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WASHINGTON STATE BAR ASSOCIATION**

In re:  
**JASON M. FELDMAN,**  
  
**Lawyer (Bar No. 41238)**

Proceeding No. 14#00080

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

This matter came on for hearing before the undersigned Hearing Officer on August 5, 2015, pursuant to ELC 10.13-10.16. The Association was represented by Disciplinary Counsel Erica Temple. Respondent Jason Feldman appeared in person and was represented by his attorney Kenneth Kagan. The Hearing Officer heard the testimony of witnesses and has considered the Exhibits admitted into evidence and final summation of counsel.

FORMAL COMPLAINT

The Formal Complaint filed by Disciplinary Counsel charged Respondent with the following acts of misconduct:

Count 1: By having sexual relations with a current client, M.R., when no consensual sexual relationship existed between them at the time the client-lawyer relationship commenced, Respondent violated RPC 1.8(j).

Count 2: By engaging in sexual intercourse with M.R., without her consent, where such lack of consent was clearly expressed by words or conduct, Respondent violated RPC 8.4(b) (by committing the crime of Rape in the Third Degree, in violation of RCW 9A.44.060(a), and/or the crime of Assault in the Fourth Degree with sexual motivation in violation of RCW 9A.36.041(2) and/or RCW 9.94A.030(47) and/or RPC 8.4(i).

FINDINGS OF FACT

The following facts were proven by a clear preponderance of the evidence:

1. Respondent Jason Feldman, 35 years of age at the time of the incidents described herein, was admitted to practice law in the State of Washington on May 13, 2009.

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2. On March 31, 2013, a Sunday, M.R. was arrested and charged with fourth degree assault/domestic violence after an incident with her husband and spent the night in jail. At the time, M.R. was 24 years of age and she and her husband had a young child in common.

3. Prior to this arrest, M.R. had no previous exposure to legal matters in a court of law of any sort, whether civil or criminal in nature, nor had ever worked with an attorney.

4. On Monday, April 1, 2013, M.R. had an initial appearance in Marysville Municipal Court and was released on her own recognizance. At that time, Feldman & Lee – Respondent’s employer - had a public defense contract and was assigned to represent M.R. on the assault/domestic violence charge.

6. Ten days later, on Thursday, April 11, 2013, M.R., who was not previously acquainted with Respondent, met Respondent and had her first consultation with him at his office for approximately 20 minutes.

7. On Monday, April 22, 2013, M.R. met with Respondent at his office a second time for approximately 1 hour. During that conference, M.R. was distressed regarding the legal issues that faced her. In addition to the pending domestic violence charges, she was coping with a divorce and a no contact order case brought by her husband in the family law court.

8. Respondent understood M.R. relied upon him and placed her trust in him to give her advice on both matters – criminal and family law.

9. Respondent understood, based on his conversations with M.R., she felt like she was ‘in-over-her-head’ with all of the pending legal matters.

10. Respondent informed M.R. he was not a lawyer with family law experience but provided some legal direction regarding the family law issues and also discussed the pending criminal matter.

11. At some point, Respondent became attracted to M.R. and wanted to get her case done as quickly as possible so that he could begin a relationship with her.

12. On Thursday, April 25, 2013, M.R. appeared in court with a different attorney from Feldman & Lee because Respondent left for a vacation.

13. On Monday, April 29, 2013, M.R. appeared at Respondent’s office in the afternoon and had a brief five minute contact with Respondent in his waiting room.

Respondent, who had appointments with other clients during that afternoon, asked M.R. to return to his office at 5:00 p.m.

2  
4 14. At approximately 5:00 p.m. that same day, M.R. returned to Respondent's  
6 office and upon arriving and walking-up to the main entrance, observed that the lights to the  
8 room just inside the main entrance office doors were off, and after entering, discovered that the  
lights in the office waiting room were off as well.

10 15. M.R. turned to leave and at that moment, Respondent came out and invited her  
12 back to his office. M.R. accompanied Respondent back to his office and Respondent shut his  
14 office door after they entered.

16 16. Respondent took a seat at his desk and M.R. sat in a chair across from him and  
18 they initially discussed the pending criminal case and Respondent advised M.R. that she  
should give consideration to pleading guilty in the pending criminal case.

20 17. After some brief discussion regarding M.R.'s case, Respondent changed the  
22 subject of the conversation to topics more personal in nature, such as whether M.R. had a  
24 tattoo, where that tattoo was located, M.R.'s interest in art and drawing and artistic skills, and  
26 Respondent's request that she draw something for him, including a naked picture of herself.

28 18. At the conclusion of this discussion regarding subjects unrelated to M.R.'s  
30 pending criminal case, Respondent asked M.R. if she wanted to 'make-out'. M.R. consented  
32 and Respondent got up from his desk, walked around to where M.R. was seated and took her  
arm and escorted her over to the couch in his office.

34 19. Respondent then sat down on his couch, M.R. straddled him and they began  
36 kissing. During this consensual contact, Respondent made efforts to touch M.R.'s breasts.  
38 Those advances were initially rejected, but later permitted by M.R.

40 20. M.R. had possession of her cellular phone while on Respondent's couch and  
42 several calls came in to her phone during her contact with Respondent in his office. M.R.  
declined to answer those calls.

44 21. Following kissing and touching by Respondent on his couch, the parties slid  
46 down onto the floor in front of the couch and continued kissing with Respondent on top of  
48 M.R. While on top of her, he, with her permission and consent, partially slid her pants and  
50 underwear down to a point that made the tattoo on her pelvis visible.

22. After briefly remaining on the floor, M.R. and Respondent slid back up onto the couch and continued kissing. They then left the couch and Respondent picked M.R. up and went to the front edge of Respondent's desk and there, they continued to kiss for a time.

23. After kissing at the desk, M.R. indicated that she needed to leave. Respondent pleaded with her to stay. They then kissed momentarily near the door to his office and M.R. then expressed to Respondent that she was going to leave.

24. M.R. then walked out of Respondent's office into the main office and before exiting the main entrance conversed with Respondent about staying longer. Respondent and M.R. then began kissing again at which time Respondent put his right hand down M.R.'s pants and penetrated her vagina with his fingers. After a few minutes of kissing and intimacy, M.R. then moved from a standing to kneeling position in front of Respondent and performed oral sex on him, and then departed his office.

25. M.R. then drove home to Sedro Wooley.

26. Over the next few days, M.R. was not herself and disclosed to her roommate, Connie Trumble, what occurred at Respondent's office.

27. On May 5, 2013, M.R. contacted the Marysville Police Department and reported a sexual assault and contended Respondent was the suspect.

28. On May 6, 2013, the prosecutor handling M.R.'s underlying assault/domestic violence case was notified of the allegations by M.R. against Respondent and elected to dismiss the assault/domestic violence charge against M.R. that same day.

29. On May 7 or May 8, 2013 a One Party Consent Authorization to intercept and Record Communications or Conversations was obtained by a police officer with the Marysville Police Department and signed by Judge Michael Downs on May 8, 2013.

30. On May 9, 2013, M.R. placed a call to Respondent from the Marysville Police Department that was recorded on a digital recorder. A second call which was recorded occurred the same date between M.R. and Respondent. The conversations which occurred during each phone call were focused on what occurred on April 29<sup>th</sup> and dominated by Respondent with little opportunity for M.R. to talk and with frequent interruptions by Respondent.

2 31. This matter was referred to the Snohomish County Prosecutor's Office for Rape  
4 2<sup>nd</sup> Degree and Rape 3<sup>rd</sup> Degree. Ultimately, a decision was made not to proceed with criminal  
6 charges against Respondent.

8 32. On February 11, 2014, a Formal Complaint was filed against Respondent by the  
10 Office of Disciplinary Counsel alleging two counts as described hereinabove on page 1.

12 BASED UPON THE FOREGOING FINDINGS OF FACT, THE HEARING  
14 OFFICER NOW ENTERS THE FOLLOWING:

16 CONCLUSIONS OF LAW

18 1. Count 1: By engaging in sexual relations on April 29, 2013 with his then  
20 client, M.R., Respondent violated RPC 1.8(j). A lawyer who is representing a client in a  
22 matter shall not have sexual relations with a current client of the lawyer unless a consensual  
24 sexual relationship existed between them at the time the lawyer/client relationship commenced.  
No such prior relationship existed between Respondent and M.R. at the time the lawyer/client  
relationship commenced between Respondent and M.R. in April, 2013.

26 2. Count 2: Disciplinary counsel bears the burden of proving each count of  
28 the Formal Complaint by a "clear preponderance of the evidence."

30 Disciplinary counsel failed to prove by a clear preponderance of the evidence that on  
32 April 29, 2013, Respondent violated RPC 8.4(b) by committing Rape in the Third Degree  
34 (RCW 9A.44.060) and violated RPC 8.4(b) by committing Assault in the Fourth Degree with  
Sexual Motivation (RCW 9A.36.041(2) and RCW 9.94A.030(47)).

36 Disciplinary counsel met its burden in proving that Respondent violated RPC 8.4(i).  
38 Respondent's actions in his office on April 29, 2013 violated the commonly accepted standard  
40 of good morals, honesty and justice, and, therefore, constituted moral turpitude. Respondent  
42 stood in a fiduciary relationship with his client, M.R.. His unsolicited sexual advances on the  
44 evening of April 29, 2013 in effect, debased the essence of the attorney-client relationship.  
Further his abuse of his professional position to exploit M.R.'s vulnerability is professional  
46 misconduct.

48 APPLICATION OF ABA STANDARDS

50 1. The ABA Standards for Imposing Lawyer Sanctions are applicable to this  
matter including the presumptive sanction, and the applicable aggravating and mitigating

2 factors. The following paragraphs reflect the Hearing Officer's analysis of the applicable ABA  
Standards pertaining to presumptive sanctions and applicable aggravating factors.

4 2. As to the violations of RPC 1.8(j). Paragraph 4.32 is applicable to Respondent:

6 "Suspension is generally appropriate when a lawyer  
8 knows of a conflict of interest and does not fully  
disclose to a client the possible effect of that conflict,  
and causes injury or potential injury to a client."

10 3. As to the violation of RPC 8.4(i), giving consideration to the facts of this case  
12 and the particular vulnerability of M.R. as well as to our higher court's analysis and  
14 disposition of the following cases, In re Disciplinary Proceeding Against Halverson, 140  
16 Wash. 2d 475, 998 P.2d 833 (2000) and In re Disciplinary Proceeding Against Heard, 136  
18 Wash. 2d 405, 963 P.2d 818 (1998), suspension is appropriate.

20 *PRESUMPTIVE SANCTION*

22 1. Ethical Duty Violated: RPC 1.8(j) provides that a lawyer shall not: "have  
24 sexual relations with a current client of the lawyer unless a consensual sexual relationship  
26 existed between them at the time the client-lawyer relationship commenced." Respondent  
28 violated this ethical duty.

30 RPC 8.4(i) provides that it is misconduct for a lawyer to commit moral turpitude.  
32 Respondent engaged in this misconduct and, therefore, violated this ethical duty.

34 2. Lawyers Mental State: There was no evidence that Respondent had diminished  
mental capacity.

36 Respondent, during his representation of M.R., admitted that he developed a physical  
38 attraction to her.

40 Respondent understood he occupied a position of authority and power with respect to  
42 M.R.

44 It is clear that Respondent acted knowingly and intentionally on April 29, 2013.

46 He invited M.R. back to his office after hours and the lights in the office were off, both  
in the entry and in the waiting room.

48 Respondent invited M.R. back into his office and closed the door behind them.

50 Respondent initiated conversation topics with M.R. that were personal and smacked of  
sexual overtones, going as far as to ask M.R. to draw a naked picture of herself.

Respondent suggested that M.R. make-out with him and knew, at the time, the criminal case was not concluded.

Respondent took M.R.'s hand and guided her to his couch.

Respondent pressed the contact with M.R. from start to finish and M.R. acquiesced.

3. Extent of Actual or Potential Injury Caused by Misconduct: Respondent's actions caused actual harm to M.R. and potential harm to the public that was reasonably foreseeable.

M.R., unsophisticated in the legal arena and caught in a web of litigation where the custody of her child was at stake, was vulnerable. Respondent knew that she was in over her head and admitted she did not understand the gravity of the situation she found herself in. Respondent knew that M.R. was relying upon him, not only to advise her on the subject of his formal representation but even more, to help her with the her family law nightmare. Respondent, who was in a position of influence and power as her attorney, took advantage of M.R.'s trust and breached that trust causing actual injury. M.R., following this incident, became physically sick and emotionally upset.

By way of 'potential injury', Respondent admitted that he developed a physical attraction for M.R. and in doing so tried to resolve her case as quickly as possible. That fits with the finding that he encouraged M.R. to plead guilty (See Finding of Fact 16). He also, at times, gave her positive information about her case so that she would like him.

But for the incident on April 29<sup>th</sup> that gave rise to M.R.'s allegations of sexual assault and the fortuitous willingness of the prosecutor who was notified of those allegations to dismiss the pending criminal charges, it is reasonably foreseeable that Respondent may have persuaded M.R. to plead guilty to a charge she believed she was innocent of for the sole purpose of expediting his relationship with her. If this approach by attorneys in the State of Washington were the guiding principle to case resolution, there is no doubt of the potential injury to clients –both in the criminal and civil arena (i.e. innocent people may plead guilty, legitimate cases may not be filed, cases with significant value, may be settled for lesser value, etc.).

The actual or potential harm to the integrity of the legal profession from Respondent's actions in the instant matter are profound and clear. At its core, clients place their trust in attorneys to help them. An attorney violates that trust when he/she decides to pursue a sexual

2 relationship with them during the course of their attorney/client relationship and, even worse,  
4 wants to get a client's case done as quickly as possible just to carry on a relationship with that  
6 client. If clients became aware that attorneys handle their cases in this manner, then clients  
8 will lose trust in our legal system, avoid seeking legal counsel in those circumstances when  
they may need it the most and will be exposed to legal repercussions that could be life-  
changing.

#### 10 *AGGRAVATING FACTORS*

12 1. Applying the ABA Standards, the following aggravating factors are found to be  
14 present as set forth in Paragraph 9.22: (b) dishonest or selfish motive, (g) refusal to  
16 acknowledge wrongful nature of conduct; and (h) vulnerability of victim.

18 2. Respondent selfishly put his emotional, personal, and/or sexual needs ahead of  
his professional duties and responsibilities of trust.

20 3. Respondent's violation of the proper boundaries of an attorney/client  
22 relationship led to and culminated in the inappropriate intimate physical contact, including  
24 sexual relations, between Respondent and M.R..

26 4. Respondent knew that engaging in an inappropriate personal and/or sexual  
28 relationship with M.R. would or could adversely impact the representation of her, but chose to  
30 pursue her nonetheless. Respondent made no disclosures to M.R. regarding any conflict of  
32 interest or the possible effects of an inappropriate personal and/or sexual relationship on her or  
her case, and obtained no written waivers.

34 5. Respondent acknowledged his wrongful conduct and claimed that he had  
36 learned from this experience. His words and demeanor did not make a complete impression in  
38 that regard.

40 6. M.R. was vulnerable and Respondent understood that. She had never been  
42 involved in a legal matter. She had never been represented by a lawyer. She was 24, charged  
44 with domestic violence/assault IV against her husband while at the same time battling her  
46 husband in family law court to prevent custody of her child being taken from her.

#### 48 *MITIGATING FACTORS*

50 1. The only mitigating factor pertinent herein is set forth in ABA Standards,  
Paragraph 9.32: (a) absence of a prior disciplinary record.



2 Respondent has never been the subject of disciplinary proceedings by the  
Washington State Bar Association prior to this matter.


4 RECOMMENDATION

6 1. It is recommended that Respondent Jason Feldman be suspended from the  
8 practice of law for a period of two and one-half (2.5) years pursuant to ELC 13.1(a)(2) and  
10 13.3.

12 2. Respondent should be responsible for costs and expenses assessed by the  
14 Association pursuant to ELC 13.9.

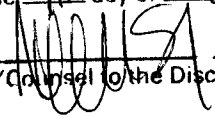
16 3. Respondent's reinstatement after suspension should be further conditioned on  
18 Respondent's payment of all costs and expenses as set forth herein.

DATED at Pasco, Washington this 14<sup>th</sup> day of September, 2015

22   
24 Edward F. Shea, Jr., WSBA No. 23704  
26 Hearing Officer

30 CERTIFICATE OF SERVICE

32 I certify that I caused a copy of the PDF of ELC & HOC Recommendation  
34 to be delivered to the Office of Disciplinary Counsel and to be mailed  
36 to Kenneth Kagan Respondent/Respondent's Counsel  
38 at 1001 1/2 W 5th St Seattle WA 98101 by Certified first class mail  
40 postage prepaid on the 14<sup>th</sup> day of September, 2015

42   
44 Clerk/Counsel to the Disciplinary Board  
46  
48  
50

## Allison Sato

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**From:** Claudia Diaz <cdiaz@khkslaw.com>  
**Sent:** Monday, September 14, 2015 10:38 AM  
**To:** Allison Sato  
**Subject:** Feldman Proceeding No. 14#00080  
**Attachments:** Feldman Findings and Recommendation.pdf

Good morning,

Attached, for filing, please find the Findings of Fact and Conclusions of Law and Hearing Officer's Recommendation prepared by Mr. Shea. Ed was wondering if you will send courtesy copies of this to Ms. Temple and Mr. Kagan or if we need to do that? Please advise.

Thank you!

### **Claudia Diaz**

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