No. 200,570-5

SANDERS, J. (dissenting)—Attorney Terry J. Preszler breached Rules of Professional Conduct (RPC) in his representation of Kinnie and Jeffery Gerrard.[1] Preszler does not dispute most of these violations. He should suffer sanctions. In determining the appropriate penalty, however, the majority today improperly brushes aside mitigating factors that weigh in Preszler's favor. It also overemphasizes aggravating factors against him. Because I would suspend Preszler for 12 months instead of 3 years, I dissent.

ANALYSIS

We undertake a three-part analysis to determine the appropriateness of Washington State Bar Association (WSBA) Disciplinary Board (Board) recommendations. First, we inquire whether the Board properly established the presumptive sanction. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 342, 157 P.3d 859 (2007). To do so we address (1) the ethical duties violated, (2) the lawyer's mental state, and (3) the actual or potential injury caused by the lawyer's misconduct. *Id*. Second, we consider aggravating or mitigating factors that counsel departure from the presumptive sanction. *Id*. Last, we look to the

[1] Hereinafter Kinnie's first name is used for the sake of clarity.

proportionality of the sanction and degree of agreement among board members. *Id*.

I largely agree with the majority that a single instance of impropriety may constitute conduct prejudicial to the administration of justice. *See* former RPC 8.4(d) (2002); majority at 11-12. Similarly, while I believe counts 14 and 15 should merge because they concern the same conduct, I do not disagree with the majority's decision to assume "without deciding" that they merge because whether counts 14 and 15 merge has no bearing on the presumptive sanction in this case: disbarment. *See* majority at 13. However, I dispute the majority's treatment of aggravating and mitigating factors.

I. Aggravating and Mitigating Factors

Once we determine the presumptive sanction, we next consider any aggravating or mitigating factors.[2] *Marshall*, 160 Wn.2d at 342. The hearing officer is in the best position to determine the attorney's state of mind and, accordingly, we defer to the hearing officer's findings unless they are not supported by substantial evidence. *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 744, 122 P.3d 710 (2005).

The hearing officer found only one aggravating factor: substantial experience in the practice of law. In contrast the hearing officer found five mitigating factors: (1) absence of a prior disciplinary record, (2) timely good faith effort to make

restitution or to rectify consequences of misconduct, (3) full and free disclosure to

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[2]The ABA *Standards* sets out a list of aggravating factors that may be considered. Aggravating factors include:

> (a) prior disciplinary offenses;
> (b) dishonest or selfish motive;
> (c) a pattern of misconduct;
> (d) multiple offenses;
> (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
> (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
> (g) refusal to acknowledge wrongful nature of conduct;
> (h) vulnerability of victim;
> (i) substantial experience in the practice of law;
> (j) indifference to making restitution.

ABA Standards for Imposing Lawyer Sanctions std. 9.22 (1991 ed. & Supp. 1992).

The ABA *Standards* sets out a list of mitigating factors that may be considered. Mitigating factors include:

> (a) absence of a prior disciplinary record;
> (b) absence of a dishonest or selfish motive;
> (c) personal or emotional problems;
> (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
> (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
> (f) inexperience in the practice of law;
> (g) character or reputation;
> (h) physical disability;
> (i) mental disability or chemical dependency including alcoholism or drug use when:
> (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
> (2) the chemical dependency or mental disability caused the misconduct;
> (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
> (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
> (j) delay in disciplinary proceedings;
> (k) imposition of other penalties or sanctions;
> (l) remorse;
> (m) remoteness of prior offenses.

ABA Standards std. 9.32.

Board and cooperative attitude toward proceedings, (4) character and reputation, and (5) delay in disciplinary proceedings. The hearing officer recommended a 30-day suspension based on the strength of Preszler's mitigating factors. Hr'g Officer's Findings of Fact and Conclusions of Law (FFCL) at 35.

The Board found an additional aggravating factor: multiple offenses. As for mitigating factors, first, the Board concluded that delay did not apply because Preszler suffered no prejudice and, second, while agreeing that the mitigating factor of timely good faith effort to make restitution applied, the Board determined it carried little weight. The Board rejected the hearing officer's recommendation and, instead, recommended a three-year suspension by a 9-to-2 vote.

Preszler argues the aggravating factor of multiple offenses does not apply (or applies with diminished weight) and that the mitigating factors of delay and timely effort to pay restitution should apply. I agree.

a. Unchallenged factors

The WSBA and Preszler agree that he is entitled to mitigating factors of (1) absence of prior disciplinary record and (2) character or reputation. On the other side of the coin, the parties agree Preszler should suffer the aggravating factor of substantial experience in the practice of law.

b. Challenged Factors

1. Aggravating: multiple offenses

I agree with the majority that Preszler committed multiple offenses against the Gerrards, but I would substantially reduce the weight given to this factor.

First, counts 14 and 15 should merge. In count 14 the hearing officer found that "[b]y disbursing to himself from his trust account a portion of the personal-injury proceeds, Mr. Preszler knowingly disobeyed obligations under the bankruptcy rules in violation of [former] RPC 3.4(c) [(1985)] and engaged in conduct that is prejudicial to the administration of justice in violation of [former] RPC 8.4(d)." FFCL at 32, ¶ 57. In count 15, the hearing officer found that "[b]y disbursing the personal-injury proceeds to himself without the consent, knowledge, or authority of the bankruptcy Trustee and bankruptcy Court, Mr. Preszler knowingly violated bankruptcy rules with the intent to gain a benefit for himself." FFCL at 33, ¶ 58.

Both counts 14 and 15 involve the same conduct and the same type of violation, i.e., Preszler disbursed funds to himself without the bankruptcy court's approval as required by the bankruptcy court rules and federal law. A finding of either count leads to the same presumptive sanction: disbarment. Preszler is correct

that counts 14 and 15 should have been viewed as one offense.

Counts 14 and 15 aside, a clear preponderance of the evidence suggested Preszler also committed misconduct by charging an unreasonable fee (count 1), failing to explain the bankruptcy exemptions to Kinnie (count 3), and failing to properly supervise his paralegal (count 17). It is important to point out, however, that all of Preszler's misconduct was "isolated to a single client and a single legal action lasting [a short period of time]." *In re Disciplinary Proceeding Against Eugster,* 166 Wn.2d 293, 322, 209 P.3d 435 (2009). Moreover, the presumptive sanction attached to count 3 is admonition and the presumptive sanction for count 17 is reprimand. These sanctions are significantly less severe than disbarment, the presumptive sanction for counts 14 and 15. Accordingly I would give little weight to this aggravating factor.

2. Mitigating: good faith effort to pay restitution

The hearing officer found Preszler satisfied the mitigating factor of timely good faith effort to pay restitution. The Board, in turn, accepted this finding, but gave it little weight because it found Preszler required Kinnie to sign a release to get her money back. Now the majority flatly rejects mitigation for Preszler's restitution. The majority suggests Preszler did not act on his own initiative because the Gerrards "demand[ed]" that Preszler make restitution. Majority at 30. In the same vein, it

suggests the release Preszler obtained tainted his effort to make restitution. *Id*.

The majority fundamentally misinterprets the interplay between Preszler and Bill Hames, the Gerrards' bankruptcy attorney. During Hames's phone conversation with Preszler, Hames pointed out that Preszler had made an error on the wild card exemption and that he had erroneously accepted a contingent fee. FFCL at 22, ¶ 45. Hames suggested Preszler make amends by repaying the contingent fee. FFCL at 23, ¶ 45. While it is true in their initial conversation Hames *requested* that Preszler refund the improperly collected fee, a better way of viewing the interaction is that Hames *notified* Preszler of his error. In response to that new information, Preszler "immediately" acknowledged his mistake and reimbursed his trust account for the contingent fee. FFCL at 23, ¶ 46. Labeling Hames's conversation with Preszler a demand, without acknowledging it also served as Preszler's first opportunity to correct his mistake, mischaracterizes the course of events. Upon being notified of his error, Preszler made an immediate good faith effort to repay his former client.

Second, the evidence clearly shows that Hames suggested and offered the release to Preszler—not the other way around. The release was Hames's idea. Preszler did not require the Gerrards to sign anything before he made restitution. Yet the majority rebukes Preszler to suggest "he was not yet prepared to assume

responsibility for the consequences of his actions." Majority at 30. Requiring Preszler to decline a release confuses remorse with stupidity. Remorse, or even assuming responsibility for his actions, did not require Preszler to expose himself to liability, let alone look a gift horse in the mouth, in order to make a good faith effort to pay restitution. In any event, Preszler voluntarily withdrew the release while the decision of the first hearing officer was pending.

The majority improperly rejects Preszler's good faith effort to make restitution. I would give this mitigator its proper undiminished weight.

3. Mitigating: delay

The hearing officer found the mitigator of delay. The Board, however, determined that because there was no showing of prejudice to Preszler and because the record did not show that the WSBA caused the delay, delay did not apply. The majority incorrectly embraces the Board's determination.

"[D]elay in the prosecution of a case is a mitigating factor to be balanced against any aggravating factors, but it does not automatically merit a reduction in sanction." *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 568, 9 P.3d 822 (2000) (citing *In re Disciplinary Proceeding Against Dann*, 136 Wn.2d 67, 82-83, 960 P.2d 416 (1998)). Demonstrated prejudice and impropriety by the WSBA weigh toward a drastic mitigation of sanctions; however, they are not strictly

required. Nonprejudicial delay, while perhaps entitled to reduced weight, should not be viewed as without weight altogether.

The majority saddles Preszler with the burden of proving he was unfairly prejudiced or that unjustified prosecutorial delay was the cause. Majority at 34. While the cases cited by the majority generally stand for that proposition, we have also held that delay operates as a mitigating factor in less stringent (i.e., nonprejudicial) circumstances. In *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 606, 48 P.3d 311 (2002), we held that the mitigating factor of delay applied even though "the record does not indicate Carmick was harmed by the delay" and "the effect of the delay in this instance was very slight." While the *Carmick* court gave delay diminished significance, it nonetheless counted the factor in the attorney's favor. *Id*. ("The only mitigating factor is a delay in the disciplinary proceedings.").

We have also shown an inclination to count delay as a mitigator when the attorney takes rehabilitative steps during the delay. *See Tasker*, 141 Wn.2d at 568. Delay should apply here as well because Preszler "made the most of the delay by demonstrating his willingness and ability to clean up his act . . . . [and] the delay in prosecution was caused through no fault of his own." *Id*. The hearing officer found neither Preszler nor the WSBA responsible for the delay. The hearing officer also

found Preszler had "undertaken measures in his practices to make []sure that occurrences of the type [charged] will not occur again" and that he had sent a letter expressing remorse to Kinnie. FFCL at 25, ¶ 50. In addition, Preszler voluntarily withdrew the release of liability, showing his willingness to take responsibility for his actions. Given Preszler's positive actions, during what was a faultless delay, I agree with the hearing officer and give some consideration to the mitigating factor of delay.

c. Balancing the factors

When reviewing sanction recommendations, this court "does not lightly depart from the Board's recommendation; however it is not bound by it." *Tasker*, 141 Wn.2d at 565 (citing *In re Disciplinary Proceeding Against Haskell*, 136 Wn.2d 300, 317, 962 P.2d 813 (1998)). This court retains the ultimate responsibility for determining the nature of an attorney's discipline. *Id*.

In the end, the aggravating factors of (1) substantial experience in the practice of law and (2) multiple offenses, while substantially reduced in weight, militate against Preszler. In contrast, the mitigating factors of (1) absence of prior disciplinary record, (2) character or reputation, (3) restitution, and (4) delay favor Preszler. The overwhelming weight of the mitigating factors—more than twice that of aggravating factors—should persuade us to depart from the Board's

recommendation.

Because I would suspend Preszler's law license for 12 months instead of 3 years, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice James M. Johnson

Justice Tom Chambers