

FILED

Apr 19, 2022

Disciplinary
Board

Docket # 004

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re

BRIAN L. BERKENMEIER,

Lawyer (Bar No. 20421).

Proceeding No. 22#00005

ODC File No. 21-00338

STIPULATION TO THREE-MONTH
SUSPENSION

Under Rule 9.1 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to suspension is entered into by the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (Association) through disciplinary counsel Amanda Lee and Respondent lawyer Brian L. Berkenmeier.

Berkenmeier understands that the ELC entitle Berkenmeier to a hearing, to present exhibits and witnesses on Berkenmeier's behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Berkenmeier further understands that the ELC entitle Berkenmeier to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Berkenmeier further understands that a hearing and appeal could result in an outcome more favorable or less favorable to Berkenmeier. Berkenmeier chooses to resolve this

1 proceeding now by entering into the following stipulation to facts, misconduct and sanction to
2 avoid the risk, time and expense attendant to further proceedings.

3 **I. ADMISSION TO PRACTICE**

4 1. Berkenmeier was admitted to practice law in the State of Washington on June 3, 1991.

5 **II. STIPULATED FACTS**

6 2. Berkenmeier met A.N. at a neighbor's home in the fall of 2019.

7 3. Between October 2019 and March 2020, A.N. retained Berkenmeier for representation
8 on several misdemeanor charges.

9 4. There was no consensual sexual relationship between Berkenmeier and A.N. at the
10 time they entered into a lawyer-client relationship.

11 5. On September 24, 2020, Berkenmeier and A.N. appeared for a pretrial review hearing
12 in one of the cases pending against A.N. Due to the COVID-19 pandemic, court hearings were
13 convened on a secure internet platform, rather than in the courthouse. A.N. went to Berkenmeier's
14 home, which is also Berkenmeier's office, to attend the hearing.

15 6. The following day, September 25, 2020, A.N. arrived at Berkenmeier's home around
16 noon, without an appointment or invitation. Berkenmeier and A.N. engaged in sexual intercourse
17 twice. Afterward, Berkenmeier left A.N. at the residence while Berkenmeier went to a bar "to get
18 my own head together."

19 7. When Berkenmeier returned home, A.N. had left. Berkenmeier called A.N. several
20 times, leaving messages asking if A.N. was okay.

21 8. Berkenmeier withdrew from representing A.N. on November 4, 2020, before the next
22 hearings in any of A.N.'s pending cases.

23 9. Berkenmeier admitted to having sexual relations with A.N.

1 10. Berkenmeier regrets the decision to have sexual relations with A.N., stating to ODC
2 that, "I am disgusted with myself for letting it happen."

3 III. STIPULATION TO MISCONDUCT

4 11. By having sexual relations with A.N., a current client with whom Berkenmeier did not
5 have a pre-existing consensual sexual relationship, Berkenmeier violated RPC 1.8(j)(1).

6 IV. PRIOR DISCIPLINE

7 12. In 2002, Berkenmeier was suspended for four months for repeatedly violating criminal
8 laws and conditions of probation, thereby violating Rule 1.1(a), (b), and (c) of the Rules for
9 Lawyer Discipline (RLD),¹ and for violating RPC 1.3 (by failing to communicate with clients
10 regarding Berkenmeier's unavailability) and RPC 1.4 (by failing to appear for legal proceedings
11 or to provide alternative representation for proceedings) during a 30-day period in which
12 Berkenmeier was incarcerated.

13 V. APPLICATION OF ABA STANDARDS

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

16 14. ABA Standard 4.3 applies to the duty to avoid conflicts of interest:

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

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

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

23 ¹ RLD 1.1(a), (b), and (c) have since been reenacted as RPC 8.4(i), (k), and (k), respectively.

1 benefit the lawyer or another and causes serious or potentially serious injury
2 to a client.

3 **4.32 Suspension is generally appropriate when a lawyer knows of a conflict of**
4 **interest and does not fully disclose to a client the possible effect of that**
5 **conflict, and causes injury or potential injury to a client.**

6 **4.33 Reprimand is generally appropriate when a lawyer is negligent in determining**
7 **whether the representation of a client may be materially affected by the**
8 **lawyer's own interests, or whether the representation will adversely affect**
9 **another client, and causes injury or potential injury to a client.**

10 **4.34 Admonition is generally appropriate when a lawyer engages in an isolated**
11 **instance of negligence in determining whether the representation of a client**
12 **may be materially affected by the lawyer's own interests, or whether the**
13 **representation will adversely affect another client, and causes little or no**
14 **actual or potential injury to a client.**

15 15. Berkenmeier acted knowingly.

16 16. Berkenmeier's conduct caused injury to A.N. because A.N. was forced to retain new
17 counsel due to Berkenmeier's breach of the fiduciary relationship. In addition, Berkenmeier's
18 conduct tarnishes the image of the profession in the eyes of the public.

19 17. The presumptive sanction is suspension.

20 18. The following aggravating factors apply under ABA Standard 9.22:

21 (a) prior disciplinary offenses;

22 (i) substantial experience in the practice of law (Berkenmeier has been licensed in
23 Washington since 1991).

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

(l) remorse;

(m) remoteness of prior offenses.

20. It is an additional mitigating factor that Berkenmeier has agreed to resolve this matter
at an early stage of the proceedings.

1 21. A significant additional mitigating factor is the contribution this stipulation makes to
2 the efficient and effective operation of the lawyer discipline system considering the effect the
3 COVID-19 public health emergency has had on disciplinary resources and the orderly processing
4 of disciplinary matters.

5 22. On balance, the aggravating and mitigating factors do not require a departure from the
6 presumptive sanction. But as set forth below, Berkenmeier agrees, as a condition of reinstatement,
7 to undergo a fitness-to-practice evaluation and to comply with any resulting treatment
8 recommendations. This condition furthers the core purpose of the lawyer discipline—protecting
9 the public (see ABA Standard 1.1)—and supports a suspension of three months.

10 VI. STIPULATED DISCIPLINE

11 23. The parties stipulate that Berkenmeier shall receive a suspension of three months.

12 VII. CONDITIONS OF REINSTATEMENT

13 24. Reinstatement from suspension is conditioned on payment of costs and expenses, as
14 provided below.

15 25. As an additional condition of reinstatement, Berkenmeier shall, at least 30 days before
16 a request for reinstatement, undergo an independent examination by a licensed clinical
17 psychologist or psychiatrist approved by ODC to evaluate Berkenmeier's fitness to practice law.

18 26. Berkenmeier shall pay all expenses associated with the examination.

19 27. Berkenmeier shall execute all necessary releases and authorizations to permit the
20 evaluator and disciplinary counsel to obtain full access to all pertinent health care and treatment
21 records for the applicable time period, and to permit the evaluator to release information regarding
22 the evaluation to disciplinary counsel, including a written report of the evaluator's findings,
23

1 diagnosis, and recommended treatment plan, if any. Berkenmeier shall provide disciplinary
2 counsel with a copy of the releases and authorizations.

3 28. If the evaluator concludes there is reasonable cause to believe that Berkenmeier does
4 not have the mental or physical capacity to practice law, then disciplinary counsel may report to
5 a review committee as provided in ELC 8.2.

6 29. If the evaluator recommends treatment, then Berkenmeier shall undergo treatment
7 with a treatment provider and be subject to probation for a period of 12 months beginning on the
8 date Berkenmeier is reinstated to the practice of law. The conditions of probation are set forth
9 below.

10 30. If the evaluator does not recommend treatment, then Berkenmeier will not be required
11 to undergo treatment and will not be subject to probation requiring mental health treatment.

12 **VIII. CONDITIONS OF PROBATION**

13 31. These conditions of probation apply if the evaluator recommends treatment, as
14 provided above. Berkenmeier's compliance with these conditions shall be monitored by the
15 Probation Administrator of the Office of Disciplinary Counsel ("Probation Administrator").
16 Failure to comply with a condition of probation listed herein may be grounds for further
17 disciplinary action under ELC 13.8(b).

18 32. Berkenmeier will be subject to probation for a period of one year, beginning when
19 Berkenmeier is reinstated to the practice of law and shall comply with the specific probation terms
20 set forth below:

21 33. If the evaluator, specified above in paragraph 25, recommends mental-health
22 treatment, the following provisions will apply.

- 23 (a) Berkenmeier shall undergo treatment with a treatment professional approved by the
24 Probation Administrator.

- 1 (b) Berkenmeier shall comply with all requirements and recommendations of the
2 treatment provider, including but not limited to the completion of any period of in- or
3 out-patient treatment and aftercare, the taking of any prescribed medications,
4 abstinence/sobriety as required, and compliance with any toxicology monitoring.
- 5 (c) Berkenmeier shall continue to participate in the recommended treatment program
6 throughout the period of probation or until such time as the treatment provider
7 determines that further participation is not needed.
- 8 (d) Berkenmeier shall execute an authorization[s] allowing and directing the treatment
9 provider to take the following actions:
- 10 (i) on a quarterly basis, send written reports to the Probation Administrator that
11 include the dates of treatment, whether Berkenmeier has been cooperative with
12 treatment, whether continued treatment is recommended, and results of random
13 toxicology reports;
 - 14 (ii) report immediately to the Probation Administrator incidences of relapse or if
15 Berkenmeier fails to appear for treatment or stops treatment without the
16 provider's agreement and consent prior to either termination of the treatment
17 plan or expiration of the probation period set forth in this stipulation;
 - 18 (iii) report immediately to the Probation Administrator if Berkenmeier fails to
19 comply with any treatment recommendations of the treatment provider;
 - 20 (iv) report immediately to the Probation Administrator if Berkenmeier otherwise
21 violates any of the terms or conditions of probation;
 - 22 (v) report immediately to the Probation Administrator if the provider will no longer
23 serve as treatment provider to Berkenmeier prior to termination of the treatment
24 plan or expiration of the probation period set forth in this [order/stipulation]; and
 - (vi) report to the Probation Administrator if Berkenmeier successfully completes
treatment and is discharged from further treatment.
- (e) Berkenmeier shall provide a copy of the authorization[s] to the Probation
Administrator upon execution.
- (f) Berkenmeier is responsible for paying any and all fees, costs and/or expenses of
chemical dependency evaluation and treatment.

IX. RESTITUTION

34. Berkenmeier is not required to make restitution.

X. COSTS AND EXPENSES

35. In light of Berkenmeier's willingness to resolve this matter by stipulation at an early
stage of the proceedings, Berkenmeier shall pay attorney fees and administrative costs of \$1,000

1 in accordance with ELC 13.9(i). The Association will seek a money judgment under ELC 13.9(l)
2 if these costs are not paid within 30 days of approval of this stipulation. Reinstatement from
3 suspension or disbarment is conditioned on payment of costs.

4 **XI. VOLUNTARY AGREEMENT**

5 36. Berkenmeier states that prior to entering into this Stipulation Berkenmeier had an
6 opportunity to consult independent legal counsel regarding this Stipulation, that Berkenmeier is
7 entering into this Stipulation voluntarily, and that no promises or threats have been made by ODC,
8 the Association, nor by any representative thereof, to induce the Berkenmeier to enter into this
9 Stipulation except as provided herein.

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

12 **XII. LIMITATIONS**

13 38. This Stipulation is a compromise agreement intended to resolve this matter in
14 accordance with the purposes of lawyer discipline while avoiding further proceedings and the
15 expenditure of additional resources by the Berkenmeier and ODC. Both Berkenmeier and ODC
16 acknowledge that the result after further proceedings in this matter might differ from the result
17 agreed to herein.

18 39. This Stipulation is not binding upon ODC or the Berkenmeier as a statement of all
19 existing facts relating to the professional conduct of the Berkenmeier, and any additional existing
20 facts may be proven in any subsequent disciplinary proceedings.

21 40. This Stipulation results from the consideration of various factors by both parties,
22 including the benefits to both by promptly resolving this matter without the time and expense of
23 hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As such,

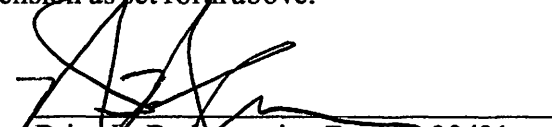
1 approval of this Stipulation will not constitute precedent in determining the appropriate sanction
2 to be imposed in other cases; but, if approved, this Stipulation will be admissible in subsequent
3 proceedings against Berkenmeier to the same extent as any other approved Stipulation.

4 41. Under ELC 9.1(d)(4), the Disciplinary Board reviews a stipulation based solely on the
5 record agreed to by the parties. Under ELC 3.1(b), all documents that form the record before the
6 Board for its review become public information on approval of the Stipulation by the Board,
7 unless disclosure is restricted by order or rule of law.

8 42. If this Stipulation is approved by the Disciplinary Board and Supreme Court, it will
9 be followed by the disciplinary action agreed to in this Stipulation. All notices required in the
10 Rules for Enforcement of Lawyer Conduct will be made.

11 43. If this Stipulation is not approved by the Disciplinary Board and Supreme Court, this
12 Stipulation will have no force or effect, and neither it nor the fact of its execution will be
13 admissible as evidence in the pending disciplinary proceeding, in any subsequent disciplinary
14 proceeding, or in any civil or criminal action.

15 WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation to
16 suspension as set forth above.

17 
18 Brian L. Berkenmeier, Bar No. 20421
19 Respondent

Dated: 3/2/22

20 
21 Amanda Lee, Bar No. 19970
22 Disciplinary Counsel

Dated: 3/7/2022