

FILED

Jun 8, 2021

Disciplinary  
Board

Docket # 005

DISCIPLINARY BOARD  
WASHINGTON STATE BAR ASSOCIATION

In re

**MARNE B. WHITNEY,**

Lawyer (Bar No. 41606).

Proceeding No. 21#00013

ODC File No. 20-00686

STIPULATION TO REPRIMAND

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Under Rule 9.1 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Reprimand is entered into by the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (Association) through Managing Disciplinary Counsel Joanne S. Abelson, Respondent's Counsel Kenneth Scott Kagan, and Respondent lawyer Marne B. Whitney.

Respondent understands that Respondent is entitled under the Rules for Enforcement of Lawyer Conduct (ELC) to a hearing, to present exhibits and witnesses on Respondent's behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that Respondent is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an outcome more favorable or less

1 favorable than the one stipulated to here. Respondent chooses to resolve this proceeding now by  
2 entering into the following stipulation to facts, misconduct, and sanction to avoid the risk, time,  
3 and expense attendant to further proceedings.

#### 4 **I. ADMISSION TO PRACTICE**

5 1. Respondent was admitted to practice law in the State of Washington on August 31,  
6 2009.

#### 7 **II. STIPULATED FACTS**

8 2. The City of Marysville contracts with a private law firm (the Firm) to provide public  
9 defense for the Marysville Municipal Court.

10 3. From April 2019 to June 2020, Respondent was an associate at the Firm and acted as  
11 a public defender for clients charged with crimes by the City of Marysville.

12 4. For approximately eight months in 2019-2020, Respondent and a prosecutor at the  
13 Marysville City Attorney's Office engaged in an intimate relationship.

14 5. During the intimate relationship, Respondent and the prosecutor appeared on opposite  
15 sides of approximately 300 cases. None of these cases was taken to trial. Most were resolved by  
16 direct negotiation between the two.

17 6. Respondent did not advise the Firm or any of Respondent's clients of the intimate  
18 relationship.

19 7. Respondent stated neither Respondent nor the prosecutor divulged any confidential  
20 information, strategy, or privileged information to each other, and that Respondent worked  
21 extremely hard to get the best possible outcomes for her clients regardless of the intimate  
22 relationship. ODC has no evidence to the contrary.

23 8. In June 2020, after the intimate relationship ended, the prosecutor advised a principal

1 at the Firm of the intimate relationship. The Firm then terminated Respondent's employment.

2 9. The Firm subsequently reviewed its case management system, identified nearly 600  
3 clients (including cases where Respondent was attorney of record, filled in for other counsel, or  
4 attended meetings) who potentially were impacted, and reached out to all identified clients. Two  
5 clients opted to have conflict counsel assigned to explore any post-conviction relief.

6 10. The intimate relationship between Respondent and the prosecutor, and its potential  
7 impact on the court system, generated local media coverage

### 8 III. STIPULATION TO MISCONDUCT

9 11. Respondent violated RPC 1.7(a)(2) and RPC 1.8(l) by engaging in an intimate  
10 relationship with a prosecutor who was representing a party adverse to Respondent's clients.

### 11 IV. PRIOR DISCIPLINE

12 12. Respondent has no prior discipline.

### 13 V. APPLICATION OF ABA STANDARDS

14 13. The following American Bar Association Standards for Imposing Lawyer Sanctions  
15 (1991 ed. & Feb. 1992 Supp.) applies to this case:

#### 16 **Standard 4.3 -- Failure to Avoid Conflicts of Interest**

17 **4.31** Disbarment is generally appropriate when a lawyer, without the informed consent of  
18 client(s):

19 (a) engages in representation of a client knowing that the lawyer's interests are adverse to  
20 the client's with the intent to benefit the lawyer or another, and causes serious or  
21 potentially serious injury to the client; or

22 (b) simultaneously represents clients that the lawyer knows have adverse interests with  
23 the intent to benefit the lawyer or another, and causes serious or potentially serious injury  
24 to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of  
a present or former client are materially adverse, and knowingly uses information relating  
to the representation of a client with the intent to benefit the lawyer or another and causes  
serious or potentially serious injury to a client.

**4.32** Suspension is generally appropriate when a lawyer knows of a conflict of interest

1 and does not fully disclose to a client the possible effect of that conflict, and causes injury  
2 or potential injury to a client.

3 **4.33** Reprimand is generally appropriate when a lawyer is negligent in determining  
4 whether the representation of a client may be materially affected by the lawyer's own  
interests, or whether the representation will adversely affect another client, and causes  
injury or potential injury to a client.

5 **4.34** Admonition is generally appropriate when a lawyer engages in an isolated instance  
6 of negligence in determining whether the representation of a client may be materially  
7 affected by the lawyer's own interests, or whether the representation will adversely affect  
another client, and causes little or no actual or potential injury to a client.

8 14. Respondent acted knowingly.

9 15. There was potential injury to Respondent's clients given the consequences to the cases  
10 Respondent handled opposite the prosecutor during the intimate relationship. See People v.  
11 Jackson, 167 Cal. App. 3d 829, 832-33, 213 Cal. Rptr. 521 (1985) (conflict of interest from  
12 undisclosed "dating" relationship between prosecutor and defense counsel led to reversal of  
13 conviction based on ineffective assistance of counsel). In addition, Respondent's conduct  
14 threatened the integrity of the criminal justice system and public confidence in the court system  
and the profession.

15 16. The presumptive sanction is Suspension under ABA Standard 4.32

16 17. The following aggravating factors apply under ABA Standard 9.22:

17 (b) selfish motive;

18 (i) substantial experience in the practice of law [admitted 2009].

19 18. The following mitigating factors apply under ABA Standard 9.32:

20 (a) absence of a prior disciplinary record;

21 (l) remorse.

22 19. It is an additional mitigating factor that Respondent has agreed to resolve this matter  
23 at an early stage of the proceedings.

24 20. On balance, based on the factors set forth above, the parties agree that the presumptive

1 sanction should be mitigated to a reprimand.

2 **VI. STIPULATED DISCIPLINE**

3 21. The parties stipulate that Respondent shall receive a reprimand.

4 **VII. RESTITUTION**

5 22. No restitution is required by this stipulation.

6 **VIII. COSTS AND EXPENSES**

7 23. In light of Respondent's willingness to resolve this matter by stipulation at an early  
8 stage of the proceedings, Respondent shall pay attorney fees and administrative costs of \$750 in  
9 accordance with ELC 13.9(i). The Association will seek a money judgment under ELC 13.9(l) if  
10 these costs are not paid within 30 days of approval of this stipulation.

11 **IX. VOLUNTARY AGREEMENT**

12 24. Respondent states that, prior to entering into this Stipulation, Respondent has  
13 consulted independent legal counsel regarding this Stipulation, that Respondent is entering into  
14 this Stipulation voluntarily, and that no promises or threats have been made by ODC, the  
15 Association, nor by any representative thereof, to induce the Respondent to enter into this  
16 Stipulation except as provided herein.

17 25. Once fully executed, this stipulation is a contract governed by the legal principles  
18 applicable to contracts, and may not be unilaterally revoked or modified by either party.

19 **X. LIMITATIONS**

20 26. This Stipulation is a compromise agreement intended to resolve this matter in  
21 accordance with the purposes of lawyer discipline while avoiding further proceedings and the  
22 expenditure of additional resources by the Respondent and ODC. Both Respondent and ODC  
23 acknowledge that the result after further proceedings in this matter might differ from the result

1 | agreed to herein.

2 |         27. This Stipulation is not binding upon ODC or Respondent as a statement of all existing  
3 | facts relating to the professional conduct of the respondent lawyer, and any additional existing  
4 | facts may be proven in any subsequent disciplinary proceedings.

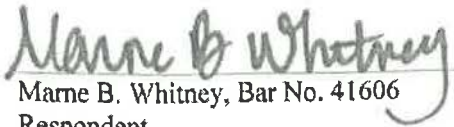
5 |         28. This Stipulation results from the consideration of various factors by both parties,  
6 | including the benefits to both by promptly resolving this matter without the time and expense of  
7 | hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As  
8 | such, approval of this Stipulation will not constitute precedent in determining the appropriate  
9 | sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in  
10 | subsequent proceedings against Respondent to the same extent as any other approved Stipulation.

11 |         29. Under ELC 3.1(b), all documents that form the record before the Chief Hearing  
12 | Officer for review become public information on approval of the Stipulation by the Chief Hearing  
13 | Officer, unless disclosure is restricted by order or rule of law.

14 |         30. If this Stipulation is approved by the Chief Hearing Officer, it will be followed by the  
15 | disciplinary action agreed to in this Stipulation. All notices required in the ELC will be made.  
16 | Respondent represents that, in addition to Washington, Respondent also is admitted to practice  
17 | law in the following jurisdictions, whether current status is active, inactive, or suspended:  
18 | Nebraska.

19 |         31. If this Stipulation is not approved by the Chief Hearing Officer, this Stipulation will  
20 | have no force or effect, and neither it nor the fact of its execution will be admissible as evidence  
21 | in the pending disciplinary proceeding, in any subsequent disciplinary proceeding, or in any civil  
22 | or criminal action.

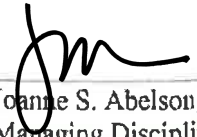
1 WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation to  
2 Reprimand as set forth above.

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4 Marne B. Whitney, Bar No. 41606  
5 Respondent

Dated: 6/3/21

6   
7 Kenneth Scott Kagan, Bar No. 12983  
8 Counsel for Respondent

Dated: 6/3/2021

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10 Joanne S. Abelson, Bar No. 24877  
11 Managing Disciplinary Counsel

Dated: 6/4/21

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