

PUBLIC MATTER

FILED

JUN 29 2006

STATE BAR COURT
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LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)
ELLEN ANN WHELAN,)
Member No. 135279,)
A Member of the State Bar.)

Case No. 04-C-14575-RAP
DECISION

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I. INTRODUCTION

This matter is before the court on an order of reference filed by the Review Department on August 25, 2006, for a hearing and decision as to the whether the facts and circumstances surrounding a misdemeanor violation of Penal Code¹ section 273(a), subdivision (b) (wilful cruelty to a child) of which respondent ELLEN ANN WHELAN was convicted, involved moral turpitude (Bus. & Prof. Code, sections 6101, 6102) or other misconduct warranting discipline (see, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 494) and, if so found, a recommendation as to the discipline to be imposed.

The Office of the Chief Trial Counsel of the State Bar of California (hereinafter OCTC) was represented by Deputy Trial Counsel Anthony J. Garcia. Respondent was represented by attorney Edward O. Lear.

After considering the facts and law applicable to this matter, the court recommends, among other things, a stayed suspension of 90 days.

II. SIGNIFICANT PROCEDURAL HISTORY

On August 9, 2005, OCTC filed the Transmittal of Records of Conviction of Attorney which

¹Future references to section are to the Penal Code unless otherwise stated.

had been properly served on respondent on August 9, 2005.

By order filed August 16, 2005, the State Bar Court Review Department referred this disciplinary proceeding to the Hearing Department pursuant to rule 951(a) of the California Rules of Court, for a hearing and decision regarding whether the facts and circumstances surrounding Respondent's violation of section 273(a), subdivision (b) involved moral turpitude or other misconduct warranting discipline and, if so, for a recommendation as to the discipline that should be imposed. A copy of the referral order was properly served on respondent on that same date.

Thereafter, on August 23, 2005, this court filed a Notice of Hearing on Conviction and caused it to be served upon respondent on August 22, 2005. Respondent filed a response on October 14, 2005.

Trial was held in this matter on February 14, 2006. A briefing schedule was established and the matter was submitted for decision on April 24, 2006.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent's culpability is conclusively established by the record of his/her conviction. (Section 6101(a); *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on July 1, 1988, and has been a member of the State Bar at all times since.

B. Facts

On September 23, 2004, respondent and her husband, Jonathon Harrington ("Harrington") were arrested for willfully and unlawfully abusing, or endangering the health of a child, in violation of section 273(a), a felony. Respondent and Harrington were each charged with two counts for the infliction of corporal punishment on two of their minor children Eren, ("Eren") age ten, and Sean, ("Sean") age eight.

The incident leading to respondent's arrest occurred in the early evening of September 15,

2004, and took place in the family residence. The evidence shows that Harrington struck both Sean and Eren with a sweat stick² numerous times. Sean told police that he was struck between 15 to 20 times³, causing bruising and redness to Sean's buttocks for being disrespectful to the babysitter the day before and making her want to quit. Sean also told the police that his mother punched him the stomach and slapped him in the face and that his mother's ring caused a scratch on his face.⁴

Eren told the police that a mark on her face was caused by her father when he pinched her nose and that her father spanked her on the buttocks with a sweat scraper because she got in trouble in school and apparently lied about it. Also, Eren told the police that her mother was present when her father spanked her and that her mother pulled her head back by her ponytail.⁵

Sean told the police that his mother was in the same area and could see what was occurring during the time his father was hitting him the sweat stick.⁶

At the preliminary hearing for Harrington and respondent, both Sean and Eren recanted significant portions of their statements to the police. The judge at the preliminary hearing found that the testimony of either child was not particularly credible in light of what the court believed the truthful statements to police after the alleged incident and that the children were clearly trying to protect their parents.⁷

²A sweat stick is a plastic stick, about 16 to 18 inches in length, and is used to remove sweat from a horse.

³At the preliminary hearing, Sean testified that he was not sure how many times he was struck with the sweat stick and does not remember telling the police he was struck 15 to 20 times.

⁴At the preliminary hearing, Sean testified that he was not quite sure if his mother struck him in the stomach with her fist and that he did not remember telling police that his mother slapped him on the right side of the face. Also, Sean testified that she did not have a ring on.

⁵At the preliminary hearing, Eren testified that her mother never touched her and that the detective must have misunderstood her.

⁶At the preliminary hearing, Sean testified that his mother was in a different room (when he was being struck with the sweat stick) but she could see what was happening.

⁷Although the court's finding of credibility is not binding on this court, that finding is entitled to significant weight.

On May 20, 2005, after pleading nolo contendere, respondent was convicted of one count of violation of section 273a, subdivision (b)⁸, a misdemeanor. She was sentenced to four years' summary probation on conditions including completion of a 52-week parenting class and payment of \$100 to the Victim's Restitution Fund. Probation was to terminate upon completion of the conditions. On that same date, after receiving proof of compliance with the conditions, the court granted a motion setting aside and vacating the plea, entered a plea of not guilty and dismissed the information pursuant to section 1203.4.

At trial in this court, respondent testified that her plea of nolo contendere was made not because she admits culpability to the charge but to protect her husband from a felony conviction and possible loss of employment. According to respondent, she never hit Sean in the stomach with her fist or hit him in the face with her hand; she never pulled Eren's hair; and she was not aware that her husband was hitting the children with a sweat stick because she was in another room caring for one of their other children, Evan, age seven, who requires constant care and attention due to a medical condition. Respondent could hear the altercation but could not see what was happening.

Respondent heard her husband spank Eren with his hand and yelled to her husband, "don't hit her." Harrington spanked Eren two or three more times and then stopped. Eren then went to her room.

Respondent testified that she was not aware who got the sweat scraper from the garage.

Shortly after Eren went to her room, Sean came downstairs after he had cut himself trying to shave. Respondent came downstairs from putting Evan to bed a moment before Sean. Her husband was still agitated. When he noticed Sean's cut, he became more agitated. Respondent testified that she got between her husband and Sean but her husband was still able to hit Sean with sweat stick a couple of times before she took it away from him. Respondent then tended to Sean's

⁸Section 273a, subdivision (b) states: Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

facial cut and her husband left the house to calm down.

The court finds that respondent's testimony is not credible. If respondent's testimony is to be believed, not only did she do nothing illegal, she attempted to stop her husband from hitting Sean and took the sweat stick from her husband while he was hitting Sean. There was no such testimony at the preliminary hearing from either Sean or Eren of this occurrence. Respondent's testimony is not an attempt to explain the circumstances that led to her arrest and conviction but is a direct attack of the conviction. Upon review, the physical evidence, Sean's and Eren's statements to the police, and their court testimony, all lead to the logical conclusion that respondent's testimony is not credible.

C. Conclusions of Law

The court finds the facts and circumstances surrounding the conduct leading to the conviction for violation of section 273a, subdivision (b) do not involve moral turpitude, but do involve misconduct warranting discipline.

IV. MITIGATING AND AGGRAVATING FACTORS

A. Aggravating Factors

The court finds no aggravating circumstances.

B. Mitigating Factors

Respondent has been an member of the State Bar since 1988, about 16 years, with no prior record of discipline. (Standard 1.2(e)(i).)

V. DEGREE OF DISCIPLINE

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 11025; Standard 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions.

(Standard 1.6(a).) The level of discipline is progressive. (Standard 1.7(b).)

Standard 3.4 provides that the final conviction of a member which does not involve moral turpitude by which does involve other misconduct warranting discipline shall result in a sanction that is appropriate to the nature and extent of the misconduct found to have been committed by the member. (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, 118; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.)

Respondent avers that the State Bar should not get involved with private matters such as parents disciplining a child. However, respondent's conduct toward her children resulted in an arrest and criminal conviction thereby making it a matter of concern to the State Bar. The superior court sentenced her to summary probation with conditions, including completing a year-long parenting course, a prophylactic measure. She complied with the conditions and her conviction has been expunged. Under the circumstances, the court believes that the misconduct will not reoccur. Significant mitigation also exists in respondent's 16 years of discipline-free practice. Accordingly, the court recommends a stayed suspension and probation as sufficient to protect the public from further misconduct in this instance.

VI. DISCIPLINE RECOMMENDATION

Therefore, it is recommended that respondent Ellen Ann Whelan be suspended from the practice of law for 90 days; that execution of that suspension be stayed, and that respondent be placed on probation for one year, with the following conditions:

1. During the period of probation, respondent shall comply with the State Bar Act and the Rules of Professional Conduct.
2. Within ten (10) days of any change, respondent shall report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the State Bar Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
3. Respondent shall submit written quarterly reports to the Probation Unit on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of

perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report shall be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.

4. Subject to the assertion of applicable privileges, respondent shall answer fully, promptly, and truthfully, any inquiries of the State Bar Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

5. Within one year of the effective date of the discipline herein, respondent shall provide to the State Bar Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent shall not receive MCLE credit for attending Ethics School (Rule 3201, Rules of Procedure of the State Bar.).

6. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter.

7. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for one year shall be satisfied and that suspension shall be terminated.

8. It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Examination Application Department, P.O. Box 4001,

Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar Office of Probation, within one year of the effective date of the discipline herein. Failure to pass the Multistate Professional Responsibility Examination within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 951(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.

VII. COSTS

IT IS HEREBY RECOMMENDED that costs be awarded o the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: June 29, 2006



RICHARD A. PLATEL
Judge of the State Bar Court

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on June 29, 2006, I deposited a true copy of the following document(s):

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in a sealed envelope for collection and mailing on that date as follows:

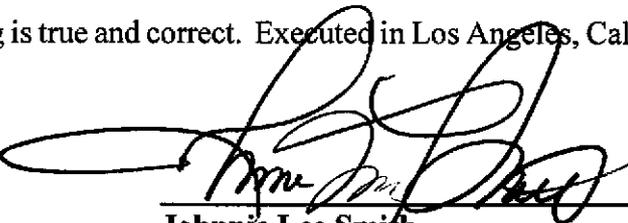
- [X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

EDWARD O LEAR
CENTURY LAW GROUP
5200 W CENTURY BLVD #940
LOS ANGELES CA 90045

- [X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

ANTHONY GARCIA , Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **June 29, 2006**.



Johnnie Lee Smith
Case Administrator
State Bar Court