testimony of Skip Mayhew during the disciplinary hearing succinctly  
5 captured the nature of this case, when Mr. Mayhew testified that the events involving the  
6 Respondent were "a tragedy." Mr. Mayhew testified that the Respondent is one of the  
7 brightest individuals and the best legal mind he had seen in 30 years of legal practice. Mr.  
8 Mayhew also corroborated the Respondent's testimony during the disciplinary hearing that the  
9 Respondent would represent clients who could no longer pay for their legal representation.

10 43. It is clear to this Hearing Officer that the Respondent is an exceptionally  
11 intelligent, talented attorney on whom many clients justifiably relied for legal representation.  
12 It is equally clear that Respondent acted admirably on numerous occasions when he agreed to  
13 continue to represent clients even after such clients' ability to pay for the Respondent's legal  
14 services had ended -- simply because such clients continued to require legal representation.  
15 Some of the letters provided to this Hearing Officer as Respondent's Exhibits 1 and 2 set out  
16 numerous instances of direct evidence from persons who themselves have seen the  
17 Respondent's many good acts, both in the professional sphere and in his non-professional  
18 activities. Given these facts, Mr. Mayhew's characterization of "a tragedy" is entirely apt.

19 44. Despite such consistent and competent performance as a lawyer, as well as the  
20 complete absence of any prior discipline as an attorney, however, the Respondent's criminal  
21 act as to a highly vulnerable young victim, a former juvenile client, coupled with the enormous  
22 breach of trust associated with that act for the reasons noted above, justifies a deviation from  
23 the presumptive sanction of Suspension to the more appropriate sanction of Disbarment. The  
24 Respondent's criminal conduct clearly reflects adversely on his trustworthiness as a lawyer,  
25 because the quality of trust must, at some level, exist in every attorney-client relationship.  
26 Without such trust in an attorney-client relationship, the client cannot be effectively

1 represented. The Respondent's criminal act here clearly suggests that his trustworthiness as a  
2 lawyer in any future matters would, at best, remain suspect, and at worst, be legitimately  
3 questioned at every turn -- especially when one views the extreme vulnerability of D.J. and the  
4 resulting abuse of the trust that D.J. and his mother had placed in him -- trust that had been  
5 engendered based on his positions as an attorney and as a judge.

6 45. Based upon the totality of evidence considered by the Hearing Officer, for the  
7 reasons stated above, the Hearing Officer recommends that the Respondent be disbarred.

8  
9 DATED this 13 day of April, 2006.

10  
11 Gregory J. Rosen  
12 GREGORY J. ROSEN  
13 WSBA Hearing Officer

14  
15  
16  
17 CERTIFICATE OF SERVICE

18 I certify that I caused a copy of the Final Hearing Report  
19 to be delivered to the Office of Disciplinary Counsel and to be mailed  
20 to Paul F. ... Respondent/Respondent's Counsel  
21 at 100 ... by Certified/first class mail,  
22 postage prepaid on the 11 day of April, 2006

23  
24 Barbara ...  
25 Clerk/Counsel to the Disciplinary Board  
26

# APPENDIX B

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FILED

OCT 12 2006

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re

JEFFREY K. DAY  
Lawyer  
WSBA No. # 22867

Proceeding No. 04#00070

DISCIPLINARY BOARD ORDER  
ADOPTING HEARING OFFICER'S  
DECISION

This matter came before the Disciplinary Board at its September 29, 2006 meeting on automatic review of Hearing Officer Gregory J. Rosen's decision recommending disbarment following a hearing.

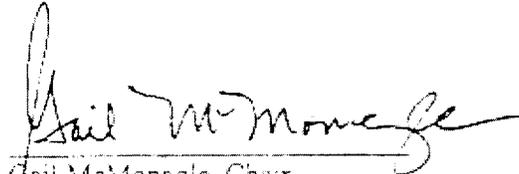
Having reviewed the documents designated by the parties, the briefs filed by both parties and hearing oral argument:

IT IS HEREBY ORDERED THAT the board adopts the Hearing Officer's decision.

The vote on this matter was unanimous.

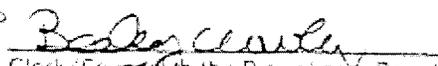
Those voting in this matter were: Bothwell, Kuznetz, Lee, Madden, McMonagle, Andrews, Romas, Heller, Dickinson Mina, Hollingsworth, Mosner and Fine.

1  
2 DATED this 2nd day of October, 2006.

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5 Gail McMonagle, Chair  
6 Disciplinary Board  
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14 CERTIFICATE OF SERVICE

15 I certify that I caused a copy of the Board Order Adopting Decision  
16 to be delivered to the Office of Disciplinary Counsel and to be mailed  
17 to Fred A. Purrier Respondent's Counsel  
18 at: 1008 Yakima Ave. Ste 302 certified/first class mail,  
19 postage prepaid on the 12 day of October 2006  
20 9 2405

21   
22 Clerk/Counsel to the Disciplinary Board  
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SUPREME COURT  
STATE OF WASHINGTON

2007 JAN 19 P 1:38



CLERK

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

In re

Jeffrey K. Day,  
  
Lawyer (Bar No. 22867)

Supreme Court No. 200,429-6

DISCIPLINARY COUNSEL'S  
DECLARATION OF SERVICE BY  
MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that she caused a copy of the Answering Brief of the Washington State Bar Association to be mailed by regular first class mail with postage prepaid on January 19, 2007 to:

Brett A. Purtzer  
Attorney at Law  
1008 Yakima Ave Ste 302  
Tacoma, WA 98405-4850

The undersigned declares under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

\_\_\_\_\_  
Date and Place

\_\_\_\_\_  
Joanne S. Abelson, Bar No. 24877  
Senior Disciplinary Counsel  
1325 4<sup>th</sup> Avenue, Suite 600  
Seattle, WA 98101-2539  
(206) 727-8251

FILED AS ATTACHMENT  
TO E-MAIL