

February 25, 2022

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

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)**

On Return to Remand

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SELLERS, Justice.¹

In these consolidated appeals, the Alabama State Bar ("the Bar") challenges a decision of Panel II of the Disciplinary Board of the Alabama State Bar ("the Board"), which suspended Christopher Mark Kaminski and Amy Cauthen Marshall from the practice of law. Kaminski and Marshall cross-appealed. The Bar argues that the discipline imposed was too lenient. Kaminski and Marshall argue that the discipline imposed was too strict. We agree with Kaminski and Marshall and reverse the Board's decision to suspend them from the practice of law. Because of the lack of evidence of tangible damage resulting from their misconduct and the existence of mitigating circumstances, we determine that, at most, a public reprimand is warranted.

Over a period of approximately eight months, Kaminski, while in office as a district-court judge, engaged in an undisclosed affair with Marshall, an attorney who routinely appeared before Kaminski. Both

¹These cases were originally assigned to another Justice on this Court on original submission; they were reassigned to Justice Sellers on return to remand.

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parties were married to other people for at least part of that period. They did not disclose their relationship to litigants, other counsel, or Marshall's clients. Kaminski, Marshall, and the Bar agree that Kaminski took some judicial actions in cases in which Marshall appeared as counsel of record, but they do not provide any examples of what those actions were, their significance, or their prejudicial or beneficial nature.

The record suggests that the relationship began in or around June 2017. There is evidence indicating that, in late 2017, Kaminski and Marshall sought advice regarding the situation from two attorneys and that Marshall began withdrawing from cases before Kaminski. In early 2018, Kaminski and Marshall began dating publicly after they had divorced their spouses. They eventually married one another in May 2020. Despite widespread news and social-media coverage of the previously undisclosed relationship, no litigant or client filed a complaint with the Bar. Nevertheless, the Bar, sua sponte, initiated disciplinary proceedings against Kaminski and Marshall, who subsequently entered blind guilty pleas in those proceedings. Kaminski was found guilty of violating Rules 8.4(a), 8.4(d), and 8.4(g), Ala. R. Prof. Cond. Marshall was

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found guilty of violating Rules 1.7(b), 8.4(d), 8.4(f), and 8.4(g), Ala. R. Prof. Cond. The Board suspended Kaminski from the practice of law for 180 days and suspended Marshall for 90 days.

After these appeals and cross-appeals were filed, this Court, on original submission, remanded the matter to the Board to further explain its decision. See Alabama State Bar v. Kaminski, [Ms. 1200073, Sept. 3, 2021] ___ So. 3d ___ (Ala. 2021). The Board complied and submitted an amended decision.

In Kaminski, in addressing the appropriate standard of review, this Court observed:

" '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).'"

___ So. 3d at ___ (quoting Cooner v. Alabama State Bar, 59 So. 3d 29, 37 (Ala. 2010)). We also pointed to precedent indicating that a "clearly

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erroneous" standard of review applies to the Board's findings of fact and 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." ___ So. 3d at ___ (citing Tipler v. Alabama State Bar, 866 So. 2d 1126 (Ala. 2003), and quoting Alabama State Bar Ass'n v. Dudley, 95 So. 3d 777, 779-80 (Ala. 2012)).

That said, the Court also observed:

"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 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."

___ So. 3d at ___.

Section I of the Alabama Standards for Imposing Lawyer Discipline ("the Standards") acknowledges that the Alabama Rules of Professional

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Conduct themselves "do not provide any method for assigning discipline for ethical violations." Instead, the Standards provide the framework for determining the appropriate discipline. Each Standard applies to a broad category of misconduct and states whether disbarment, suspension, a public reprimand, or a private reprimand is generally appropriate for the sort of misconduct that is the subject of the Standard in question.

In imposing discipline on Kaminski, the Board applied a subpart of Standard 5.0, which addresses violations of duties owed to the public, and a subpart of Standard 7.0, which addresses violations of duties owed to the legal profession. The Board, in imposing discipline on Marshall, applied the same subpart of Standard 7.0 and, in addition, a subpart of Standard 4.0, which addresses violations of duties owed to clients.

In particular, the Board determined that Kaminski should be disciplined under Standard 5.22, which provides that "[s]uspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." In Marshall's case, the Board applied Standard 4.32, which

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provides that "[s]uspension is generally appropriate when a lawyer 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." Finally, in disciplining both Kaminski and Marshall, the Board pointed to Standard 7.2, which provides that "[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system."²

The Bar argues that the Board also should have considered and applied Standards 4.51, 5.11(b), and 7.1, all of which recommend disbarment. Standard 4.51 states that disbarment generally is

²The Court notes that the specific subparts of Standard 7.0 apply in cases involving "false or misleading communication about [a] lawyer or the lawyer's services," "improper communication of fields of practice," "improper solicitation of professional employment from a prospective client," "clearly excessive or improper fees," "unauthorized practice of law," "improper withdrawal from representation," "failure to report professional misconduct," or "failure to comply with the provisions of Alabama's Interest on Lawyers' Trust Accounts Rules." The Board's decision does not specify which of these circumstances justified its reliance on Standard 7.0.

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appropriate when "a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client." The evidence, however, does not indicate that either Kaminski or Marshall failed to understand fundamental legal doctrines or procedures; rather, it indicates that they failed to follow proper procedures or rules. The Bar, therefore, has not demonstrated that the Board erred in not considering and applying Standard 4.51.

Standard 5.11(b) states that disbarment generally is appropriate when "a lawyer engages in ... intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Although Kaminski and Marshall's concealment of their relationship might be described as dishonest or deceitful, the Board's refusal to find that their conduct seriously adversely reflected on their fitness to practice law was not clearly erroneous.

Finally, Standard 7.1 provides that disbarment is generally appropriate when a lawyer violates a duty "with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious

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injury to a client, the public, or the legal system." The Board did not err in determining that Kaminski and Marshall did not act with the intent to obtain a benefit for themselves or someone else that caused serious or potentially serious injury to a client, the public, or the legal system. We are unconvinced by the Bar's arguments that the Board erred in not considering and applying these additional Standards.

The Standards that the Board did apply provide that suspension is generally appropriate with respect to the type of misconduct the Board found that Kaminski and Marshall had committed. However, under those Standards, suspension is not necessarily appropriate. The Standards require consideration of aggravating and mitigating factors, which can weigh in favor of an increase or a decrease in the recommended discipline. In the present case, the Board determined that two aggravating factors existed, namely, that Kaminski and Marshall had exhibited dishonest or selfish motives and that they possessed substantial experience in the practice of law. See Standards 9.22(b) and 9.22(i). Kaminski and Marshall do not challenge those determinations. For its part, the Bar asserts that the Board also should have determined that Kaminski and

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Marshall had engaged in "a pattern of misconduct," Standard 9.22(c), and had committed "multiple offenses," Standard 9.22(d). And, as to Marshall specifically, the Bar asserts that she submitted "false evidence, false statements, or [engaged in] other deceptive practices during the disciplinary process." Standard 9.22(f).

According to the Bar, Kaminski and Marshall engaged in a pattern of misconduct and committed multiple offenses because, the Bar says, their "misconduct was not an isolated incident" but, rather, was ongoing for "an extended period of time from at least June 2017 to January 2018."

The Board disagreed, concluding as follows:

"There was no evidence that either Marshall or Kaminski had ever committed any other types of adulterous affairs with officers of the court or members of the judiciary and there was no evidence of any other misconduct other than the issues stemming from the relationship at issue."

Although, as the Bar points out, during the duration of their affair, Marshall appeared before Kaminski in court on multiple occasions and Kaminski approved Marshall's indigent-fee declarations and took judicial actions in cases in which Marshall was counsel of record, the Board viewed Kaminski and Marshall's behavior as a single incident of

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misconduct, i.e., one concealed affair, regardless of its duration. The Board rejected the notion that a single concealed affair could be deemed a pattern of misconduct or multiple offenses. The Board's interpretation of the evidence is not unreasonable. Marshall testified before the Board that "this wasn't some fly-by-night thing" or that "there's some sort of pattern," but, instead, that it was merely two people who accidentally "ended up falling in love." Although the concealment of the affair, and not the affair itself, constitutes the misconduct at issue and the concealment occurred over a period of months, the Board's conclusion that Kaminski and Marshall's behavior did not amount to a pattern of misconduct or multiple offenses was not clearly erroneous.

The Bar also argues that Marshall engaged in the "submission of false evidence, false statements, or other deceptive practices during the disciplinary process" and that the Board therefore erred in not relying on Standard 9.22(f). According to the Bar, "[t]hroughout her testimony, Marshall repeatedly refused to disclose when the sexual relationship with Kaminski began." The Bar also asserts that Marshall "falsely claimed that she could not remember when the sexual aspect" of her relationship

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with Kaminski began -- a claim that, according to the Bar, "strains credulity." Although specifically acknowledging that Marshall's testimony "seemed evasive at times," the Board nonetheless concluded that there was no evidence indicating that either Kaminski or Marshall was guilty of the "submission of false evidence, false statements, or other deceptive practices during the disciplinary process." A review of Marshall's testimony during the disciplinary proceeding confirms that her relationship with Kaminski began in 2017 when, after Kaminski had consulted Marshall regarding divorce advice, the two discussed unhappiness in their marriages. When questioned about when the relationship became sexual, Marshall both noted her embarrassment in discussing the subject and said only that "[i]t was just something that kind of developed." When questioned about an alleged delay in seeking an ethics opinion from the Bar, Marshall explained:

"I didn't know at what point I should call and say[,] 'Hey, you know, I find this person attractive,' or, 'Hey, I think that he might like me, but I'm not sure,' and so what if he did not like me, and then I just threw him under -- I didn't -- there wasn't a point in time where we entered into this relationship, and there was a date to it. And I guess I didn't know -- I didn't know how to report that, and I -- I should have. I know that

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now."

Although acknowledging that she traveled to meet Kaminski in Reno, Nevada, in June 2017, where the two stayed in the same hotel room but purportedly did not have sex, Marshall explained that she "admitted" that a sexual relationship had occurred but qualified that "[she] just ... [could not] give ... a date on when [she] had sex with [Kaminski]." When questioned by a panel member of the Board as to whether, by the time they spent the night in the hotel room together, "there was something going on more than just being friends," Marshall responded as follows: "Looking back, absolutely."

The Board reasonably could have concluded that, rather than speculating and possibly offering false testimony, Marshall noted her inability to recall the specific date on which the relationship became sexual. Both Marshall and Kaminski clearly conceded the time frame within which their "relationship began." Further, Marshall admitted that "something" was "absolutely" going on between the two at that time and did not dispute other testimony in the record that characterized the relationship as having begun by June 2017. There is nothing in the record

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conclusively establishing that Marshall was deceptive or provided false testimony, and the Board's failure to determine that she had been deceptive or had provided false testimony was not clearly erroneous. In fact, the specific information that was sought from Marshall seems more prurient than probative, and the line of questioning seems intended to embarrass.

As for mitigating factors, the Board determined that Kaminski and Marshall had no prior disciplinary records, that they had made timely good-faith efforts to rectify the possible negative consequences that could have flowed from their relationship, that they had made full and free disclosure to the Board and had cooperated during the disciplinary proceedings, and that they had expressed remorse for their actions. See Standards 9.32(a), 9.32(d), 9.32(e), and 9.32(l). The Bar agrees that Kaminski and Marshall had no prior disciplinary records and that they expressed remorse. The Bar, however, challenges the Board's determinations that Kaminski and Marshall made timely good-faith efforts to rectify the situation and that they cooperated fully with the Board.

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Noting that Kaminski failed to recuse himself in cases in which Marshall appeared as counsel, that Kaminski and Marshall concealed their relationship during the relevant time frame, and that Kaminski initially denied the affair when questioned by the Judicial Inquiry Commission, the Bar asserts that there was no evidence to support the Board's finding that both Kaminski and Marshall had engaged in a timely good-faith effort to rectify any possible consequences stemming from their misconduct. In reaching a different conclusion, the Board stated:

"There is evidence that during Kaminski and Marshall's romantic relationship, they both sought advice from a current member of the Alabama State Bar Disciplinary Board Panel and their local Bar Commissioner. ... Marshall had her paralegal and other legal assistants draft and file motions to withdraw on all cases that she had in front of then Judge Kaminski. Those withdrawals would have occurred in November or December 2017. Marshall had a local Coffee County attorney stand in for her instead of appearing before then Judge Kaminski on multiple occasions."

According to Kaminski, he and Marshall both "voluntarily corrected their misconduct well before any complaint was lodged" and "took the appropriate steps to remedy the misconduct" of their own accord. Marshall also emphasizes the fact that she and Kaminski sought outside

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advice and notes that she voluntarily withdrew from cases over which Kaminski was presiding despite the risk of their misconduct being exposed. Although there was a delay between the beginning of the relationship and the efforts at rectifying any potential injury resulting from it, the Board's determination regarding the timeliness and significance of the efforts Kaminski and Marshall undertook before their relationship was discovered by others was not clearly erroneous.

The Bar asserts that Kaminski and Marshall failed to give "full and free disclosure" to the Board and did not demonstrate a "cooperative attitude toward proceedings." Standard 9.32(e). The Bar relies on some of the same allegations it relies on in support of its claim that Marshall was deceptive regarding when her relationship with Kaminski began. In addition to Marshall's alleged evasiveness, the Bar also asserts that Kaminski and Marshall "repeatedly attempted to downplay" and/or "minimize" their conduct during the affair despite their acknowledgment that the misconduct occurred. The Court disagrees. Kaminski's and Marshall's guilty pleas and the entirety of their testimony suggests that they cooperated with the disciplinary process and candidly disclosed their

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views as to the unfolding of the affair. The Board's conclusion as to this issue was not clearly erroneous.

For their part, Kaminski and Marshall assert that there are further mitigating factors that the Board should have applied -- specifically, the mitigating factors set out in Standards 9.32(g) and 9.32(k). Standard 9.32(g) provides that good character and reputation should be considered in mitigation. Several people, including attorneys, judges, judicial employees, a State official, and Marshall's ex-husband, gave testimony or submitted statements in support of Kaminski and Marshall indicating that they are ethical people, that they have good reputations in the community, and that they are a benefit to the legal profession. That evidence was undisputed, because no witness testified to facts indicating that Kaminski or Marshall do not have good character or reputations. In fact, the Bar did not call any witnesses at all. In refusing to apply Standard 9.32(g), the Board reasoned that "Marshall and Kaminski both admitted to having a romantic relationship with each other while Kaminski was still married and while Marshall was representing clients before then Judge Kaminski." Thus, it appears that the Board

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determined, at least in part, that committing the misconduct under investigation rendered Marshall and Kaminski without good character or reputation. At least with respect to the facts of this particular case, relying on the misconduct at issue to conclude that the good-character-and-reputation mitigating factor is not applicable seems illogical, because mitigating factors are supposed to mitigate the consequences of the misconduct. Obviously there can be situations in which the misconduct is sufficiently egregious that evidence of good character or reputation is simply outweighed or lacking in credibility, but that is not the case here, where there was a substantial amount of undisputed character evidence. The Board's failure to apply this mitigating factor was clearly erroneous.

Standard 9.32(k) provides that the "imposition of other penalties or discipline" is a mitigating factor. As a result of the misconduct and proceedings before the Judicial Inquiry Commission, Kaminski resigned from his position as a judge, forfeited his retirement benefits, and lost his ability to obtain approximately \$140,000 in student-loan forgiveness

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under a public-service loan-forgiveness program.³

The Board refused to apply Standard 9.32(k) because Kaminski's resignation and his loss of retirement benefits and of the opportunity for student-loan forgiveness resulted from application of the Alabama Canons of Judicial Ethics in proceedings before the Alabama Court of the Judiciary, not from application of the Rules of Professional Conduct and the Standards. The Board concluded that "[t]here was no evidence of any other penalties or discipline under the Alabama Rules of Professional Conduct as to either Kaminski or Marshall" and that "[t]here is no overlap or reciprocation between the disciplinary rules and procedures governing Alabama judges and those that govern Alabama attorneys." But nothing in the Standards indicates that the other-penalties-or-discipline mitigating factor does not apply when the prior discipline has resulted from the application of legal authorities other than the Rules of Professional Conduct and the Standards. Violations of the Rules of

³It is also worth noting that both Kaminski and Marshall experienced significant public shame and embarrassment resulting from social-media and news coverage regarding their relationship.

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Professional Conduct generally are punished by discipline set in accordance with the Standards. In deciding what that discipline should be in a particular case, it is perfectly logical and sensible to take into account other penalties or discipline that has already been imposed for the same misconduct under other legal frameworks. If the only other discipline that can be considered in mitigation is discipline that has been applied under the Standards for violations of the Rules of Professional Conduct, then it is difficult to discern a field of operation for that particular mitigating factor. The Board's failure to apply the mitigating factor set out in Standard 9.32(k) was clearly erroneous.⁴

Finally, in addition to the mitigating factors that we have determined apply, we note the lack of evidence of any tangible, concrete injury resulting from Kaminski's and Marshall's misconduct. There is no evidence indicating that Marshall obtained a financial benefit from her undisclosed relationship with Kaminski. To the contrary, appointments

⁴We are not convinced by Kaminski and Marshall's argument that the Board erred in not concluding that there was an "undue delay" in the disciplinary proceedings, which is an additional mitigating factor. See Standard 9.32(i).

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in criminal and juvenile matters involving indigent parties in Kaminski's court were made on a rotating basis from attorneys practicing in Coffee County; there is no indication that Marshall was assigned a disproportionate number of cases compared to other attorneys. Fee declarations for representing indigent parties were reviewed and preliminarily approved by Kaminski's judicial assistant before Kaminski gave final approval, and there is no indication that he approved any exorbitant fee requests submitted by Marshall. There also is no evidence indicating that their relationship influenced procedural or substantive decisions Kaminski made as a judge to the benefit of Marshall as a lawyer. Nothing in the record indicates that Marshall tried any cases before Kaminski during the relevant period or that Kaminski gave Marshall or her clients preferential treatment. Likewise, there is no evidence indicating that the relationship influenced Marshall's actions to the detriment of her clients. No client or litigant filed a complaint with the Bar alleging that they had been harmed. The only forms of injury justifying application of the particular Standards that the Board utilized were the "potential" injuries that could have resulted from the misconduct

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and the intangible damage allegedly done to the reputation of the legal profession and the judicial system.

The Bar offers opinions from other jurisdictions that involve seriously egregious conduct by judges and attorneys who were in an undisclosed sexual relationship. But the facts in the present case are more similar to the facts in In re Adams, 932 So. 2d 1025 (Fla. 2006). In Adams, the Florida Supreme Court approved a public reprimand of a trial judge who had engaged in a two-month romantic relationship with an attorney practicing before him. There was evidence that the judge in Adams had entered judgments dismissing charges that had been levied against clients of the attorney in question. Nevertheless, in Adams, the Florida Supreme Court approved the public reprimand in light of the judge's acceptance of responsibility and his remorse, his "otherwise unblemished record as a judge," and the lack of evidence indicating that the inappropriate relationship had actually influenced any of his rulings. Id. at 1028.⁵

⁵Although Adams involved a judicial disciplinary proceeding and not an attorney disciplinary proceeding, its reasoning is still persuasive.

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No doubt Kaminski and Marshall made a serious mistake; they and their families likely have suffered. Although the Court cannot condone an inappropriate relationship, even between consenting adults, the lack of tangible damage and the existence of compelling mitigating circumstances call for, at most, a public reprimand. Accordingly, we reverse the decision of the Board and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Wise, Mendheim, and Stewart, JJ., concur.

Bryan, J., concurs in the result.

Parker, C.J., and Bolin, Shaw, and Mitchell, JJ., dissent.

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SHAW, Justice (dissenting).

This Court is called upon to review the appropriate discipline imposed, for violations of the Alabama Rules of Professional Conduct ("the Rules"), against Christopher Mark Kaminski, a former district-court judge who, while serving in his capacity as a public official, engaged in and actively concealed for a period of several months an extramarital affair with an attorney who routinely appeared before him while he took official action in cases in which the attorney was counsel of record. We are further called upon to consider the appropriate discipline for Amy Cauthen Marshall, the attorney with whom Kaminski was secretly romantically involved, who failed to inform her clients, opposing counsel, and opposing parties of her relationship with Kaminski. The conflict of interest that existed because of this relationship is clear and warrants no further discussion.

As a result of his misconduct, Kaminski pleaded guilty to violating several Rules, including Rule 8.4(a) ("It is professional misconduct for a lawyer to ... violate or attempt to violate the Rules ..., knowingly assist or induce another to do so, or do so through the acts of another."); Rule 8.4(d)

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("It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice."); and Rule 8.4(g) ("It is professional misconduct for a lawyer to ... engage in any other conduct that adversely reflects on his fitness to practice law."). Marshall also entered a guilty plea to violating the following Rules: Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless ... [t]he lawyer reasonably believes the representation will not be adversely affected [] and ... the client consents after consultation."); Rule 8.4(d) (see above); Rule 8.4(f) ("It is professional misconduct for a lawyer to ... knowingly assist a judge or judicial officer in conduct that is a violation of applicable Canons of Judicial Ethics or other law."); and Rule 8.4(g) (see above).

As acknowledged in the main opinion and also observed in this Court's previous opinion in this case, see Alabama State Bar v. Kaminski, [Ms. 1200073, Sept. 3, 2021] ___ So. 3d ___ (Ala. 2021), this Court has two distinct roles with regard to the Alabama State Bar: "one stemming from our independent duties arising from rules authorizing appellate review of

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orders entered in disciplinary proceedings and one from our inherent authority to supervise the Bar." Id. at _____. In addition, it is well established that the purpose of attorney discipline is "to maintain appropriate standards of professional conduct to protect the public and the administration of justice" Preamble, Ala. R. Disc. P. A further goal of attorney discipline is to deter similar, future misconduct and to preserve the public trust in the legal profession. See In re Abrams, 227 Ariz. 248, 250-51, 257 P.3d 167, 169-70 (2011) (noting that "'[t]he purpose of professional discipline is ... (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in misconduct'" with the aim "'to instill public confidence in the Bar's integrity.'" (citations omitted)). Thus, the Court's duties in this regard are taken very seriously.

In keeping with the gravity of this Court's supervisory duties, I fear the result in these cases is not only contrary to authority but will fail to deter inappropriate and unprofessional conduct that clearly inhibits the fair administration of justice. Despite acknowledging that the Alabama Standards for Imposing Lawyer Discipline ("the Standards") generally

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provide that suspension was appropriate here, the main opinion accepts the arguments of Kaminski and Marshall that mitigating circumstances mandated less severe punishment for their admitted misconduct than the suspensions imposed by Panel II of the Disciplinary Board of the Alabama State Bar ("the Board") based on the evidence it heard below. I disagree and would instead hold that the Board's imposition of discipline for Kaminski and for Marshall was not clearly erroneous. In particular, I find troubling the main opinion's holdings as to the applicability of the mitigating factors contained in Standard 9.32(g) ("character or reputation") and Standard 9.32(k) ("imposition of other penalties or discipline") and the ultimate conclusion reached by the majority that no "tangible, concrete injury" resulted in these cases. ____ So. 3d at ____.

Because neither of those mitigating factors sways the balance away from suspension, and because I am convinced that the misconduct of Kaminski and Marshall indisputably diminished the public's confidence in our judicial system, I respectfully dissent.

I. Standard 9.32(g)

The main opinion accepts Kaminski and Marshall's contention that

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the Board clearly erred in failing to find evidence of their purported good character within the community as a mitigating factor. The Board's amended order explained its rejection as follows:

"Marshall and Kaminski both admitted to having a romantic relationship with each other while Kaminski was still married and while Marshall was representing clients before then Judge Kaminski. While there were witnesses who testified on their behalf at the hearing as to the good qualities of both Kaminski and Marshall, the Board is not inclined to provide any character or reputation mitigation 'credit' in light of the circumstances of this case."

Under the ore tenus rule, see Hayes v. Apperson, 826 So. 2d 798, 802 (Ala. 2002), which governs this Court's review, see Alabama State Bar v. Giardini, 324 So. 3d 1216, 1228 (Ala. 2020), the Board was free to determine the credibility of the witness testimony before it. This Court is not.

"When a trial court in a nonjury trial hears oral testimony, the ore tenus standard of review applies. Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67 (Ala. 2010). Under that standard, the trial court's findings of fact are presumed correct, 'and the trial court's judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.' Lawson v. Harris Culinary Enters., LLC, 83 So. 3d 483, 491 (Ala. 2011). The ore tenus standard or rule is grounded on the principle that, in hearing such testimony, the trial court has the opportunity to evaluate the

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demeanor and credibility of witnesses, Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000), 'and to assign weight to their testimony.' Wehle v. Bradley, 195 So. 3d 928, 934 (Ala. 2015). The trial court is 'in the best position' to perform this evaluation, even if a witness 'is the sole witness or the only witness to provide testimony on some question of fact.' Chunn v. Chunn, 183 So. 3d 985, 992 (Ala. Civ. App. 2015). Further, in making such evaluations, the trial court is 'free to reject' a witness's testimony 'as being not credible.' Wells v. Wells, 69 So. 3d 192, 196 (Ala. Civ. App. 2011). See also Hall v. Mazzone, 486 So. 2d 408, 410-11 (Ala. 1986) ('In this case, the trial court observed one witness testify concerning this issue and made a determination of credibility. The fact that this determination was negative does not entitle us to ignore it.')."

Langley & Watters, LLP v. Gamble, 281 So. 3d 1228, 1231 (Ala. 2018)

(Shaw, J., concurring specially). Here, this Court is assigning weight and credibility to oral, in-court testimony contrary to what the body that actually heard that testimony decided. I see no clear error in the Board's rejection of the testimony purporting to support Kaminski's and Marshall's "good character" as a mitigating factor.

II. Standard 9.32(k)

The main opinion similarly agrees with Kaminski that the Board also clearly erred in failing to apply the mitigating factor found in Standard 9.32(k) ("imposition of other penalties or discipline"). As support

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for this claim, Kaminski points to his voluntary resignation from the bench to end judicial disciplinary proceedings before the Alabama Court of the Judiciary, to the loss of potential retirement and student-loan-forgiveness benefits, and to related public embarrassment. In rejecting the circumstances cited by Kaminski as mitigating, the Board explained:

"There was no evidence of any other penalties or discipline under the Alabama Rules of Professional Conduct as to either Kaminski or Marshall. As such, the Board finds no mitigating circumstances. Kaminski argued that his guilty plea to violations of the Alabama Canons of Judicial Ethics before the Alabama Court of the Judiciary, which resulted in his resignation as a judge and other concessions, should be evidence of a mitigating factor in this category. The Board disagrees. There is no overlap or reciprocation between the disciplinary rules and procedures governing Alabama judges and those that govern Alabama attorneys. In fact, the rules and procedures are expressly distinct. The Alabama State Bar had no express jurisdiction to discipline Kaminski under Rule 1 of the Alabama Rule of Disciplinary Procedure until he resigned as a judge. But once he did resign, the Bar had jurisdiction to impose discipline for his actions as a judge. If anything, the jurisdictional language of Rule 1 of the Alabama Rule[s] of Disciplinary Procedure, which allows the Bar to impose discipline on a judge who resigns or is removed as a result of certain allegations, supports the conclusion that such resignation or removal should not be considered a mitigating factor."

The "other penalties or discipline" Kaminski claims to have received

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were, as the Board noted, associated with Kaminski's violations of the Canons of Judicial Ethics. Although I am not convinced, as the Board appeared to conclude, that only prior penalties or discipline imposed pursuant to the Rules of Professional Conduct would trigger application of this mitigating factor, I am also not convinced that the Board clearly erred in declining to apply it here. First, Kaminski includes no argument or authority showing that the Board was per se required to accept the consequences for his violations of the Canons of Judicial Ethics in place of discipline for separate violations of the Rules of Professional Conduct. Additionally, a review of the final judgment entered against Kaminski in the proceedings initiated before the Alabama Court of the Judiciary reflects that, "[b]ased on ... Kaminski's resignation from the bench ... [n]o additional sanction or penalty [would] be imposed."

Further, any societal consequences naturally flowing from Kaminski's misconduct do not necessarily constitute mitigation under Standard 9.32(k). See In re Hanlon, 110 P.3d 937, 945 (Alaska 2005) (declining to find as mitigating "the likely effects of a penalty on a lawyer's business, family, and personal reputation"); In re Richmond's Case, 152

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N.H. 155, 162, 872 A.2d 1023, 1030-31 (2005) (rejecting lawyer's claim "that suspension [was] too great a sanction because he already suffered financial loss" on ground that "financial losses resulting from his poor investment decisions [are not] the type of penalty or sanction that would warrant mitigation"); and In re Van Dox, 214 Ariz. 300, 307, 152 P.3d 1183, 1190 (2007) (concluding that, in imposing discipline, a hearing officer had "improperly considered the potential effects of discipline on [the lawyer's] livelihood and reciprocal discipline in Florida and Virginia in determining the sanction" because "[t]he effects of sanctions on an attorney's practice and livelihood are not mitigating factors that may be considered in determining sanctions"). Therefore, I cannot agree that the Board clearly erred in failing to deem that evidence mitigating.

III. Alleged lack of resulting injury

Finally, although Kaminski and Marshall argue that nothing before the Board and this Court suggested any quantifiable evidence of actual injury to any party, I can reach no other conclusion but that the legal profession as a whole was damaged as a result of the apparently highly

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publicized nature of their misconduct.⁶

First, the nature of any action taken by Kaminski in cases in which Marshall appeared is not minimal. As aptly observed in In re Adams, 932 So. 2d 1025 (Fla. 2006), on which the main opinion relies in part:

"Even in the absence of evidence that a romantic relationship with an attorney practicing in a judge's court has influenced the judge's judgment, the judge's authority necessarily suffers. First, the intimate relationship itself is contrary to the judge's role of maintaining detached neutrality as to the litigants and lawyers who appear in his or her courtroom. Second, in continuing to preside over cases in which the lawyer appears during the relationship, the judge necessarily depletes the single most important source of his or her authority -- the perception of the legal community and public that the judge is absolutely impartial in deciding cases."

932 So. 2d at 1027. See also People v. Biddle, 180 P.3d 461, 464 (Colo. Office of Presiding Disciplinary Judge 2007) ("Although there is no evidence of favorable treatment to [the deputy district attorney with

⁶The lack of a client complaint to the Bar, to my mind, is not determinative and should in no way factor into this analysis, because clearly, a complaint was made to the Judicial Inquiry Commission regarding Kaminski and both Kaminski and Marshall freely acknowledge that misconduct actually occurred. Further, counsel and members of the community may have had various reasons for declining to make a complaint regarding the only sitting district-court judge in the county.

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whom the judge engaged in an affair while she practiced before him in his courtroom], the Court finds that [the judge] caused actual injury and serious potential injury to the integrity of the legal process because of the appearance of favoritism"), and In re Gerard, 631 N.W.2d 271, 278 (Iowa 2001) ("Judge Gerard adamantly argues that no one has been able to find any evidence that he acted partially toward the State and, therefore, this mitigates his misconduct. ... It is immaterial that the judge's association may not have had a detrimental impact on defendants appearing before him. ... [O]nce the public learned of the judge's relationship with the State's attorney who appeared before him ..., the appearance of bias was very real.").

I further note, as the Bar also argues, that other courts called upon to address the public perception of judicial misconduct have reached a similar conclusion:

"The actual injury and serious potential injury caused to the integrity of the legal process is the most disturbing factor in this case. An independent and honorable judicial system is crucial to our system of justice. Indeed, the integrity of our judicial system is at the core of our democratic system of government. When a public official flagrantly abandons his ethical duties, he necessarily damages the public's confidence

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in the rule of law and the integrity of our judicial system."

People v. Biddle, 180 P.3d at 465. See also In re Gerard, 631 N.W.2d at 278 (quoting In re Flanagan, 240 Conn. 157, 190, 690 A.2d 865, 881 (1997)) (" 'Although it may be difficult to assess the degree to which the public at large now may condone or disapprove of one having a sexual affair with a married person, we are persuaded that, in general, such conduct is regarded as improper when it involves a subordinate in a professional, highly sensitive public context. Moreover, we think it is fair to say that a member of the public, aware of the aforementioned combination of [facts], would reasonably conclude that the integrity of the judiciary was likely to be impaired.' " (emphasis omitted)). In In re Gerard, the Iowa Supreme Court also stated the following, which I find particularly apt here: "Judge Gerard was neither prudent nor forthcoming about his relationship with a lawyer who appeared before him daily. As such, this secret relationship, upon discovery, did contribute to diminished public confidence in our judicial system." Id. at 279.

The main opinion relies on In re Adams, *supra*, in which a similar affair of much shorter duration occurred between a sitting judge and an

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attorney who routinely practiced before him, as a basis for varying from the generally appropriate discipline under the Standards. Although acknowledging the value of guiding decisions from other jurisdictions when faced with an issue of first impression, I am ultimately disinclined to deviate from our own Standards, which clearly establish terms of suspension as the presumptively appropriate discipline for both Kaminski and Marshall.

In sum, I disagree with both Kaminski's and Marshall's claims of entitlement to a mere reprimand. Their misconduct, which was admittedly knowingly undertaken, does not amount to the "isolated instance of negligence" contemplated by Standard 5.24 and Standard 4.34, respectively, for imposing a reprimand, nor does it, in my opinion, satisfy the objectives attendant to the supervisory role granted to this Court. See In re Abrams, 227 Ariz. at 254, 255, 257 P.3d at 173, 174 (observing that the offending judge's "proposal of a reprimand fail[ed] to acknowledge the seriousness of his misconduct and the harm it inflicted on the legal system" and that "[a] reprimand or shorter term of suspension would not adequately address the[] objectives [of restoring the public's faith in our

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legal institutions and deterring attorneys from similar misbehavior]"). In my opinion, the spirit and integrity of the legal profession as a whole was damaged as a result of the highly publicized misconduct of Kaminski and Marshall. Based on the foregoing, the Board's findings are not clearly erroneous, and because a mere reprimand -- public or otherwise -- is insufficient "to protect the public and the administration of justice," Preamble, Ala. R. Disc. P., I would affirm the Board's imposition of terms of suspension for both Kaminski and Marshall. See In re Dowdy, 247 Ga. 488, 493, 277 S.E.2d 36, 40 (1981) (quoting 7 C.J.S. Attorney & Client § 38) (" 'The question is not what punishment may the offense warrant, but what does it require as a penalty to the offender, a deterrent to others, and as an indication to lay[persons] that the courts will maintain the ethics of the profession.' "). Thus, I respectfully dissent.

Bolin and Mitchell, JJ., concur.