

Filed February 17, 2023

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	SBC-20-C-30811
)	
SEONG HWAN KIM,)	OPINION AND ORDER
)	
State Bar No. 166604.)	
_____)	

Respondent Seong Hwan Kim was convicted of five misdemeanors: willful infliction of traumatic injury on a spouse, assault with a deadly weapon (not a firearm), animal cruelty, and child abuse (two counts). A hearing judge found that the facts and circumstances surrounding Kim’s misdemeanor convictions involved moral turpitude. The judge recommended discipline including a 60-day actual suspension.

Both Kim and the Office of Chief Trial Counsel of the State Bar (OCTC) appeal the hearing judge’s decision. Kim disputes the moral turpitude finding and the discipline recommendation. OCTC appeals numerous evidentiary rulings and requests a remand or, if a remand is not ordered, greater discipline.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find the hearing judge committed an error of law in excluding some of OCTC’s evidence proffered at trial, including initial reports regarding allegations of spousal abuse and child abuse that occurred prior to 2019 (pre-2019 abuse allegations). However, we affirm the rulings regarding the application of the marital communications privilege, the exclusion of the domestic violence expert, forensic interviews of Kim’s children, pre-2019 conduct described after September 16,

2019, and the police body camera footage. We remand this case back to the judge to conduct further proceedings consistent with this Opinion and Order.

I. FACTUAL BACKGROUND

A. The August 2019 Assault

Around 9:00 p.m. on August 26, 2019, Kim instigated a volatile argument with his wife, K.A.K.,¹ at their family home while intoxicated. After his wife went to sleep, he woke her up hours later, in the early morning hours of August 27, to start the argument anew. Over Kim's objection, K.A.K. recorded this portion of the argument, which lasted several more hours. The argument ended with Kim's unprovoked physical attack upon his wife. The argument woke one child (12-year-old K.K.), who pleaded with Kim to stop. The child then hid in an upstairs closet and called 911. A 911 dispatcher referred the call to the Los Angeles Police Department (LAPD), stating the child reported that Kim had kicked and punched K.A.K. and could still hear them screaming.

Police officers arrived at the Kim home right before 4:00 a.m. They found K.A.K. shaking and crying with evidence of minor physical harm. K.A.K. reported she was in fear for her life during the assault. Kim was arrested and taken into custody.² K.A.K. obtained an emergency protective order (EPO). Because children were involved, on-scene officers notified Child Protective Services.

B. The Investigation and Resulting Five Misdemeanor Convictions

After his arrest, Kim was initially charged in a four-count complaint. A child abuse investigation was also initiated based upon the referral by the responding officers. This referral

¹ We refer to respondent's wife and children by their initials to protect their privacy.

² Kim was arrested for a violation of Penal Code section 273.5 (intimate partner violence with visible injuries). All further references to section or sections are to the Penal Code, unless otherwise noted.

led to an investigative interview of the children by LAPD Officer Angelica Lopez on September 16, 2019. A forensic interview of the children conducted by Jenny Matthews and observed by LAPD Detective Alina Gheta followed on October 7, 2019.

An 11-count amended complaint followed in January 2020. On October 6, Kim entered a nolo contendere plea to misdemeanor violations of sections 273.5, subdivision (a) (willful infliction of traumatic injury on a spouse); 245, subdivision (a)(1) (assault with deadly weapon, not a firearm); 597, subdivision (a) (animal cruelty); and 273a, subdivision (b) (child abuse—two counts). The remaining charges were dismissed. Kim was sentenced the same day to, inter alia, a 48-month probationary term with 60 days in county jail.

II. STATE BAR COURT PROCEEDINGS

A. Procedural Background

OCTC filed an initial conviction transmittal in the Review Department on November 24, 2020. Once the conviction became final, we referred the matter to the Hearing Department on July 16, 2021, for a hearing and decision as to whether the facts and circumstances surrounding Kim's convictions involved moral turpitude or other misconduct warranting discipline, and, if so found, the discipline to be imposed. A pretrial conference was held on November 8. Prior to the pretrial conference, both parties filed motions in limine.

The parties entered into a stipulation as to facts and admission of documents, which was filed on November 16, 2021, and the first three days of trial occurred on November 17–19. Additional argument regarding the motions in limine was heard on the first day of trial. The hearing judge made oral rulings followed by a written ruling on the motions in limine on the third day of trial. A fourth and final day of trial took place on December 14. The parties filed closing briefs on January 5, 2022. The hearing judge issued her decision on April 1, 2022.

B. Trial Before the Hearing Department

For context, we recount Kim's admissions from trial.³ Kim testified he was "highly intoxicated" and therefore unable to recall much of that night, including whether he received a copy of the EPO. He also testified that past arguments with K.A.K. were exacerbated by his drinking. While Kim did not recall any other instances in 2019 where he was verbally or physically abusive toward K.A.K, his children, or the family pets, he acknowledged marital strife occurred, and divorce had been discussed.

Kim stipulated that he caused injuries to his wife, which resulted in a traumatic condition. He also stipulated that he caused his children "unjustifiable mental suffering" and that he was "criminally negligent" in causing such harm to them. The stipulation makes no mention of any harm inflicted on the family pet. In the written statement provided to character witnesses,⁴ Kim acknowledged the verbal and physical assault on K.A.K., which left her physically and emotionally damaged, and that he was drunk, which fueled his anger. The statement provided information about the EPO that precluded contact with his family until November 2022.

Evidence was presented at trial regarding Kim's method of punishment for his young children, which he referred to as "huggy time." It involved capturing and squeezing a child very tightly to make the child uncomfortable.

³ On the morning of the first day of trial, OCTC advised the court that K.A.K. declined to testify. It was already known that the minor children would likely not testify. No indication exists in the record that OCTC attempted to compel K.A.K.'s presence via a subpoena or that OCTC proffered that K.A.K. was "unavailable" as that term is defined in Evidence Code section 1370. The hearing judge offered OCTC a continuance to reassess its case. The offer was declined.

⁴ The statement was attached as an exhibit to each character witness declaration.

C. Evidentiary Rulings

Numerous evidentiary issues were raised before and during trial. The hearing judge made both oral and written rulings. We summarize the evidentiary rulings as they relate to our remand order.

The hearing judge excluded K.A.K.'s recording of the August 27, 2019 argument due to the marital communications privilege. In addition, the judge ruled the recording was made in violation of both section 632, subdivision (d), and section 633.5, which permitted certain surreptitious recordings in the prosecution of criminal matters, but not State Bar Court proceedings. Furthermore, she excluded portions of reports, described *post*, that recounted privileged communications.

OCTC was also precluded from submitting evidence of other alleged abuse that occurred prior to 2019. These rulings resulted in the exclusion of portions of responding LAPD Officer Daisy Arzate's report mentioning prior spousal abuse; portions of LAPD Detective Ralph Barone's August 29, 2019 investigation report regarding the domestic abuse charges to the extent it reflected marital communications during the fight; the entire Department of Children and Family Services intake report (SCAR report);⁵ portions of Officer Lopez's report of a September 16, 2019 interview of K.A.K. and the children regarding pre-2019 abuse allegations referenced in the SCAR report;⁶ and one entire report and significant portions of a second report

⁵ The SCAR report documented the August 27, 2019 telephonic referral by law enforcement. It also contained a September 7, 2019 supplement regarding a report by a school employee and a summary of Officer Lopez's interviews.

⁶ In her November 19, 2021 ruling, the hearing judge denied Kim's motion in limine to exclude the SCAR report and Officer Lopez's report because they related to dismissed charges. However, during the trial itself she limited the reports and related testimony to events in 2019.

prepared by Detective Gheta, who was assigned to investigate the child sexual abuse charges.⁷ The rulings also resulted in the exclusion of testimony that related to marital communications and pre-2019 abuse allegations.

Video recordings of forensic interviews of Kim's children in furtherance of the child abuse investigations were excluded on due process grounds, as the hearing judge reasoned Kim did not have the opportunity during that interview to question the interviewees, his children.⁸ Matthews, who conducted the forensic interviews, was also not permitted to testify. The judge also excluded written victim statements submitted by K.A.K. and the children, which had been prepared for Kim's sentencing hearing.⁹ OCTC's expert witness on domestic violence was excluded as the judge determined the proffered areas of testimony were not relevant as they did not go to the facts and circumstances surrounding Kim's convictions, the expert was not a percipient witness, and the resulting testimony would be more prejudicial than probative.

OCTC sought to admit seven exhibits of body camera video footage from multiple police officers who responded to K.K.'s 911 call. All were excluded. At the outset, the hearing judge ruled any video or photograph that contained images of the minor children or details about the minor children (such as birthdates or cell phone numbers) would be excluded in its entirety. Early in the proceedings, OCTC suggested having the exhibits submitted under seal, but OCTC

⁷ These reports summarized Detective Gheta's real-time observations of forensic interviews of the other child, L.K., and K.K. Kim's motion in limine to exclude these exhibits was denied because the exhibits related to dismissed charges.

⁸ At the pre-trial conference, in response to a question from the hearing judge, OCTC stated Matthews would testify as to her training in conducting forensic interviews and "facilitate the admission" of the video-recorded interviews into evidence.

⁹ At trial, Kim objected to the admission of the victim statements, which were part of the multi-page exhibit 24. In her decision, the hearing judge excluded the entire exhibit, which also contained certified court copies of documents such as Kim's signed plea statement and court sentencing records. We find it was an abuse of discretion to exclude the entire exhibit rather than just the victim statements.

never made a written or oral motion to seal. OCTC did not use redacted video exhibits at trial. Police officer witnesses were unable to identify the video exhibits placed before them as originating from their own body cameras. Some of the video exhibits contained unredacted images of the minor children. OCTC attempted to use one such video to impeach Kim. However, when OCTC began its examination with a portion of video that showed one child, it was required to stop.

III. ANALYSIS

A hearing judge has broad discretion to admit or exclude evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.) Case law is clear that an abuse of discretion occurs when a hearing judge “exceeded the bounds of reason, all of the circumstances before it being considered.” (*H. D. Arnaz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) To prevail on a claim of error, abuse of discretion and actual prejudice resulting from the ruling must be established. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241.) As detailed *post*, the judge committed an error of law in excluding evidence regarding prior abuse of K.A.K, the children, and the family pets that was reported between August 27 and September 16, 2019.

When considering disciplinary cases pursuant to Business and Professions Code section 6101, subdivision (a), we first must determine if moral turpitude exists. It is axiomatic that any finding of moral turpitude must be made after considering the crime of which the attorney is convicted and the circumstances of that criminal conviction. (Bus. & Prof. Code, § 6102, subd. (e).) In examining such circumstances, the court may look beyond the specific elements of a crime to the whole course of an attorney’s conduct as it reflects upon the attorney’s fitness to practice law. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510; *In re Kristovich* (1976) 18 Cal.3d 468, 472; *In re Higbie* (1972) 6 Cal.3d 562, 572.)

While the convictions at issue here do not establish moral turpitude per se, moral turpitude can be established based on the particular circumstances surrounding such convictions. (*In re Kelley* (1990) 52 Cal.3d 487, 493.) Facts and circumstances relating to Kim’s prior abuse of his family are relevant to this conviction referral matter. (*In re Gross* (1983) 33 Cal.3d 561, 566.)

Case law provides that a “wide ambit of facts surrounding the commission of a crime is appropriate to consider in a conviction referral proceeding.” (See *In the Matter of Miller* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 110, 115; see also *In re Arne* (1978) 22 Cal.3d 740, 745; *In re Higbie, supra*, 6 Cal.3d at p. 572; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 740-747; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935 [moral turpitude analysis not restricted to examining elements of crime but must look to the whole course of misconduct].) This includes dismissed counts in a criminal case as illustrated in *In the Matter of Sawyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 765. In *Sawyer*, we stated the inquiry surrounding a conviction for a federal tax offense was not limited to the facts contained in the plea agreement. Rather, it was necessary to “look to the circumstances surrounding the misconduct leading to that conviction to determine the appropriate discipline.” (*Id.* at p. 770.) This examination can also include pre-licensure conduct. (*In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402.)

A. Evidence of Prior Abusive Conduct Improperly Excluded

The hearing judge limited evidence regarding other alleged acts of abuse to only those acts that occurred in 2019. We find this is too restrictive and contrary to the established authority detailed *ante*. In this case, the evidence of pre-2019 abuse reported between August 27 and September 16, 2019, should have been admitted. The reports of abuse made during this three-week investigative window were close in time to the events that triggered the disclosures.

OCTC was prejudiced in that its arguments regarding culpability, aggravation, and appropriate discipline were unduly limited.

The following should have been admitted: (1) K.A.K.'s statements of prior domestic abuse reflected in the August 27, 2019 police report by Officer Arzate; (2) statements of prior abuse reflected in the August 27, 2019 SCAR report; and (3) statements of prior abuse reflected in the September 17, 2019 police report by Officer Lopez.¹⁰ To the extent questioning of a called witness who testified at trial was precluded regarding the pre-2019 conduct disclosed by K.A.K., K.K., and L.K. between August 27 and September 16, 2019, that was an abuse of discretion as well, and such witnesses may be recalled.

This excluded evidence properly fell within our referral to the Hearing Department to examine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. It also was relevant to whether the events of August 27, 2019, were aberrational as Kim asserted at trial.

The record also includes the fact that two other misdemeanor charges involving Kim's children (annoy or molest a child under age 18 and misdemeanor sexual battery) and two other animal cruelty charges were dismissed. Therefore, information gathered from the children between August 27 and September 16, 2019, regarding prior abuse in the household, supplements the evidence including Kim's testimony about his drinking, "huggy time," and his conduct regarding the family pets.

Turning to any hearsay contained in the excluded evidence specified *ante*, such was admissible under rule 5.104(D) of the Rules of Procedure of the State Bar.¹¹ Rule 5.104(D)

¹⁰ These are exhibits 12, 14, and 16, respectively.

¹¹ All further references to rules are to the Rules of Procedure of the State Bar, unless otherwise noted.

provides for, inter alia, the admission of hearsay if it is “used for the purpose of supplementing or explaining other evidence” The evidence supplemented the facts contained in the elements established by Kim’s guilty plea, the parties’ trial stipulation, Kim’s testimony, and Kim’s written statement provided to each character witness.

B. Exhibit 19 Improperly Withdrawn

The parties stipulated to the admissibility of the November 15, 2019 protective order (identified as exhibit 19 in the November 16, 2021 stipulation) issued as a result of the August 27, 2019 incident. The hearing judge withdrew this stipulated exhibit at trial over OCTC’s objection as it did not comply with her redaction requirements. OCTC argues that this action was contrary to rule 5.151.2 and we agree.¹² As the exhibit was ordered withdrawn, no copy of the exhibit exists for us to review. We therefore remand to the hearing judge for a determination of whether the exhibit should be admitted or excluded, rather than withdrawn.

C. No Error in Excluding Marital Communications

California law recognizes two marital privileges: the testimonial privilege and the communications privilege. At issue here is the marital communications privilege. A spouse, such as respondent, may prevent the disclosure of confidential communications made between them during the marriage. (Evid. Code, § 980.) This privilege can be applied in State Bar Court proceedings. (Rule 5.104(E) [privilege rules apply to “the extent that they are otherwise required by statute” to be recognized].) The proponent of the confidential marital communication privilege must establish, by a preponderance of the evidence, the facts necessary to establish that the privilege applies; similarly, the party opposing the application of the privilege has the burden

¹² Rule 5.151.2 provides, “Upon the filing of a timely request for review, the Clerk shall prepare the record on review. The record on review shall consist of all pleadings filed in the formal proceeding under review, the decision of the judge of the Hearing Department and all other orders relating to the matter under Review, all exhibits offered or received in evidence, and all tape recordings and transcripts of testimony relating to the matter under review.

of proof that it does not. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 220-221; *People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 420; see also Cal. Rules of Evid., rule 912.)

Furthermore, it is well established that, as with other privileges, the marital communications privilege is narrowly construed because it prevents the admission of relevant evidence while exceptions to the privilege are broadly construed and applied. (*People v. Sinohui* (2002) 28 Cal.4th 205, 212; see also *Dunn v. Superior Court* (1993) 21 Cal.App.4th 721, 725-726.) Finally, the California Supreme Court reminds us that, since “[t]he privileges set out in the Evidence Code are legislative creations[,] the courts of this state have no power to expand them or to recognize implied exceptions.” (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206.)

Against this legal framework, we find that the hearing judge did not abuse her discretion or commit an error of law by excluding the recording made by K.A.K. during the altercation and ensuing physical attack as well as any privileged communication relayed by K.A.K. to investigators. Although the asserted privilege could not be applied in the underlying criminal proceeding (Evid. Code, § 985, subd. (a)), no authority exists to apply that exception to a civil or administrative proceeding.¹³ We understand that in the criminal arena it is well settled that there is no “mantle of confidentiality” when one spouse assaults another. (*People v. Johnson* (1991) 233 Cal. App. 3d 425, 438; see also *People v. Carter* (1973) 34 Cal. App. 3d 748, 752-753 [policy considerations regarding “confidence and tranquility of the marital relationship” are not served “by shielding as confidential and privileged threats against third persons made by one spouse in the course of criminally victimizing the other spouse”].) However, as stated in rule 5.104(E), the scope of any privilege asserted in this court is applicable “to the extent that

¹³ State Bar Court disciplinary proceedings are “neither civil nor criminal.” (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447; see also *In re Ruffalo* (1968) 390 U.S. 544, 550-551 [attorney disciplinary proceedings are adversarial proceedings of quasi-criminal nature].)

they are otherwise required by statute to be recognized” Here, the marital communications privilege is recognized; however, the statutory limitation applies only to criminal proceedings.

State Bar Court proceedings are not criminal proceedings.

Turning to the hearing judge’s reading of sections 632, subdivision (d),¹⁴ and 633.5, we find the hearing judge properly interpreted those provisions. Section 633.5 provides:

Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 236.1, or a violation of Section 653m, or domestic violence as defined in Section 13700. Sections 631, 632, 632.5, 632.6, and 632.7 do not render any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 236.1, a violation of Section 653m, or domestic violence as defined in Section 13700, or any crime in connection therewith.

We interpret that this provision makes such evidence admissible in a *prosecution* for specified crimes. There is no reference to administrative or civil proceedings. OCTC argues it should apply to State Bar Court proceedings with no authority that expands the reach of section 633.5. If the legislature desired to expand the reach of section 633.5, it could have done so.

Finally, the cases permitting the use of evidence in an administrative proceeding that was suppressed in a criminal case, such as *Emslie v. State Bar* (1974) 11 Cal.3d 210, 226-229 and *Park v. Valverde* (2007) 152 Cal. App. 4th 877, 887 [DMV administrative proceedings], do not apply in this case. The purpose of the exclusionary rule in a criminal proceeding is to impose a penalty for improper conduct by government actors and thereby deter law enforcement from illegally obtaining evidence. *Emslie* and *Park* explain that the goal of deterring police from

¹⁴ The exclusionary remedy for surreptitious recordings in section 632, subdivision (d), was abrogated by a 1982 state constitutional amendment to the extent it requires suppression of relevant evidence in criminal proceedings. (*People v. Guzman* (2019) 8 Cal. 5th 673, 681.)

illegal collection of evidence by excluding it in an administrative proceeding is minimal as compared to the interests advanced in the administrative proceeding in terms of protecting the public. Here, it was a private citizen, not a law enforcement officer, that made the recording that was contrary to California law. Moreover, the cases cited *ante* do not involve evidence that was otherwise excluded because it was privileged.

The hearing judge did not abuse her discretion or act contrary to law in excluding the recording made by K.A.K. and other evidence of marital communications during the August 27, 2019 fight that K.A.K. relayed to police officers. Those communications fell within the marital communications privilege. We also find no abuse of discretion in the judge's determination there was no waiver of the privilege. In addition, she did not err in determining that the recording was made in violation of section 632. It was properly excluded pursuant to section 632, subdivision (d), and the exception set forth in section 633.5 did not apply in the instant proceeding.

D. No Abuse of Discretion in Excluding LAPD Body Camera Footage

Without citation to authority, OCTC argues the hearing judge should have, on her own, issued a sealing order in regard to the video and photographic evidence to protect the identity of minor children, so that OCTC could admit this evidence. OCTC further argues that the failure to seal the videos, in essence, prevented OCTC from being able to lay a foundation for the exhibits. Hence, OCTC argues, it was not able to show Kim's inconsistent or untrue statements or the children's statements to police about other abusive conduct, and it prevented an effective cross-examination of Kim, which in turn could have impacted the discipline determination.

The hearing judge did not abuse her discretion in excluding exhibits 5–11, the seven body camera exhibits. First, the parties were on notice that they were not permitted to display the children's images or other identifying information. While filing exhibits under seal was raised

generally with the judge (as well as other means to protect the children's identity), OCTC never specifically requested a sealing order for any particular exhibit or combination of exhibits.

Second, none of the police officer witnesses were prepared or able to identify the body camera exhibits shown to them. While strict adherence to the rules of evidence is not required (rule 5.104(C)), some fundamentals must be established in order to establish that an exhibit is connected to the issue at hand.

OCTC attempted to use body camera footage from one video exhibit to cross-examine Kim regarding his claimed level of intoxication that night. While that may be a proper ground for cross-examination, one of the first parts of the footage OCTC used on cross-examination contained an image of one child, which was in violation of the hearing judge's prior order.¹⁵ While perhaps the hearing judge could have permitted a little more leeway and allowed additional cross-examination using body camera video, it was not an abuse of discretion to end the cross-examination when OCTC had not structured the cross-examination in order to comply with court rulings.

E. No Abuse of Discretion to Exclude Evidence of Past Abuse Reported after September 16, 2019, or Expert Witness Testimony

OCTC concedes the children's statements regarding other abuse made to forensic interviewer Matthews, Detective Geta's observations of that interview, and even the children's statements to Officer Lopez are not admissible on their own. However, it argues the evidence should have been admitted as the information "supplemented and explained" other evidence. We disagree as to statements made after the September 16, 2019 Officer Lopez interview.

¹⁵ We note there was a gap in the trial between November 19 and December 14, 2021. This was ample time for OCTC to redact the video exhibits or create conforming excerpts of the video exhibits.

As discussed *ante*, the initial disclosures by the children should not have been excluded. However, we find there was no abuse of discretion to exclude the video-recorded forensic interviews of the two children, the testimony of forensic interviewer Matthews, Detective Gheta's written reports, and testimony regarding the October 2019 interviews.

The forensic interviews occurred a long time after the traumatic August 2019 event that led the children to disclose their experiences. By October 2019, the criminal case and divorce proceedings were well underway, and a protective order was about to expire. The status of the divorce and related proceedings combined with the lapse of time makes the content of the forensic interviews less reliable and not of a sort "responsible persons are accustomed to rely in the conduct of serious affairs" (Rule 5.104(C).)

We turn next to the October 2020 victim impact statements submitted to the sentencing court. OCTC raised for the first time on appeal that the victim impact statements prepared for Kim's criminal case fell under rule 5.107.¹⁶ OCTC argues the hearing judge erred by taking admissibility of the statements under submission and not ruling until the final decision to exclude them was issued. That, in turn, did not give OCTC advance notice the exhibits would be excluded unless the wife and children were submitted for cross-examination. OCTC does not cite any authority applying the rule to conviction referral matters as opposed to disciplinary proceedings such as those initiated by a Notice of Disciplinary Charges. We do note OCTC ignores the fact that on the fourth day of trial—when Kim asserted rule 5.107 to these exact same

¹⁶ Rule 5.107(A) provides any person harmed by an attorney's misconduct "may submit a written statement setting forth the nature and extent of that harm and the manner in which the attorney's conduct caused the harm." It is only *once a finding of culpability is made* that rule 5.107(B) requires the admission of the statements submitted pursuant to rule 5.107(A). If a respondent establishes good cause, the hearing judge may require OCTC to make a victim available for cross-examination in the mitigation/aggravation stage of the proceeding.

victim statements—OCTC argued the rule did *not* apply. OCTC offers no explanation for its change in position between the trial and this appeal. OCTC was correct in the first instance.

At trial, OCTC proffered the victim statements primarily to support its position that facts and circumstances of the underlying convictions warranted a culpability finding of moral turpitude. Rule 5.107(B) does not contemplate use of victim statements until *after* a culpability finding is made. OCTC offered the exhibits *before* any culpability finding. By its own terms, the rule does not apply.

As to the statements themselves, which are contained within exhibit 24, the statements were typed and undated but part of the record of Kim’s October 2020 sentencing. In the written decision, the hearing judge excluded exhibit 24 as cumulative and unduly prejudicial citing rule 5.104(F). She also noted the unsworn victim statements from K.A.K., K.K., and L.K. were hearsay, that Kim objected to their admission, the three were not available for cross-examination, and the content of the written statements went “beyond the relevant time frame of the conviction underlying this proceeding and raises facts and circumstances that arguably fall outside the scope of this proceeding.” Independent of Kim’s hearsay objection, we separately conclude that the statements are not inherently reliable. (Rule 5.104(C).) The victim statements were prepared in order to have input on Kim’s criminal sentence, not Kim’s disciplinary proceeding, and appears to have been prepared long after the events that took place in August 2019. Like the forensic interviews, the victim statements were created for a different litigation purpose and while divorce proceedings were still ongoing. Though the hearing judge relied on rule 5.104(F) to exclude the victim statements, we find that the judge did not abuse her discretion based on rule 5.104(C).¹⁷

OCTC argues it was an abuse of discretion to exclude its expert witness on domestic violence as the proffered testimony was relevant to culpability and discipline, such as changing

¹⁷ See footnote 9, *ante*, regarding the remaining documents in exhibit 24.

societal norms regarding domestic abuse. OCTC argued that the expert's testimony would aid the hearing judge in analyzing the evidence. The judge ruled the proffered testimony was more prejudicial than probative as it was not relevant since it did not address the facts and circumstances of the convictions at issue. In addition, the written decision in this matter illustrates the judge was well versed in the concept of changing societal norms and therefore OCTC suffered no prejudice. We find the judge did not commit an error of law or act outside the bounds of reason in excluding the testimony.

IV. ORDER

We order that this matter is remanded to the Hearing Department before the Honorable Yvette D. Roland to conduct further proceedings consistent with this Opinion and that a revised decision be issued. (Rule 5.155(B).)

McGILL, J.

WE CONCUR:

HONN, P. J.

RIBAS, J.