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SUPREME COURT
FOR THE STATE OF WASHINGTON

BY C.J. HERRITT

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WASHINGTON STATE BAR ASSOCIATION,

Respondent,

vs.

JEFFREY K. DAY,

Appellant.

APPEAL FROM THE DECISION OF THE
WASHINGTON STATE DISCIPLINARY BOARD

Public #04-00070

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Washington State Bar Association Disciplinary Board erred when it affirmed the Hearing Officer's decision affirming Mr. Day's disbarment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Washington State Bar Association erred by affirming Mr. Day's disbarment when the presumptive sanction endorsed by the ABA Standards is suspension and no aggravator or mitigating factors exist to modify the presumptive sanction? (Assignment of Error #1).

III. STATEMENT OF THE CASE

A. Procedural History

On October 15, 2004, the Washington State Bar Association (Association) filed a one-count formal complaint alleging that respondent violated RPC 8.4(b) (criminal conduct, by violating RCW 9A.44.083) and/or RPC 8.4(i) (act involving moral turpitude and/or unjustified act of assault and/or other act reflecting disregard for the rule of law) based on his conviction of first degree child molestation. BF 2.

A disciplinary hearing was held on January 20, 2006. On April 17, 2006, the hearing officer filed his Findings of Fact, Conclusions of Law and Recommendation (FFCL) finding that respondent violated both RPC 8.4(b) and RPC 8.4(i) and recommending that he be disbarred. BF 51.

The Disciplinary Board adopted the hearing officer's decision on October 2, 2006. This appeal now follows.

B. Statement of Facts

Jeffrey K. Day was admitted to the practice of law in the State of Washington on October 22, 1993. FFCL 1. In February, 2002, Mr. Day began

representing D.J., who was then nine years old, in a juvenile court criminal matter that was ultimately dismissed in September, 2002. FFCL 3.

After the attorney/client relationship ended, Mr. Day befriended D.J. and his mother. Mr. Day had been raised in a single parent home as well and he was aware of some of the issues surrounding a child growing up in that situation. This ongoing relationship was not in his professional capacity as an attorney. FFCL 5.

D.J. stayed overnight at Mr. Day's home on two occasions. On February 14, 2004, Mr. Day and D.J. were watching movies at Mr. Day's home. D.J. fell asleep on the couch. Mr. Day covered him with a blanket and went to sleep in his own room. FFCL 7-9.

D.J. awoke in the middle of the night and went into Mr. Day's room, got in his bed and fell asleep. FFCL 15.

Later, after Mr. Day returned D.J. to his home, D.J. claimed that when he awoke, Mr. Day had touched his testicles. FF 12.

On April 14, 2004, the Pierce County Prosecutor charged Mr. Day with one count of First

Degree Child Molestation. On October 7, 2004, a jury convicted Mr. Day of the charge, and on November 5, 2004, the court sentenced Mr. Day to 60 months confinement, a mid-range sentence. FFCL 15-17.

Mr. Day has consistently maintained his innocence of this charge. His appeal of the verdict remains pending. FFCL 22, 34.

IV. ARGUMENT

The ABA Standards for Lawyer Discipline govern all disciplinary cases in Washington. In Re Disciplinary Proceedings Against Curran, 115 Wn.2d 747, 801 P.2d 962 (1990). When considering discipline, this court is to consider the ethical duty violated, the mental state, and the client's injury. Next, the court must determine whether the hearing officer and Board properly weighed any aggravating or mitigating factors. After the appropriate sanction is determined, the court is to consider if the revised Noble factors of unanimity and proportionality should alter the sanction. See In Re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 667 P.2d 608 (1983). The court, ultimately, may reject the Board's

recommendation. In Re Disciplinary Proceeding Against Vanderbeek, 153 Wn.2d 64, 90, 101 P.3d 88 (2004).

A. SUSPENSION IS THE PRESUMPTIVE SANCTION.

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

In it's prior briefing, the Association argued that Standard 5.12 does not apply to a violation of Rule 8.4(i) based on In Re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 801 P.2d 962 (1998). A reading of Curran, however, strongly supports imposition of a suspension. In Curran, the attorney was convicted of two counts of vehicular homicide, and he received a two-year suspension for violating RLD 1.1(a), which is now RPC 8.4(i).

In analyzing what sanction to impose, the Curran court noted that the modern trend focused lawyer discipline on conduct that directly interfered with the administration of justice or cast doubt about a lawyer's competence or honesty. Id. 115 Wn.2d at 756.

Curran received a 26-month prison sentence, which the court also considered in determining the sanction. In so doing, the court noted that the criminal justice system bore primary responsibility for enforcing the criminal code and that lawyer discipline should supplement the criminal courts.

In imposing a sanction for violation of RLD 1.1(a), the Court said the rule should not be administered in a manner unfair to a lawyer or simply to appease the public.

The Court found that Curran chose to drive while drunk and that he decided to risk the lives of his passengers. In the end, his actions led to the death of two clients. However, Curran's actions, like Mr. Day's charge, took place outside the practice of law. If a two-year suspension was appropriate for causing the deaths of two clients,

a long-term suspension is appropriate in Mr. Day's case. Nothing stated by the Curran court suggests disbarment should be the sanction.

This Court has also imposed suspensions for acts involving sexual misconduct. A two-year suspension was imposed on an attorney who, in addition to other misconduct, had sex with a client. The attorney gave his 23 year-old client alcohol and then engaged in sex, knowing that the client had a history of alcohol and drug problems and had sustained head injuries in an accident. In Re Disciplinary Proceeding Against Heard, 136 Wn.2d 405, 963 P.2d 818 (1998).

The court imposed a one-year suspension on another attorney who was involved in an ongoing sexual relationship with a client. In Re Disciplinary Proceeding Against Halvorson, 140 Wn.2d 465, 998 P.2d 833 (2000).

Thus, based upon the ABA Standards and case law, the Hearing Officer correctly concluded the presumptive sanction is a suspension.

B. THE ASSOCIATION'S RELIANCE ON
CASES PRE-DATING THE ABA
STANDARDS SHOULD BE
SCRUTINIZED.

The Association's relies on a case that pre-dates adoption of the ABA Standards. The Standards, first adopted in 1986 and modified in 1991 and 1992, govern the imposition of sanctions in attorney discipline cases in Washington. In Re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 66 P.3d 1057 (2003). The ABA Standards were designed to increase uniformity in imposing sanctions. Id. 149 Wn.2d at 256-7. The Standards constitute a model, setting forth a comprehensive system for determining sanctions while permitting flexibility and creativity when imposing sanctions. Id. at 258.

In Re Disciplinary Proceeding Against McGrath, 98 Wn.2d 337, 655 P.2d 232 (1982), is a pre-ABA Standards case. It was not decided using the Standards that now govern all attorney discipline cases in Washington. Because neither the analysis of the violation nor the sanction imposed was guided by the Standards that have been in effect for twenty years, McGrath should be

considered in conjunction with the current status of the law surrounding attorney discipline.

In McGrath, an attorney shot and seriously wounded a person. McGrath entered a guilty plea to Second Degree Assault. The McGrath decision was 5-3, and it is the strong dissent which is notable. Justice Williams' logic, expressed in the dissent, was a well-reasoned precursor to the analysis, which is now reflected in the ABA Standards.

Justice Williams found disbarment too harsh a result. Nothing, he said, would be gained by removing McGrath from the practice of law and much would be lost; a sentiment that applies equally to Mr. Day's case. Justice Williams compared an assault to a case in which an attorney tampered with a witness and found that equating a crime of dishonesty such as witness tampering, which struck at the heart of the legal system, with an assault, a crime wholly unrelated to the practice of law, was fundamentally unfair. McGrath's disbarment, he argued, would not protect the public from an unscrupulous or dishonest lawyer.

As an alternative approach, Justice Williams suggested that if an offense involved conviction of a crime of moral turpitude, it should be presumed that some punishment short of disbarment would suffice until shown otherwise.

The dissent criticized the then-current approach, which presumed disbarment was appropriate unless sufficient mitigating factors were shown. That approach was considered too harsh and the cause of unfair results.

Justice Williams argued that a term of suspension with its attendant pecuniary loss and loss of an attorney's good standing with the public and colleagues would often be sufficient.

The dissent also argued that imposition of sanctions by the criminal court should be considered, a mitigating factor now specifically recognized in the ABA Standards. Justice Williams stated that if the criminal courts have dealt with the attorney's conduct by imposing criminal penalties, a lesser disciplinary measure may be needed to adequately punish the individual. The imposition of a second, severe punishment, without first considering the punishment already enacted,

undermines the principals of fairness and proportionality embodied in the criminal laws and disciplinary cases.

The ABA Standards now reflect Justice Williams' approach in many regards and reject the reasoning cited by the five-member majority in McGrath. The Standards embrace a "modern trend" of putting more emphasis on disciplining lawyers for violation of practice norms than for actions not directly related to the practice of law. Curran, 115 Wn.2d 747. The Standards provide a method of analysis and a variety of sanctions, which allow flexibility in disciplining attorneys. The Standards also recognize that conduct occurring outside the practice of law should be treated less harshly than actions that strike at the heart of the judicial system.

Significantly, Standard 5.12 is the sanction most applicable to felonies involving sexual assault, and is the sanction imposed in other jurisdictions. See In Re Safran, 18 Cal.3d 134, 554 P.2d 329 (1976) (lawyer suspended three years for child molestation, but suspension stayed if lawyer met certain conditions).

The ABA Standards continue to govern lawyer discipline in Washington. The analysis which led to disbarment in McGrath has been superseded by the more rational and flexible approach of the Standards. Under those Standards, suspension is the presumptive and proper sanction to be imposed in this case.

C. AGGRAVATING AND MITIGATING FACTORS.

The second step of the analysis requires this court to determine if any factors justify a deviation from the presumptive sanction. Upon review of the pertinent factors, no deviation from the sanction of suspension should apply.

The hearing officer found one aggravating factor (vulnerability of the victim) and one mitigating factor (absence of prior discipline). At worst, these factors offset each other. However, the hearing officer minimized the affect of the additional mitigating factor that the criminal penalties imposed on Mr. Day, including imprisonment and community custody, are not mitigating factors. That position is legally incorrect.

1. Criminal Sanctions Must be Considered a Mitigating Factor.

Not only is this factor specifically included in the Standards, the Court has always considered criminal penalties to be a significant mitigating factor. Curran, 115 Wn.2d 747, 801 P.2d 962 (1990). Not only did a prison sentence influence the sanctions in Curran, so did an 18-month interim suspension.

In Curran, the Association argued that allowing Curran to practice, despite the conviction, would subject the court system to such ridicule that the administration of justice would be compromised. The Court rejected this argument, noting that Rule 8.4 is not concerned with maintaining public confidence in the Bar by disciplining lawyers harming the public image of the Bar. Rather, it is concerned with protecting the public from incompetent practitioners. In Mr. Day's case, there has never been an allegation regarding his competence.

Here, the Hearing Officer offered no reason why imposition of criminal penalties should not be considered as a mitigating factor. The Standards

include this as a factor, and this Court has recognized criminal sanctions as a significant mitigating factor. Criminal sanctions should be given great weight, both in regard to punishment for past action and deterrence of any future actions.

2. No Additional Aggravating Factors Exist to Modify the Presumptive Sanction of Suspension.

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

Mr. Day's ability to provide high-quality legal representation to any client was never the issue. As noted previously, Mr. Day's representation of the juvenile in this case led to dismissal of an arson charge. Mr. Day's alleged abuse of trust in this case had nothing to do with his legal performance on behalf of a client. Yet, the Hearing Officer and the Association contend that he should be disbarred because his trustworthiness as an attorney might be questioned

in the future. Essentially, they argue he should be disbarred not because of his actions as an attorney, but because of his status as an attorney, acting in a non-legal setting. There is no evidence showing Mr. Day is untrustworthy as an attorney performing legal duties for his clients.

On one hand, the Association wants to characterize the incident as occurring outside the practice of law so that Mr. Day's reputation and competence as an attorney cannot be used as a mitigating factor, but the Association then argues to increase the presumptive sanction, specifically because Mr. Day is an attorney, which makes his act, theoretically, more egregious. You cannot have it both ways. If the argument is to be considered that Mr. Day's status as an attorney is an aggravating factor regarding his trustworthiness, then, to be fair, one has to look at Mr. Day's entire reputation and record of competence. To do less would be extremely unfair to an attorney who the Hearing Officer found to be "an exceptionally intelligent, talented attorney . . . who acted admirably on numerous occasions."

The hearing testimony of attorney Alvin Mayhew who has known and worked with Mr. Day since 1992 is particularly relevant. He described Mr. Day as one of the more unique lawyers he had met, who had an incredible compassion for his clients. TR 87:3-5. He found Mr. Day to be one of the brightest individuals and legal minds he had seen in his 30 years of practice. TR 96:4-6. Mr. Mayhew related that Mr. Day often went beyond what might normally be considered a responsibility to a client and that he related to his clients very effectively. TR 88:13-89:2. Mr. Mayhew noted that, even while facing criminal charges, Mr. Day never wavered in his duty to his clients and witnessed him as aggressive and effective on behalf of his clients. TR 91:1-2.

The testimony of Sharon Schwartzle, who worked with and for Mr. Day for ten years, also says much about his performance as an attorney. She noted that he treated all clients, whether private or court-appointed, respectfully and professionally. TR 99:5-9. She noted that Mr. Day's approach was always to give a client the best legal representation possible regardless of a

client's ability to pay. TR 101:9-17. As a witness to Mr. Day's continued work ethic on behalf of clients while he faced criminal charges, she described his work and dedication to his clients as amazing. TR 102:1-5. Even after the conviction, it was important for Mr. Day that all actions required by the Bar Association were followed to the letter, and he provided guidance to his staff even while incarcerated. TR 104:1-24.

The ability of Mr. Day to be a trusted, effective practitioner in the future was best summed up by Mr. Mayhew, who also serves as a part-time municipal court judge. First, he noted that none of the judges to whom he had spoken regarding Mr. Day had anything negative to say. Second, and even more telling, when asked if he would again hire Mr. Day as an employee as he did in 1992, Mr. Mayhew said he would not only do that, but that if he needed an attorney himself in the future, he would hire Mr. Day to represent him. TR 92:22-93:10.

The packet of letters submitted in this proceeding as an exhibit also attests to Mr. Day's

positive actions as an attorney. These letters are from attorneys, prosecutors, court staff, and others who have worked with Mr. Day and would welcome the chance to do so again. This testimony contradicts any allegation that Mr. Day could not be trusted in the future as an attorney. His performance as an attorney is not in question.

Mr. Day's sentence requires that he have no contact with minors. That restriction specifically addresses his alleged misconduct. There is no need to disbar Mr. Day and lose an excellent attorney in the process.

As stated previously, the Standards were designed to permit flexibility and creativity when imposing sanctions. Kuvara, 149 Wn.2d 237, 66 P.3d 1057 (2003). ELC 13.1 provides for options, including up to three years probation, appointment of a person to supervise and limitations on practice. A suspension can include one or more of these options and would recognize the severity of the misconduct as well as the excellent representation Mr. Day has provided in the past and can still provide in the future.

Under the Hearing Officer's analysis, at worst, the mitigating and aggravating factors offset each other. However, considering the significant criminal penalties already imposed, which could include up to life in prison if a violation occurs, the mitigating factors, in substance as well as number, outweigh the one aggravating factor identified. Such finding does not justify an increase of the presumptive sanction.

3. Suspension is the Proper Sanction Based on Prior Cases.

Under proportionality review, the court is to analyze whether a presumptive sanction is proper by comparing the case at hand with other similarly situated cases in which the same sanction was approved or disapproved. In Re Disciplinary Proceeding Against Miller, 149 Wn.2d 148, 66 P.3d 1036 (2003).

The two Washington cases reviewing sexual misconduct by an attorney both resulted in suspension.

An attorney was suspended for two years in In Re the Disciplinary Proceeding Against Heard, 136 Wn.2d 405, 962 P.2d 818 (1998). Heard's client

was involved in a motor vehicle accident. Heard knew his client was physically and psychologically impaired and going through a prolonged rehabilitation. Heard also knew his client had extensive alcohol and drug problems as well as many cognitive deficits. Heard mishandled the client's personal injury settlement, essentially inflating the value of property he recovered to justify his taking \$50,000.00, the only cash in the settlement. He failed to obtain the client's consent to the settlement and failed to provide an accounting. Then, aware of his client's problems, he took her to two bars, gave her alcohol and engaged in sex with her.

The Court found Heard committed seven ethical violations. The Court noted that Heard sexually exploited an "exceedingly vulnerable" client who he knew had alcohol problems and who suffered from the effects of serious head injuries. Nevertheless, for seven violations, which involved improper sexual conduct with a very vulnerable client, the Board imposed a two-year suspension affirmed by the Court.

A one-year suspension was imposed in In Re Disciplinary Proceeding Against Halvorson, 140 Wn.2d 465, 998 P.2d 833 (2001). Halvorson became involved in a sexual relationship with a client. The Court found that this relationship, while improper, was not directly related to professional activity, when imposing the suspension.

Cases from other jurisdictions indicate suspension is also the appropriate sanction. In In Re Disciplinary Action Against Kimmel, 322 NW 2d 224 (Minn. 1982), the Court imposed a suspension on an attorney convicted of a felony for sexual contact with a 13-year old boy. In rejecting a call for disbarment by the Bar, the Court noted that such arguments were primarily directed to the nature of the misconduct as opposed to any danger the attorney might present to the public. The Court also noted the contact was unrelated to the practice of law and there was no indication that disbarment was required to adequately protect the public. The Court also recognized that Kimmel was a successful attorney with an excellent reputation.

A six-month suspension was imposed on an attorney following two felony convictions for sexual assault of a child. The attorney also received two five-year prison terms. In Re Disciplinary Proceeding Against Lyons, 266 Wis.2d 55, 670 NW 2d 550 (2003).

A two-year suspension was imposed on an attorney who had improper sexual contact with his 11-year old nephew in Iowa Board of Professional Ethics v. Blazek, 590 NW.2d 501 (Iowa 1999). The attorney had no prior ethics complaints in 11 years of practice and his conduct was unrelated to the practice of law. A grievance commission had recommended a three-year suspension, which the Court reduced.

A one-year suspension was imposed on an attorney for non-consensual sexual contact with a female client and a resulting sexual assault conviction. In Re Disciplinary Proceeding Against Stringenz, 185 Wis.2d 370, 517 NW.2d 190 (1994).

Upon reviewing the aforementioned cases, suspension is the proper sanction to impose in Mr. Day's case, is presumed by the Standards, and supported by case law.

V. CONCLUSION

This court should reject the Board's recommendation and impose the presumed sanction of suspension.

Under the ABA Standards, which govern lawyer discipline in Washington, suspension is the presumptive sanction. The one aggravating factor found by the Hearing Officer, vulnerability of the victim, does not justify increasing the sanction, particularly in light of Heard and Halvorson. The Board should also recognize the criminal penalties imposed as a significant mitigating factor. Those sanctions and requirements do far more to protect the public and deter similar conduct than disbarment.

Mr. Day's trustworthiness in his role and practice as an attorney is not an issue because, as the testimony and exhibits demonstrated, Mr. Day's trust to effectively and aggressively represent his clients in legal matters has not been questioned. His colleagues would welcome his return to practice in the future.

Other jurisdictions have often imposed a suspension for similar misconduct. It is the proper and proportional sanction.

Lawyer discipline is not to be imposed as punishment. The primary concern is protection of the public and deterring other lawyers from similar misconduct. In Re Disciplinary Proceeding Against Plumb, 126 Wn.2d 334, 892 P.2d 739 (1995). The criminal sanctions imposed on Mr. Day protect the public. The criminal statutes, as well as the sanctions, deter other attorneys from similar conduct. Disbarment will do nothing but further punish Mr. Day, lessen his ability to earn a living and deprive the community of a talented and skilled attorney. Mr. Day's punishment has been severe enough.

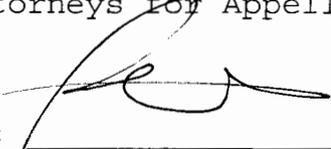
The court should use the flexibility and creativity embraced by the ABA Standards to fashion a sanction involving a suspension with a limitation on practice or supervision for a period of time. Such a sanction will acknowledge the severity of the misconduct, but not deprive the

community of a person who has been an excellent attorney in the past and can be so again.

RESPECTFULLY SUBMITTED this 27th day of November, 2006.

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CERTIFICATE OF SERVICE

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Lee Ann Mathews, hereby certifies under BY C. J. HERBETT
dic
penalty of perjury under the laws of the State of
Washington, that on the day set out below, I
delivered true and correct copies of brief of
appellant to which this certificate is attached,
by United States Mail or ABC-Legal Messengers,
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Signed at Tacoma, Washington this 27th day
of November, 2006.



Lee Ann Mathews