

Rel: September 3, 2021

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1200073

Alabama State Bar

v.

Christopher M. Kaminski

Appeal from Disciplinary Board of Alabama State Bar
(ASB-2019-1100)

1200074

Alabama State Bar

v.

Amy C. Marshall

**Appeal from Disciplinary Board of Alabama State Bar
(ASB-2019-1130)**

1200083

Christopher Mark Kaminski

v.

Alabama State Bar

**Appeal from Disciplinary Board of Alabama State Bar
(ASB-2019-1100)**

1200084

Amy Cauthen Marshall

v.

Alabama State Bar

**Appeal from Disciplinary Board of Alabama State Bar
(ASB-2019-1130)**

SHAW, Justice.¹

¹These cases were previously assigned to another Justice; they were reassigned to Justice Shaw.

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In these consolidated appeals, the Alabama State Bar ("the Bar") appeals from an order of Panel II of the Disciplinary Board of the Alabama State Bar ("the Board") suspending both Christopher Mark Kaminski and Amy Cauthen Marshall from the practice of law. Kaminski and Marshall also each cross-appeal the Board's order. We remand the matters with directions.

Facts and Procedural History

The material facts in these matters are undisputed: Kaminski, formerly a judge of the Coffee District Court, and Marshall, an Enterprise attorney who routinely appeared before the Coffee District Court, secretly engaged in an extramarital affair, during which Kaminski admittedly both appointed Marshall as counsel in pending cases and took judicial action in cases in which Marshall appeared as counsel of record, without disclosing their relationship to the parties. During the proceedings below, Kaminski and Marshall married each other and Marshall assumed Kaminski's last name. To avoid confusion, this opinion will refer to Marshall by her prior surname, under which the disciplinary matter against her was originally initiated and by which she is consistently

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referred to in the record. Kaminski and Marshall waived the filing of formal charges against them and entered "blind" pleas in the disciplinary matters initiated against them by the Bar.²

At the ensuing disciplinary hearing, the Bar recounted the misconduct to which Kaminski and Marshall had previously pleaded

²Specifically, Kaminski's guilty plea stated:

"I voluntarily waive the filing of formal charges and enter a plea of guilty to violating Rules 8.4(a) [regarding the violation, or the attempt to violate the Rules of Professional Conduct, or knowingly assisting or inducing another to do so], (d) [regarding engaging in conduct prejudicial to the administration of justice,] and (g) [regarding engaging in conduct adversely reflecting on the lawyer's fitness to practice law], Alabama Rules of Professional Conduct."

Marshall's guilty plea stated:

"I voluntarily waive the filing of formal charges and enter a plea of guilty to violating Rules 1.7(b) [prohibiting a lawyer's representation of a client if the representation may be materially limited by the lawyer's own interest, unless the client consents after consultation], 8.4(d) [regarding engaging in conduct prejudicial to the administration of justice], (f) [prohibiting knowingly assisting a judge in conduct that violates the Canons of Judicial Ethics,] and (g) [regarding engaging in conduct adversely reflecting on the lawyer's fitness to practice law], Alabama Rules of Professional Conduct."

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guilty; presented authorities from other states involving allegedly comparable conduct and standards similar to the Alabama Standards for Imposing Lawyer Discipline ("the Standards"), each of which resulted in disbarment or a minimum of two years' suspension; and cited the particular Standards that it maintained applied in determining appropriate punishment for the acknowledged misconduct in these matters.³

Thereafter, Kaminski and Marshall both testified before the Board, called numerous character witnesses, and presented other evidence. Primarily, their evidence related that both Kaminski and Marshall were remorseful for their misconduct; that both were assets to the legal community within Coffee County; that Kaminski had played only a limited role in Marshall's appointments and the approval of her related fee declarations; that Kaminski never showed Marshall any discernible favoritism; and that both Kaminski, who was required to resign from the bench as a result of the above-described misconduct, and Marshall had,

³These included Standards 4.3, 4.5, 5.1, 5.2, and 7.0.

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before the institution of the disciplinary proceedings, already experienced "public-sham[ing]" within their local media and community when their relationship was disclosed.

In summation, the Bar reiterated its belief regarding the applicable discipline range and argued the following regarding aggravating circumstances:

"[A]s far as aggravating circumstances, [the Bar would] like the Board to consider the following: Dishonest or selfish motive, a pattern of misconduct, and multiple offenses. This happened over a long period of time. This was not a one-time thing. It happened over, at least by their own testimony, a five- or six-month period."

It further argued that the negative publicity that Kaminski and Marshall cited as a mitigating circumstance actually amounted to evidence of damage to the integrity of the legal profession and the legal system in the eyes of the public resulting from their misconduct. The Bar recommended a minimum of a three-year suspension for both Kaminski and Marshall.

The Board's subsequent order suspended Kaminski from the practice of law for 180 days and suspended Marshall from the practice of law for 90 days, with Marshall's suspension to begin immediately upon the entry

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of the order and Kaminski's suspension to begin 91 days after entry of the order. In its order, the Board recounted the specific rules of the Alabama Rules of Disciplinary Procedure that Kaminski and Marshall were charged with violating and also detailed, without reference to any supporting Standard on which the Board relied, the Board's determination of suspension as the "appropriate discipline."

The order included, without reference to any evidentiary finding on which the Board relied, the Board's conclusions as to the existence of each individual aggravating and mitigating circumstance prescribed in Standard 9.0 and a corresponding indication that each circumstance either did or did not exist for Kaminski or for Marshall. More specifically, the Board found the existence of only two aggravating circumstances: that both Kaminski and Marshall had exhibited dishonest or selfish motives and that each possessed substantial experience in the practice of law. The Board found the existence of the following mitigating circumstances: that neither Kaminski nor Marshall had a prior disciplinary record; that both had made a timely, good-faith effort to rectify any consequences of their misconduct; that both had provided full

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disclosure and cooperation to the Board during the disciplinary proceedings; and that both had exhibited remorse for their misconduct.

The Bar appealed, and Kaminski and Marshall cross-appealed.

Standard of Review

"The standard of review applicable to an appeal from an order of the Disciplinary Board is "that the order will be affirmed unless it is not supported by clear and convincing evidence or misapplies the law to the facts." Noojin v. Alabama State Bar, 577 So. 2d 420, 423 (Ala.1990), citing Hunt v. Disciplinary Board of the Alabama State Bar, 381 So. 2d 52 (Ala.1980).'

"Davis v. Alabama State Bar, 676 So. 2d 306, 308 (Ala.1996)."

Cooner v. Alabama State Bar, 59 So. 3d 29, 37 (Ala. 2010).

Discussion

On appeal, the Bar argues that the Board's discipline was so lenient as to be "manifestly unjust" under the Standards, which, it argues, mandate, at a minimum, suspensions lasting several years. In their cross-appeals, Kaminski and Marshall argue that the Board erred, on various grounds, in imposing their respective terms of suspension and in failing, instead, to impose lesser punishments under the applicable Standards.

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Both the Bar and Kaminski and Marshall, in support of their respective claims of error, challenge certain of the Board's findings as to the existence of aggravating and mitigating circumstances as clearly erroneous. See Tipler v. Alabama State Bar, 866 So. 2d 1126 (Ala. 2003) (explaining that the "clearly erroneous" standard of review applies to the findings of fact of the Board), and Alabama State Bar Ass'n v. Dudley, 95 So. 3d 777, 779-80 (Ala. 2012) (observing that a finding is "clearly erroneous" when, although there is evidence to support it, this Court, based on the evidence, is left with the definite and firm conviction that a mistake has been made).

Rule 4.2(b)(6), Ala. R. Disc. P., provides, in part:

"The Disciplinary Hearing Officer shall make written findings of fact and conclusions of law as directed by the Disciplinary Board, which shall be captioned 'Report and Order.'

"....

"(C) The Report and Order shall contain:

"(i) A finding of fact and conclusion of law as to each allegation of misconduct, which, upon acceptance by the Disciplinary Board, shall enjoy the same presumption of correctness as

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the judgment of a trier of fact in a nonjury civil proceeding in which evidence has been presented ore tenus;

"(ii) A finding as to whether the respondent attorney is guilty or not guilty of the misconduct charged; [and]

"(iii) A finding as to the discipline to be imposed, with reference, where appropriate, to the Alabama Standards for Imposing Lawyer Discipline."⁴

(Emphasis added.)

All parties take issue with the Board's findings as to the existence of various aggravating and mitigating circumstances. The Bar contends that the Board erroneously failed to find additional aggravating circumstances and also improperly found the existence of certain mitigating circumstances. Both Kaminski and Marshall contend that the Board's findings as to the existence of each aggravating circumstance were correct, but they assert that the Board erroneously failed to find the

⁴Although findings and conclusions regarding each allegation of misconduct and guilt are absent from the Board's order, presumably the Board determined that such findings and conclusions were unnecessary in light of the guilty pleas.

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existence of at least two additional mitigating circumstances that, they say, applied to each of them. The Bar also maintains that the Board's order is legally insufficient either to demonstrate the relation of the discipline imposed to the allegations of misconduct to which Kaminski and Marshall pleaded guilty and/or to allow for meaningful appellate review. More specifically, it contends that, in disciplining Kaminski and Marshall, the Board failed to consider, to follow, or to cite to the relevant Standards supporting that discipline.

With regard to Bar disciplinary proceedings, this Court has two distinct roles: one stemming from our independent duties arising from rules authorizing appellate review of orders entered in disciplinary proceedings and one from our inherent authority to supervise the Bar. In Simpson v. Alabama State Bar, 294 Ala. 52, 56, 311 So. 2d 307, 309 (1975), this Court stated that the Board of Bar Commissioners, which appoints the members of the Board, see Rule 4, Ala. R. Disc. P., "was created in aid of this [C]ourt," which "retains the power to ... inquire into the merits of any disciplinary proceeding, and to take any action it sees fit in such matters." (Emphasis added.) Further, this Court "in any case of

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suspension or disbarment from practice ... may ... inquire into the merits of the case and take any action agreeable to its judgment." § 34-3-43(a)(5), Ala. Code 1975.

Based on the record before us and considering the evidence adduced in the underlying disciplinary proceedings, it is unclear to this Court how -- or more precisely based on what evidence -- the Board could have reached some of its findings regarding the existence or nonexistence of certain aggravating and mitigating circumstances. More critical than the absence of specific underlying factual findings, though the Board's order also omits, in "determin[ing] the appropriate discipline in this matter," reference to any supporting Standards pursuant to which that discipline was allegedly imposed -- as Rule 4.2(b)(6)(C)(iii) specifically requires. The Board had an independent duty to comply with Rule 4.2, and this Court, which is called upon to approve the Board's actions, is unable to do so in the present matters without either further clarification or additional information. The indicated omissions prevent this Court from engaging in the review necessary to determine whether each unexplained finding enumerated by the Board and recounted above is "' supported by clear

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and convincing evidence" ' ' or to consider, based on those findings, the propriety of the Board's disciplinary sanctions. Cooner, 59 So. 3d at 37. This Court's precedent suggests that remanding the matters for the entry of an order containing the necessary findings is an appropriate remedy in such cases. See Cooner, 59 So. 3d at 39. See also Cooner v. Alabama State Bar, 145 So. 3d 1 (Ala. 2013) (remanding a second time to address similar deficiencies). Cf. Alabama State Bar v. R.G.P., 988 So. 2d 1005 (Ala. 2008) (vacating an order of the Board of Disciplinary Appeals of the Alabama State Bar because the order did not provide the basis for reversing a disciplinary decision of the Board).

Conclusion

The parties have raised issues regarding whether the Board erred in its findings as to the existence of aggravating and mitigating circumstances. Because the Board's order does not provide a sufficient explanation of its holdings so as to allow meaningful review under Rule 12(f), Ala. R. Disc. P., and § 34-3-43(a)(5), Ala. Code 1975, we remand the matters for the Board to issue a new order that specifically provides, as to each finding by the Board concerning the existence of an aggravating or

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mitigating circumstance, the evidentiary basis on which the Board relied in reaching its conclusion and that references, as provided in Rule 4.2(b)(6)(C)(iii), the supporting Standards on which the Board relied in determining that the terms of suspension imposed were appropriate. See Cooner, 59 So. 3d at 39. The Board shall make due return to this Court within 42 days of the issuance of this opinion.

1200073 -- REMANDED WITH DIRECTIONS.

1200074 -- REMANDED WITH DIRECTIONS.

1200083 -- REMANDED WITH DIRECTIONS.

1200084 -- REMANDED WITH DIRECTIONS.

Parker, C.J., and Bolin, Mendheim, Stewart, and Mitchell, JJ.,
concur.

Wise, Bryan, and Sellers, JJ., concur in the result.