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FILED

MAY 16 2012

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

DAVID A. STIRBIS,
Lawyer (Bar No. 26037)

Proceeding No.: 11#00094

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND HEARING OFFICER'S
RECOMMENDATION**

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), the undersigned Hearing Officer held a hearing on May 8, 2012. Respondent David A. Stirbis ("Stirbis") appeared in person and through his legal counsel, James E. Lobsenz of Carney Badley Spellman. Senior Disciplinary Counsel Linda B. Eide appeared for the Washington State Bar Association ("the Association").

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Formal Complaint filed by Disciplinary Counsel charged respondent with one count of misconduct as follows:

By assaulting and supplying alcohol to SCJ with sexual motivation, Respondent David Stirbis violated RPC 8.4(b) and/or RPC 8.4(i) (by committing the crimes of assault with sexual motivation and supplying

1 alcohol to a minor with sexual motivation in violation of RCW 9A.36.041,
2 RCW 66.44.270(1), RCW 9.94A.835(1), and RCW 9.94A.030).

3 The Association seeks a suspension of Stirbis' license to practice law for one year. Based on the
4 pleadings in this case, the Stipulation of the Parties ("the Stipulation"), and the testimony and
5 exhibits admitted into evidence at the hearing, the Hearing Officer makes the following:

6 **FINDINGS OF FACT**

7 1. Stirbis was admitted to the Washington State Bar Association on October 14,
8 1996.

9 2. Stirbis has no prior disciplinary record.

10 3. For several years before the conduct giving rise to this disciplinary proceeding,
11 SCJ (also referred to as "SJ" in the Stipulation), a minor, was a babysitter for Stirbis' young
12 children. During this time, SCJ's family and Stirbis' family had gone on weekend hang gliding
13 and camping outings together. SCJ babysat Stirbis' children at various times during these
14 outings and at Stirbis' home.

15 4. In May of 2007, Stirbis' wife, Maria, an attorney and Stirbis' law partner,
16 represented SCJ's parents in conducting interviews and writing letters to a teacher and
17 administrators at SCJ's high school to report and stop harassing comments about SCJ. In April
18 of 2008, Stirbis filed a lawsuit on behalf of SCJ's father to recover damages for personal injury.
19 Stirbis had previously represented SCJ's older sister, who worked for a time in Stirbus' law
20 office.

21 5. In lieu of calling SCJ as a witness at the hearing, Stirbis and the Association
22 entered into the Stipulation agreeing that the facts set forth herein in the following paragraphs
23 numbered 6 through 11 are true and correct.

1 6. On September 14, 2008, a Sunday, the Stirbis family and SJ's family had been out
2 camping together. When it was time for them to leave and go to their respective homes, David
3 Stirbis was intoxicated. SJ believed that Maria Stirbis was also intoxicated and she felt it would
4 not be safe for either of them to drive given their level of intoxication, and she was
5 uncomfortable with the idea of them driving home with his two children in their car.

6 7. Since SJ was scheduled to do some babysitting for the Stirbis family on the next
7 day (Monday), she offered to drive the Stirbis family home herself. Stirbis accepted her offer to
8 drive him home, and SJ then drove the Stirbises and took David and Maria Stirbis and their
9 children to the Stirbis home. SJ then spent Sunday night at the Stirbis home, sleeping in the
10 guest room.

11 8. On Monday when she awoke, both David and Maria Stirbis were gone. SJ took
12 care of the Stirbis children that day. The Stirbises came home that evening around 7 p.m.

13 9. After putting the children to bed, SJ and David Stirbis watched the movie
14 "Jumper" together. During the movie, SJ drank beer. Stirbis himself drank apple flavored
15 vodka, and he also supplied SJ with shots of the same.

16 10. Late Monday evening or early Tuesday morning, by the time Stirbis initiated
17 sexual contact with SJ, Stirbis and SJ were both intoxicated.

18 11. SJ was 16 years and eleven months old (DOB 9/21/91) and Stirbis was 42 years
19 old at the time of these events.

20 12. On January 23, 2009, at an arraignment hearing in the Kitsap County District
21 Court, Stirbis pleaded guilty as charged to two gross misdemeanors: (1) Assault in the Fourth
22 Degree with Sexual Motivation in violation of RCW 9A.36.041 and (2) Furnishing Liquor to a
23

1 Minor with Sexual Motivation in violation of RCW 66.44.270. In his Statement on Plea of
2 Guilty, Stirbis stated:

3 On 9-16-08 [in] Washington State I intentionally assaulted SCJ for sexual
4 motivation, and on said date I gave her alcohol [sic] in the commission [sic]
5 of the assault. She is under the age of 21.

5 Stirbis has never denied that he had sexual intercourse with SCJ.

6 13. Kitsap County District Court Judge Stephen J. Holman sentenced Stirbis to
7 30 days in jail (365 days with 333 days suspended) and fined him a total of \$1,000. The court
8 also placed Stirbis on probation for two years; prohibited him from having contact with SCJ or
9 any person under 18 years of age other than his own children; required Stirbis to obtain a
10 certified chemical dependency evaluation and a psychosexual evaluation and comply with any
11 counseling recommendations; and directed Stirbis to undergo AIDS and DNA testing. Stirbis has
12 served his time in jail, paid the fine, and complied with all other conditions imposed by the court.

13 14. After Stirbis' conduct on September 16, 2008, SCJ's father discharged Stirbis as
14 his attorney in his pending personal injury lawsuit and hired a Wenatchee attorney who
15 concluded a settlement in the case. SCJ's parents also brought a civil lawsuit against Stirbis
16 based on his sexual assault of SCJ; this lawsuit was satisfactorily settled in 2010 by a payment to
17 SCJ's family, the amount of which is subject to a confidentiality agreement.

18 15. In late January of 2009, there was a newspaper article and information supplied to
19 the public by broadcast media regarding the incident that prompted Stirbis' guilty plea. The
20 public became aware that Stirbis, who had served as a judge pro tem in district and municipal
21 courts, had entered a plea of guilty to a sexual assault of a girl.

22 16. Before Stirbis' assault of SCJ, SCJ was an honor student and planned to enter the
23 Running Start program at a community college. SCJ had lettered in several high school sports,

1 | played cello in the orchestra and flute in the band, and was involved in many school activities
2 | with her friends. SCJ also enjoyed hang gliding and riding a dirt bike. SCJ had a close
3 | relationship with her family and no significant health problems.

4 | 17. After Stirbis assaulted SCJ, SCJ started failing her classes and sometimes could
5 | not bring herself to get out of the car at school to go to class. For a time SCJ did not go to school
6 | at all as she became withdrawn, stayed in her room with the lights off, did not want to eat, and
7 | lost weight. SCJ stopped doing her usual athletic, musical, and recreational activities. SCJ also
8 | exhibited extreme psychological stress, using a heated nail to burn her arms, having difficulty
9 | sleeping, and for a time exhibiting suicidal tendencies. For about a year after Stirbis' assault, all
10 | aspects of SCJ's family's life were altered because family members needed to spend time with
11 | SCJ to keep her from harming herself, take her to therapy sessions, and see that she took
12 | prescribed medications to treat depression, anxiety, post-traumatic stress syndrome, and
13 | difficulty in sleeping.

14 | 18. Eventually SCJ recovered and began taking online courses and engaging others.
15 | SCJ accumulated enough credits to graduate from high school in December of 2010, about six
16 | months after the rest of her high school class. She was not able to get college credits through the
17 | Running Start program.

18 | 19. Since early 2009, when Stirbis served his jail time for assaulting SCJ, Stirbis has
19 | abstained from any alcohol use. Stirbis completed a 90-day intensive outpatient substance abuse
20 | treatment program with aftercare follow up sessions at the Olalla Recovery Center. As part of
21 | his continued recovery efforts, Stirbis attends Alcoholics Anonymous meetings and meets
22 | weekly for coffee with a group of attorney acquaintances in alcohol recovery.

1 20. In February of 2012, Stirbis was evaluated by Mark R. McClung, M.D., P.C., a
2 board-certified psychiatrist. Based on Stirbis' self-reported lifetime history of alcohol use before
3 the 2008 incident, Dr. McClung testified that, in his opinion, Stirbis' conduct on September 16,
4 2008, was directly related to his alcoholism and that alcohol intoxication was a major factor in
5 his behavior. Dr. McClung further opined that Stirbis met the psychiatric DSM-IV diagnostic
6 criteria for Alcohol Dependence and Alcohol Intoxication at the time of the assault; Stirbis is
7 demonstrating a meaningful and successful rehabilitation from his alcohol problems; and Stirbis'
8 alcohol dependence is in remission and he is motivated to maintain abstinence.

9 21. Stirbis has never denied that he supplied SCJ with alcohol on the night in question
10 and had sexual intercourse with SCJ. He testified that he knows his conduct was wrong and he
11 was the cause of what SCJ went through as a result of his actions, which he regrets.

12 Having made the foregoing Findings of Fact, the Hearing Officer hereby makes the
13 following:

14 **CONCLUSIONS OF LAW**

15 **Violations Analysis**

16 The Hearing Officer concludes that the Association proved the following:

17 22. Count 1 charging a violation of RPC 8.4(b) is proven by a clear preponderance of
18 the evidence. RPC 8.4(b) provides that it is professional misconduct for a lawyer to:

19 Commit a criminal act that reflects adversely on the lawyer's honesty,
20 trustworthiness or fitness as a lawyer in other respects.

21 23. ELC 10.14(c) provides that in a disciplinary proceeding if a formal complaint
22 charges a respondent lawyer with an act of misconduct for which the respondent has been
23 convicted in a criminal proceeding, "the court record of the conviction is conclusive evidence at

1 the disciplinary hearing of the respondent's guilt of the crime and violation of the statute on
2 which the conviction was based." There can be no dispute that Stirbis committed a criminal act
3 under RPC 8.4(b).

4 24. Stirbis contends that his "criminal act" was a crime of an assaultive nature that
5 does not reflect on a his honesty, trustworthiness or fitness as a lawyer.

6 25. In pleading guilty to assault in the fourth degree, Stirbis admitted he intentionally
7 touched SCJ in an offensive manner in violation of RCW 9A.36.041. In pleading guilty to
8 furnishing alcohol to a minor, Stirbis admitted he intentionally supplied liquor to SCJ in
9 violation of RCW 66.44.270. For both crimes, Stirbis admitted he acted with "sexual
10 motivation," meaning "one of the purposes for which a defendant committed the crime was for
11 the purpose of his or her sexual gratification."

12 26. Stirbis' criminal conduct reflects adversely on his honesty because he did not
13 immediately disclose his behavior. Stirbis' criminal conduct reflects adversely on his
14 trustworthiness because he took advantage of his position as a trusted adult parental figure for his
15 own sexual gratification. Stirbis' criminal conduct reflects adversely on his fitness as a lawyer in
16 other respects because a lawyer must be of good moral character including adherence to the law
17 and respect for the rights of other persons. Admission to Practice Rule ("APR") 21.

18 27. Count 1 charging violation of RPC 8.4(i) is proven by a clear preponderance of
19 the evidence.

20 28. RPC 8.4(i) provides that it is professional misconduct for a lawyer to:

21 Commit any act involving moral turpitude, or corruption, or any
22 unjustified act of assault or other act which reflects disregard for the rule
23 of law, whether the same be committed in the course of his or her conduct
as a lawyer, or otherwise, and whether the same constitutes a felony or
misdemeanor or not; and if the act constitutes a felony or misdemeanor,

1 conviction thereof in a criminal proceeding shall not be a condition
2 precedent to disciplinary action, nor shall acquittal or dismissal thereof
preclude the commencement of a disciplinary proceeding.

3 29. Although SCJ was never Stirbis' client, Stirbis abused SCJ's trust, supplied her
4 with alcohol, and sexually exploited SCJ, a vulnerable young girl. This conduct involves "moral
5 turpitude" within the meaning of RPC 8.4(i). Moreover, Stirbis' unjustified assault of SCJ,
6 whether or not committed in the course of his conduct as a lawyer and whether or not a felony or
7 misdemeanor, clearly falls within the provisions of RPC 8.4(i) and constitutes professional
8 misconduct.

9 **Sanction Analysis**

10 30. The Washington Supreme Court requires the Hearing Officer to apply the
11 American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. and Feb. 1992
12 Supp.) ("the ABA Standards") in all lawyer discipline cases. *In re Discipline of Halverson*,
13 140 Wn.2d 475, 492 (2000).

14 31. Applying the ABA Standards involves a two-step process: The first step is to
15 determine a presumptive sanction by considering (1) the ethical duty violated, (2) the lawyer's
16 mental state, and (3) the extent of the actual or potential injury caused by the misconduct. The
17 second step is to consider any aggravating or mitigating factors that might alter the presumptive
18 sanction. *In re Discipline of Dann*, 136 Wn.2d 67, 77 (1998).

19 32. A presumptive sanction must be determined for each ethical violation. *In re*
20 *Discipline of Anshell*, 149 Wn.2d 484, 502 (2003).

21 33. As to Stirbis' violation of RPC 8.4(b), ABA Standard 5.1, relating to failure to
22 maintain personal integrity, is applicable.

1 34. ABA Standard 5.1 provides in pertinent part as follows:

2 5.11 Disbarment is generally appropriate when:

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

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

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

20 5.13 Reprimand is generally appropriate when a lawyer knowingly
21 engages in other conduct that involves dishonesty, fraud, deceit, or
22 misrepresentation and that adversely reflects on the lawyer's
23 fitness to practice law.

24 5.14 Admonition is generally appropriate when a lawyer engages in any
other conduct that reflects adversely on the lawyer's fitness to
practice law.

35. Stirbis' criminal conduct did not involve the elements described in
ABA Standard 5.11. However, Stirbis acted intentionally and his conduct caused serious injury
to SCJ and her family. Pursuant to ABA Standard 5.12, the presumptive sanction for Stirbis'
violation of RPC 8.4(b) is suspension.

36. As to Stirbis' violation of RPC 8.4(i) for committing an act involving moral
turpitude or an unjustified act of sexual assault, the Washington Supreme Court has held that the
ABA Standards do not apply to presumptive sanctions for violations of RPC 8.4(i) involving acts

1 of moral turpitude because this Washington Rule of Professional Conduct does not appear in the
2 ABA Model Rules of Professional Conduct on which the ABA Standards are based. *In re*
3 *Discipline of Day*, 162 Wn.2d 527, 547 (2007). Accordingly, the Hearing Officer must look to
4 Washington case law to determine a presumptive sanction for Stirbis' violation of RPC 8.4(i).

5 37. There appear to be no Washington lawyer discipline cases involving assault with
6 sexual motivation or furnishing alcohol to a minor with sexual motivation.

7 38. The Washington lawyer disciplinary cases that seem most analogous to Stirbis'
8 misconduct involving a consensual sexual relationship with a vulnerable person are: *In re*
9 *Discipline of Halverson*, 140 Wn.2d 475 (2000) (one-year suspension based on sex with a
10 dissolution client); and *In re Discipline of Heard*, 136 Wn.2d 405 (1998) (two-year suspension
11 based on sex with a client suffering from a head injury). However, both of these cases involved
12 clients and neither involved criminal convictions.

13 39. Based on Stirbis' relationship to SCJ's family, the minor status of SCJ, and the
14 fact that Stirbis' criminal conduct involved sexual motivation, the appropriate presumptive
15 sanction for Stirbis' violation of RPC 8.4(i) is suspension.

16 40. In cases such as this where multiple acts of misconduct are found, the "ultimate
17 sanction imposed should at least be consistent with the sanction for the most serious instance of
18 misconduct among a number of violations." *In re Discipline of Petersen*, 120 Wn.2d 833, 854
19 (1993). The appropriate presumptive sanction in this case is suspension.

20 **Aggravating and Mitigating Factors**

21 41. Aggravating and mitigating factors may support deviation from the presumptive
22 sanction.

1 42. The following aggravating factors set forth in Section 9.22 of the ABA Standards
2 are applicable in this case:

- 3 (b) Dishonest or Selfish Motive. Stirbis acted for his own personal sexual
4 gratification.
- 5 (h) Vulnerability of Victim. Stirbis took advantage of SCJ, a minor.
- 6 (i) Substantial Experience in the Practice of Law. Stirbis was admitted to
7 practice on October 14, 1996, and has over 15 years experience in the
8 practice of law.

9 43. The following mitigating factors set forth in Section 9.32 of the ABA Standards
10 are applicable in this case:

- 11 (a) Absence of a Prior Disciplinary Record. Stirbis has not been subject to
12 discipline as an attorney.
- 13 (e) Cooperative Attitude Toward Proceedings. Stirbis has demonstrated a
14 cooperative attitude throughout this disciplinary proceeding, and he has
15 never denied that he committed the acts resulting in his guilty plea in the
16 Kitsap County District Court.
- 17 (g) Character or Reputation. Prior to the misconduct that is the subject of this
18 proceeding, Stirbis had a reputation as a skilled lawyer who was
19 frequently called upon to be a *pro tem* judge. He also received a Special
20 Pro Bono Award from the Tacoma-Pierce County Bar Association in 2004
21 for devoting a significant amount of time to pro bono legal services.
- 22 (i) Chemical Dependency. There is medical evidence that Stirbis was
23 affected by alcoholism and his alcoholism caused the misconduct. Stirbis'
24 recovery from alcoholism is demonstrated by a meaningful and sustained
period of successful rehabilitation. Stirbis has refrained from alcohol use
for over three years and a recurrence of the misconduct is unlikely.
- (k) Imposition of Other Penalties or Sanctions. Stirbis has been punished for
his criminal acts and incurred civil liability to SCJ's family.
- (l) Remorse. Stirbis realizes that his conduct was wrong and he regrets the
harm he caused to SCJ and her family.

1 44. The Washington Supreme Court has held that a period of six months is generally
2 the accepted minimum term of suspension. *In re Discipline of Cohen*, 149 Wn.2d 323, 339
3 (2003). In *Cohen*, the court stated that the “minimum suspension is appropriate in cases where
4 there are both no aggravating factors and at least some mitigating factors, or when the mitigating
5 factors clearly outweigh the aggravating factors.” *In re Discipline of Cohen*, 149 Wn.2d 323,
6 339 (2003) citing *In Re Discipline of Halverson*, 140 Wn.2d at 497. In this case, the mitigating
7 factors clearly outweigh the aggravating factors.

8 45. Deviation from the presumptive minimum sanction is appropriate if the
9 aggravating and mitigating factors are sufficiently compelling to justify a departure. “While six
10 months may be the presumptive starting point when suspending an attorney, it is not necessarily
11 the absolute minimum.” *In re Discipline of Cohen*, 149 Wn.2d 323, 339 (2003).

12 **Proportionality of Sanction.**

13 46. In determining the recommended sanction, the presumptive sanction, as adjusted
14 by considering aggravating and mitigating factors, may be modified by considering whether the
15 proposed sanction departs significantly from the sanctions imposed in other attorney disciplinary
16 cases. *In re Discipline of Dynan*, 152 Wn.2d 601, 611 (2004).

17 47. Respondent cites several Washington attorney disciplinary cases in which the
18 sanction imposed for an assault committed by an attorney was less than the presumptive six-
19 month minimum term of suspension. The cases cited by respondent are as follows: *In re*
20 *Discipline of Kuvara*, 97 Wn.2d 743 (1982) (letter of censure where the attorney became
21 involved in an altercation and struck another individual in the face with a wine glass; the court
22 held that a simple assault on a non-client was not an act of “moral turpitude”); *In re Discipline of*
23 *Roe*, No. 04#00024 (reprimand for grabbing and pushing a juvenile client constituting an assault

1 in the fourth degree); and *In re Discipline of Highland* (1998) (admonition where attorney
2 committed an assault in the second degree outside a court room by grabbing a defense attorney's
3 finger and twisting it, fracturing the bone and separating the ligaments from the bone). Finally,
4 respondent suggests that *In re Discipline of Perez-Pena*, 161 Wn.2d 820 (2007), may set a
5 ceiling of a two-month suspension for the sanction to be imposed in this case. In the *Perez-Pena*
6 case, the attorney pushed or hit a client at a meeting to refund money to the client in exchange
7 for a release. A jury convicted Perez-Pena of a misdemeanor assault. The court found that
8 Perez-Pena's acts were directly related to the practice of law and the presumptive sanction was
9 suspension. The court went on to find two aggravating factors and three mitigating factors and
10 imposed a 60-day suspension.

11 48. Stirbis contends that he should receive no more than a two-month suspension
12 based on the following comparison of this case with *Perez-Pena*: Perez-Pena assaulted a client;
13 Stirbis did not. Perez-Pena committed a second entirely separate RPC violation that involved
14 dishonesty in the practice of law; Stirbis' RPC violations do not involve dishonesty in the
15 practice of law. There were only three mitigating factors in *Perez-Pena*; there are more
16 mitigating factors for Stirbis.

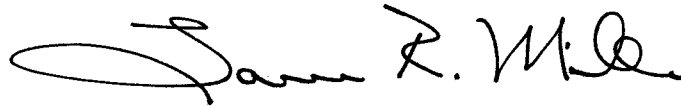
17 49. The Hearing Officer finds the *Perez-Pena* case inapposite. Stirbis' misconduct
18 involves crimes with sexual motivation involving a minor and abuse of trust, none of which were
19 involved in the *Perez-Pena* case. Accordingly, the *Perez-Pena* case does not establish a ceiling
20 on the length of a suspension in this case or reduce the presumptive suspension to a reprimand as
21 contended by Stirbis.

RECOMMENDATION

50. Based on the ABA Standards, the applicable aggravating and mitigating factors, and the proportionality of sanction analysis, the Hearing Officer recommends respondent David A. Stirbis be suspended from the practice of law for a period of four months.

51. The Hearing Officer further recommends that respondent's reinstatement be conditioned on respondent's prior payment of the Association's costs and expenses as provided in ELC 13.9.

Dated this 15th day of May, 2012.

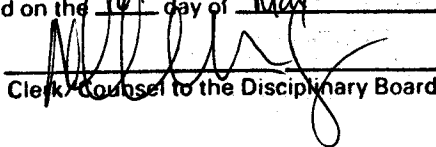


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CERTIFICATE OF SERVICE

I certify that I caused a copy of the POF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to JAMES LORSCHE Respondent/Respondent's Counsel at DISC. COUNSEL 3100 SEATTLE WA 98104, by Certified/first class mail postage prepaid on the 16th day of May, 2012


Clerk/Counsel to the Disciplinary Board