

SUPREME COURT NO. 200,376-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DISCIPLINARY PROCEEDING AGAINST

TIMOTHY W. CARPENTER,

Lawyer (Bar No. 5882).

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REPLY BRIEF OF TIMOTHY W. CARPENTER

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This is Respondent Timothy W. Carpenter's Reply to the Association's Answering Brief in this matter.

**Issues Related to Count 3 and Count 4:** Several issues are raised in the Association's Answering Brief regarding Count 3 and its impact on Count 4. These are discussed here.

The Formal Complaint alleged in Count 3 that "By representing Holden/Five Star in the SPI litigation, respondent violated RPC 1.7 and/or RPC 1.9." DP 1. The hearing officer found a violation of RPC 1.9 but dismissed the RPC 1.7 allegation. The Association asserts at page 14 of its Answering Brief that Respondent does not challenge the finding of the Count 3 violation of RPC 1.9. This is correct; Respondent accepted below the finding of a technical violation of RPC 1.9 by the hearing officer and argued that the Board should accept the hearing officer's determination as to sanction on this violation. However, this was all in relationship to RPC 1.9, not RPC 1.7.

This is crucial because Count 4 of the Formal Complaint alleges that "By continuing to Represent Holden/Five Star when doing so would result in a violation of RPC 1.7, Respondent violated RPC 1.15(a)(1)." DP 1. Count 4 on its face does not charge a violation of RPC 1.7 but rather is based on the premise that there has been a finding of a violation of RPC

1.7 in other counts. The only counts that alleged a violation of RPC 1.7 were Counts 1 and 3. The notice provided to Carpenter in the Formal Complaint was that if he beat the RPC 1.7 allegations in Counts 1 and 3 – he would prevail on Count 4 since an RPC 1.7 violation was a required antecedent for a violation of RPC 1.15(a)(1).

The hearing officer dismissed Count 1 and the Association did not appeal that dismissal. Count 1 was not presented to the Board and the Board did not change the dismissal of Count 1. Therefore, if an RPC 1.7 violation was before the Board it was in the context of Count 3.

The Association asserts that Respondent was on notice that all of Count 3 was subject to review because the Bar's brief at the Disciplinary Board "discussed the Count 3 violation at length." Answering Brief, page 15. This is not correct, what the Bar argued in the brief before the Disciplinary Board was the issue of Carpenter's state of mind and the sanctions issue of injury in regards to Count 3. It did not argue that the Count 3 RPC 1.7 dismissal should be reversed. In his briefing and argument Carpenter recognized that state of mind and injury had been appealed but asserted that what was not appealed was the issue of whether the RPC 1.7 dismissal at Count 3 had been violated. He stated at page 7 of

his Reply to Association's Brief in Opposition to Hearing Officer's Decision:

In dismissing Count 4 the hearing officer determined that since there was no violation of RPC 1.7, as found in Count 1, and since violation of RPC 1.7 is a mandatory antecedent to the alleged violation of RPC 1.15(a)(1), there was no violation of RPC 1.15(a)(1) in Count 4. Having not challenged Count 1's determination of the no violation of RPC 1.7, the Association cannot now assert that Count 4 was violated.

BF 52. He also discussed the relationship of the RPC 1.7 allegations in Count 1 and Count 3 at page 9 but since the Association had not asserted that the Count 3 RPC 1.7 dismissal was being appealed he did not argue the Count 3 RPC 1.7 allegations.

Apparently the Board agreed since it did not amend Count 3 to include a violation of RPC 1.7. The result is that there is no antecedent determination of the violation of RPC 1.7 and, therefore, there is no basis for the finding of the RPC 1.15(a)(1) violation at Count 4.

Not having a RPC 1.7 violation at Count 1 or Count 3 to rely upon the Bar instead rests its argument on the Board's amended findings at Count 4 to the effect that "The Respondent knowingly violated RPC 1.5(a)(1) by his continuing representation of Holden/Five Star in violation of RPC 1.7 after he became aware of facts and circumstances regarding

Holden's willingness or ability to pay. Therefore, Respondent knowingly violated RPC 1.15(a) and/or 1.7."

This is the very issue which was dismissed in Counts 1 and 3. Respondent defended and prevailed on the counts that alleged violations of RPC 1.7 but now the Board has created a new count 4 asserting that despite the specific dismissal of the RPC 1.7 allegations by the hearing officer which were not appealed by the Bar and which were affirmed by the Board, there was, nonetheless an uncharged violation which has been proved.

The Association's Brief seeks to support this finding by rearguing the very factual issues which were presented in the original hearing and which it lost, namely that at various times Carpenter had an RPC 1.7 violation. This included the allegation at Paragraph 22 of the Formal Complaint that "Holden communicated with Respondent's firm around the time of the summary judgment hearing about the possibility of filing bankruptcy." Despite this assertion and others which raised the RPC 1.7 issues, the counts which directly raised RPC 1.7 allegations were both dismissed and the Disciplinary Board did not change those dismissals. It is inconsistent for the Board to dismiss the direct allegations and yet to state

that there has been an RPC 1.7 violation in a count which did not charge it.

The Association states this is permissible since the Board “sua sponte” amended the pleadings to conform to the evidence. It cited *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 509-510, 29 P.3d 1242 (2001) in support of the contention that the Board can do this. That case does not provide support for this contention. In *Bonet* the Bar was asserting that the Board had a duty to sue sponte amend the pleadings to conform to the findings even when the Bar had not moved for such a determination. The court declined to find that the Board had a duty to do so. This alleged duty of the Board to conform the pleadings to the evidence is the only issue addressed in *Bonet*. It did not address the issue of whether CR 15(b) was even available in an appellate setting but rather addressed the issue and dismissed on an if it was available basis.

Conforming the pleadings to the evidence is based on CR 15(b) which is a civil rule and would appear to be available at the hearing level since ELC 10.1 provides that the civil rules serve as guidance for proceedings under Title 10. The civil rules are not made applicable for proceedings under Title 11. While the RAPs are mentioned several times, i.e. ELC 11.6; 11.7 and 11.10, in Title 11, there is no provision for the

Disciplinary Board to use CR 15(b) to change the pleadings. There is no equivalent rule in the RAPs. CR 15(b) also anticipates that before the discretionary decision to conform pleadings to the evidence occurs the parties will have a chance to argue the issue by way of a motion.

The reason is clear why the RAPs do not contain the equivalent of CR 15(b) and why notice and the opportunity to argue is important – if the Board could simply change the pleadings, a Respondent would never know how or what to appeal or argue. He or she is entitled to some certainty as to what is at issue. That certainty occurs at the end of the case when the hearing office files findings as to what the case was about. The Board did not state that it was using some version of CR 15(b) to change the pleadings and Carpenter did not have the opportunity to argue why such a determination should not be made. A CR 15(b) type amendment is not available to the WSBA in this matter.

The point of raising the issue that the entirety of Count 3 was not before the Board is that Carpenter was entitled to notice as to the charges against him. *In re Matter of Disciplinary Proceedings Against Jeffrey G. Poole*, 156 Wn.2d 196, 219, 125 P.3d 954 (2006) as well as other cases and argument presented in Respondent's Opening Brief. A fair reading of the charges of the Formal Complaint were that if the WSBA did not prove

one or both of the RPC 1.7 counts, Counts 1 and 3, then it could not prove Count 4. The hearing officer certainly believed this to be the case when she dismissed Count 4 by referencing the failure to prove a RPC 1.7 violation in Count 1.

What the Board has done and what the Bar seeks to have the court approve is to take a count which on its face does not charge RPC 1.7 but rather references it to show why RPC 1.15(b)(1) was violated and now convert it into an RPC 1.7 charge. Carpenter presented his arguments both to the hearing officer and to the Disciplinary Board on the premise that if he defeated Counts 1 and 3 then he necessarily defeated Count 4. Neither the Bar nor the Board should now be allowed to create a new charge at the appellate level. The court should find that having not proven RPC 1.7 violations at Counts 1 and 3, there can be no finding of such violation at Count 4 and as result there has been no violation of RPC 1.15(a)(1).It is too late at the Disciplinary Board level to find that the reference to RPC 1.7 in Count 4 meant something other then the references to it in Counts 1 and 3.

**State of Mind:** The Association argues that Carpenter acted knowingly. It essentially says that this is proven because there are facts that show a violation therefore Carpenter must have “known” he was

violating the rules. For this argument, they rely upon those facts that show Carpenter had knowledge of the events which were occurring. The Bar ignores the fact that Carpenter also had other information which formed the reasonable basis for his beliefs. *See* factual discussion at pages 23 to 25 of Opening Brief and discussion below under wavier. His reliance upon those beliefs was the negligence.

Under the Association's argument a lawyer could virtually never have a negligent state of mind since it is their position that if facts exist which show a violation, then the lawyer must have acted "knowingly." "Knowing" requires Carpenter to have had the "conscious awareness of the nature or attended circumstances of the conduct" with the result that he knowingly continued to go forward in a conflict situation. "Negligence" is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *ABA Standards for Imposing Lawyer Sanctions*, Section III, Definitions. What Carpenter did was fail to heed a substantial risk because he thought there was no conflict when SPI was not only aware of his representation and did not object but asked him to represent it.

The Bar and the Board seem to key off the assertion that Holden indicated that he would not post an appeal bond and asked a question about bankruptcy. This is alleged to have happened in August 1999 and it is alleged Carpenter should have recognized a conflict at that time and either withdrawn or gotten conflict waivers.

The Bar, at page of 28 of its brief, says that Carpenter “knew from Thulin’s email message to him that Holden did not plan to pay the judgment or to post an appeal bond.” This wrong factual assertion is based on Thulin’s August 25, 1999, email message sent to Carpenter and attached to the Bar’s brief as Appendix A. The email does not say what the Association says it says – No place in that email is there any indication that Holden does not plan to honor the indemnification – In fact, the email specifically discusses that Holden had three options – pay, appeal with a supersedes bond to keep Tark from collecting while on appeal or to appeal without the bond which would not prevent an appeal but would also not stop the collection action. Holden was indicating that he was willing to take a chance on the collection issue and so was considering the legal option of appealing without posting the bond. None of this indicates that Holden was not going to honor his obligation to indemnify. As for the bankruptcy, it not ever discussed again. Carpenter was never on notice that

Holden might not be good for the debt but when issues came up about where Holden was and where his assets were, Crawford notified SPI.

Carpenter acted negligently when he concluded based on the facts as he knew them that there was no conflict. This is the difference between this case and *In re Disciplinary Proceedings Against Haley*, 156 Wn.2d 324, 340, 16 P.3d 1262 (2006) cited by the Association. Haley knew there was a conflict and failed to do anything about it but did not have facts that lead him to believe that there was no conflict. Since he did not have facts that lead him to conclude there was no conflict he acted knowingly but when a lawyer is aware of facts that could be a conflict but reaches a reasonable but wrong conclusion based on other facts that the conflict does not exist, then he has acted negligently. That is the situation in this case.

**Waiver**: SPI did waive any conflict. It did so when through counsel it asked Holden to indemnify it and to assume the costs of defense. In such circumstance the law of indemnification applies. The law in this state on the duties in an indemnification situation is found in *Seattle v. Regan & Co.*, 52 Wn. 262, 100 P. 731 (1909).<sup>1</sup> In that case the Supreme Court found that Regan and National could not complain about a defense

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<sup>1</sup> The Bar has complained in the past that this is an "old" case as though old but unchanged law is somehow not good. Of course, the opposite is the truth, old cases which remain unchanged show the strength of the decision and the uncontroversial nature of the issue presented.

that was not raised when they did not accept the tender of defense made to them by the City.

The court stated at page 268:

The purpose of the notice to the person liable over is to give him the chance to make such defenses to the action as he deems fit. But to make such defenses he must come into the action. He cannot stay out of the case and at the same time dictate to his principal what defenses shall be interposed. This would be giving him the double advantage of having such issues determined as he wishes without subjecting himself to the corresponding hazards arising from their presentation, and such is not the policy of the rule.

The *Regan* case is, of course, the flip side of what happened in this case. In *Regan* the party that could have taken up the indemnification defense did not do so and, therefore, could not later complain about how the defense was conducted. In this matter, the party who could take up the indemnification defense did so and by doing so had the right to “make such defenses to the action as he deems fit.” SPI is not permitted to tender the costs and impact of the suit to Holden/Five Star and then, after acceptance of the tender, dictate how the case is tried. “Where an indemnitor is notified of a suit against an indemnitee and requested to defend the action, he is entitled at his own expense and charges fully to defend such suit, and to conduct in good faith the whole litigation from beginning to end ....” CJS Indemnity, 42 C.J.S. § 59, updated through

June 2004, *citations omitted*. When Holden/Five Star accepted the costs and risks of defense it then had control of the litigation and could conduct it however it saw fit. At that point, as a matter of law, SPI no longer had any control over how the case was conducted. There is no conflict because SPI had no right to have any say in how the litigation was conducted. By asking Holden to indemnify it, it waived the conflict.

The second point the conflict was waived was when SPI asked Carpenter to accept service on its suit against Holden and then did not ask Carpenter to remove himself from representation when it had express knowledge of his being involved. This issue is discussed extensively in the Opening Brief at pages 23 to 25. When specifically asked by Crawford if it wanted him to withdraw, he got no response from SPI. Apparently, SPI wanted to play both sides of the fence by raising conflict as a possible issue while not being willing to ask Carpenter to withdraw. This sort of game playing with the rules is why waiver has to be found. Clearly SPI knew all the relevant facts yet it not only wanted Carpenter to serve as Holden's attorney when it sought service through him, it also did not say "Withdraw" when specifically asked if that is what it wanted Carpenter to do. Under such circumstances, SPI waived any conflict.

SPI waived the conflict when it asked Holden to indemnify and defend it; when it asked Carpenter to serve as Holden's attorney when that suited its purposes for service; and when it refused to tell Carpenter whether it wanted him to withdraw. Where a client represented by counsel makes decisions which result in the waiver of the conflict a lawyer should not be found to have acted unethically when he relies upon that waiver when he proceeds.

**Harm**: The Board did not make findings of harm. The Bar concedes this when it states at page 31 of its brief that the Board found harm by implication. The Board made specific changes to the Hearing Officer's Findings, Conclusions and Recommendation but did not enter factual findings on harm. The Association had specifically raised harm in its appeal. Association's Brief in Opposition to Hearing Officer's Decision, page 9. BF 41. Because the Bar raised the issue in its appeal and because the Board did not change it, the hearing officer's conclusion on harm remains the finding in this matter.

The hearing officer found that an admonition was appropriate which requires little or no actual or potential injury to a client. As such the finding of little or no actual or potential injury to a client is a verity on appeal. *In re Disciplinary Proceedings Against Whitney*, 155 Wn.2d 451,

461, 120 P.3d 550 (2005). This is a truism which the Association itself relies upon in these proceedings. Association's Brief at page 14. The Bar cannot have it both ways, either the results of the hearing officer which are not changed by the Disciplinary Board are verities or they are not. The Bar says that because the Board used a standard with a higher level of harm, that similar to the hearing officer the Board must have found injury or potential injury to the client. The difference is that because there was little or no harm to the client no express facts identifying such non-existent harm would be made by the hearing officer but if the Board is going to find harm, it needs to tell us what that harm is. The Board did not do so. The hearing officer's determination of little or no harm is the verity on appeal which controls this issue.

The Bar, in the hopes of filling in the gap, speculates what the Board must have meant but there are no findings to support their speculation. The Bar wanders all over the map in trying to find when the conflict occurred which required Carpenter to withdraw but if the Board's findings are accepted then it was only after August when he learned of the payment issue that the conflict arose. Any harm must be looked at in terms of events after this time. If Carpenter had withdrawn in August the result would have been exactly the same.

The Bar points to bankruptcy as a possible harm but that is a risk in any litigation and is not related to any conflict by Carpenter. Carpenter's status does not affect that right. The Bar points to the possible use of confidences or secrets as a potential harm – there were no confidences and secrets to be used against SPI and the WSBA has not identified any. They say that the officers were concerned about the impact of a California judgment but that was not a confidence or secret and there was no evidence to support the idea that Carpenter was in anyway going to use any knowledge he had about SPI against it. In fact, all the evidence pointed to just the opposite conclusion.

The Bar says that SPI never had its day in court but this is the issue it argued on the other counts of the Formal Complaint and lost. By the time the August conversation with Holden occurred regarding payment, that issue was long past.

Prior to August 1999 SPI was not harmed by an alleged conflict because the Board did not find a conflict in that period and because by asking for indemnification and defense it had given up the right to have any say in the litigation. After August 1999, any injury or potential injury was slight at best and the Association has not demonstrated convincingly to the contrary.

**Lack of Dishonest or Selfish Motive as Mitigator:** The hearing officer, based on her hearing all the evidence, found that Carpenter did not have a dishonest or selfish motive for acting as he did. The Board struck that mitigator specifically saying that is was not supported by the record. The Bar agrees that it is not asserting there was a dishonest or selfish motive. Answering Brief, page 35. Rather the Association says this issue is neither an aggravator nor a mitigator and so is simply not part of the sanction's analysis in this case. The Bar's assertion is that when it seeks to show a dishonest or selfish motive, it has the burden but when the Respondent seeks to show the absence of a dishonest or selfish motive, the burden is on Respondent to affirmatively make a showing of the absence of such motive.

Even if this analysis is correct, Carpenter did so when he testified, when he explained his reasoning for why he went forward and when he demonstrated that the WSBA had not proved the several counts and RPC sections which were dismissed. There is in fact substantial evidence in the record as demonstrated by the discussions of Carpenter's state of mind in both this brief and the Opening Brief to support the hearing officer's finding in this regard.

By stating that the record did not support the conclusion that Carpenter lacked a dishonest or selfish motive, the Board acknowledged that this was a factual determination to be judged on appeal by ELC 11.12(b) which provides that findings of fact are reviewed based on a “substantial evidence” test. Simply saying the record does not support such finding when Carpenter specifically pointed out that the hearing officer had heard his testimony and had judged his demeanor and had pointed to the evidence which showed his state of mind does not show consideration by the Board of the application of a substantial evidence test. It does not explain why the record identified by Carpenter and found persuasive by the hearing officer does not support the finding. Did the Board find that Carpenter was not credible when he explained his motives for going forward? What parts of the evidence did the Board find was not substantial?

After a review of the record and the acknowledgement by the Association that it is not asserting there was a dishonest or selfish motive, the court should reject the Board’s change of this finding of fact by the hearing officer and reinstate it.

**Aggravating Factor of Multiple Offenses:** The root of the multiple offenses as an aggravator issue is that the Board found that

Carpenter should have withdrawn when he allegedly found out that Holden was not going to make good on his indemnification of SPI. The offenses were having a conflict and not withdrawing but these are, for all intents and purposes, the same offense. The Bar asserts that once the conflict occurred the remedy for SPI was that Carpenter had to withdraw. RPC 1.9 provides the remedy for an RPC 1.7 conflict. These rules as charged in this case are locked together.

This is not the same as a lawyer who fails to keep the client informed and takes money from the client's trust funds. Those are truly multiple offenses having different facts and which stand alone. RPC 1.9, under the facts of this case cannot stand without the finding of the RPC 1.7 violation – this makes them essentially the same offense or at least makes them so substantially related that the court should not find multiple offenses as it relates to this single client.

**Sanction:** The Association asserts that a six-month suspension is in order. While arguing that the Board's broader experience provides the reason why the Board's decision should be adopted over the hearing officer's, Answering Brief at page 38, the Bar does not provide any reasons why the Board's decision that length of the suspension should be two-months should be rejected except to say that this is the general policy.

If the Bar wishes to argue that the court should override its policy of giving "serious consideration to the Board's recommended sanction and generally affirms it unless {the} court can articulate a specific reason to reject the recommendation," *In re Disciplinary Proceeding Against McLeod*, 104 Wn.2d 859, 865, 711 P.2d 310 (1985), it is incumbent on the Bar to provide specific reasons to reject the recommendation. They have not done so.

The Bar also asserts that the recommendation of the hearing officer of a finding of a violation but without imposition of a sanction is not recognized by the rules. That is not correct. Each case involving attorney discipline must be decided individually. Each case must stand on its own. "The challenge [in attorney discipline cases] is to fashion a suitable remedy in each case before us to accomplish these goals and insure that individualized justice is dispensed." *In Re Livesey*, 85 Wn.2d 189, 193, 532 P.2d 274 (1975).

The *ABA Standards* provide that attorney discipline is a case-by-case matter, not something that is imposed in order to simply conform to other cases:

[T]he standards provide a theoretical framework to guide courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards

thus are not analogous to criminal determinate sentence, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of a lawyer's misconduct.

*ABA Standards for Imposing Lawyer Sanctions*, Theoretical Framework.

The question presented here is whether in determining “individualized justice” can an attorney discipline case be resolved without imposing a sanction or an admonition? The ELCs, the *ABA Standards* and the case law do not require imposition of a sanction in every instance in which misconduct is found. The *ABA Standards* state that the *Standards* are “designed for use in imposing a sanction.” There is nothing in the *Standards* that mandates an imposition of a sanction.

The lowest presumptive sanction is admonition. Under the express requirements of the *Standards*, once the presumptive sanction is determined mitigators must then be addressed. Mitigation is “any consideration or factors that may justify a reduction in the degree of discipline to be imposed.” [Emphasis added.] *Standard* 9.31. The *Standards* do not exclude the consideration of mitigating factors when an admonition is the presumptive sanction. If such exclusion had been intended the *Standards* would have specifically provided that where the lowest sanction was being considered mitigation was not to be taken into account. As a result, it is possible to mitigate to no sanction.

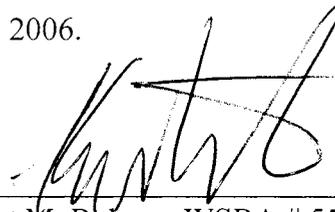
This result is entirely consistent with the Rules for Enforcement of Lawyer Conduct. Those rules contemplate that there will be situations in which a finding of misconduct is in itself sufficient. ELC 13.1 provides that:

Upon a finding that a lawyer has committed an act of misconduct, one or more of the following may be imposed [list of sanctions and remedies deleted.]

[Underlining added.] The use of “may” in this rule shows that imposition of a sanction or an admonition is permissive and not mandatory.

The only Supreme Court case on the issue is *In re Discipline of McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983). The court in that case specifically found that no sanction would be imposed despite a finding of misconduct. The ELCs, the *Standards* and the case law all provide that in the appropriate circumstance a case can be concluded by a finding of misconduct without the imposition of a sanction or admonition. That is the result which should be found in this case and the hearing officer’s recommended should be adopted.

Dated this 27<sup>th</sup> day of November, 2006.



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