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BY COURT



No. 200469-5

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re:

JACK L. BURTCH, Attorney at Law

Bar No. 4161

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APPEAL FROM DISCIPLINARY BOARD  
OF THE WASHINGTON STATE  
BAR ASSOCIATION

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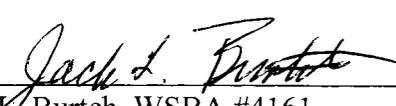
BERTHA B. FITZER, HEARING OFFICER

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REPLY BRIEF OF APPELLANT

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LAW OFFICE OF JACK L. BURTCH

  
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## **I. REPLY REGARDING BAR ASSOCIATION'S STATEMENT OF FACT.**

The events regarding Ms. McGuin started in 1988 and ended in 1996. Regardless of my age, nobody's memory is completely accurate after that many years. Despite this, the hearing officer obviously punished me for not having a complete recollection of the events. In addition, I have handled numerous cases since that time.

Bar counsel stated that I intentionally refused to pay restitution ordered the Board. It should be clear that my position always was that Ms. McGuin owed me more money than the Board had ordered me to pay in restitution, and that I was entitled to an offset. The Grays Harbor County District Court ruled against me on that issue, entered judgment against me based upon the restitution ordered by the Board and I paid that judgment in full. The fact that the Court did not include interest in the judgment indicated to me that the Court thought that I have a valid argument and took that into consideration in the final judgment.

I have never falsely testified about a fee arrangement with a client to avoid having to pay restitution.

My testimony in the Moreland matter was that I had been working on that case, but that I had not yet dictated the complaint. Roxie Moreland fired me before I could dictate the complaint. I received that case on August 16, 2004. The statute of limitations on the insurance case would have run on December 31, 2004. I was fired on December 6, 2004. I received the final information regarding damages in the first part of November, 2004.

My contract with Roxie Moreland was very clear. Ex. 12. When I first met with her, I had not considered a contingent fee contract. As a result of that conversation, I had with me an hourly fee agreement, which I modified.

I strenuously object to the statement of counsel that I intentionally falsely testified and presented false evidence to the court.

### **A. Donna McGuin Matter**

In his brief Bar counsel refers to findings of fact entered by the hearing officer. No reference is made to the actual testimony. The findings of fact have all been challenged by me in my brief. The hearing officer's findings regarding my credibility was not supported by the evidence, nor has counsel referred to any testimony that would in effect support a claim that I testified falsely. The most that happened was mistakes about dates due to the long passage of time since my first contact with Ms. McGuin.

I have always consistently testified that our original agreement was an hourly agreement. I so testified to this because that was the truth.

Furthermore, Ms. McGuin never filed a grievance against me. See the letter received by the bar from Ms. McGuin, which was dated January 8, 1997. It appears in the appendix of my opening brief on pages 31 and 32.

All references by Bar counsel to findings of fact made by the hearing officer should be ignored because he does not support those findings of fact by reference to the record. They are challenged and should not be accepted as verities in this appeal.

The disciplinary hearing, which was conducted on September 11, 2000, can certainly be used to impeach me. I do not recall in that hearing whether or not I testified that my agreement was converted to a contingent fee agreement in October 1993. If I said that, it was an incorrect date. I do not think that I should be punished for misstating dates after such a long period of time. My recollection is that it was changed to a contingent fee agreement prior to the trial, which occurred in 1996. However, I have repeatedly and unequivocally testified and argued that I had an hourly fee agreement with Ms. McGuin, which was converted eventually into a contingent fee agreement. However, when Ms. McGuin cooperated with the bar in claiming that I owed her money for sanctions, any agreement we had was breached by her and my position was that the contingent agreement was unenforceable and that either my hourly agreement applied or I was entitled to recover my time on a quantum meruit basis.

All of these things happened almost twenty years ago and it is hard to recollect dates. The one consistent thing is that I always truthfully testified that our original agreement was an agreement with her to pay on an hourly fee basis. It was only converted into a contingent fee agreement at the last minute because she had not been paying me and it was too late for me to withdraw from the case. The agreement was that she would pay me enough on fees to pay any sanctions and any other fees earned would be on a contingent basis.

The language indicating that I was not truthful to the Grays Harbor County District Court was deliberately taken out of context.

I did not tell the Court that prior to the trial we had converted the agreement to a partial contingent fee agreement. This was not a deliberate omission nor was it material. I just didn't think of it, nor did I believe it was material. The material issue was whether public policy would allow an offset against a restitution order entered by the Bar Association. My claimed untruthful statement appears on page 2 of the transcript. Ex A46. It was in reply to Ms. McGuin's statement on page 1 of that exhibit that our original agreement was a contingent fee agreement. I was surprised when it was brought to my attention that in District Court I had not mentioned the change in our agreement.

RPC 3.3 involving candor towards a tribunal requires that a false statement of fact be material. In re: Dynan, 152 Wn.2d 601, 98 P.3d 444 (2004). The material fact was that the Judge believed that an offset was against public policy.

Material facts are generally those facts upon which the outcome of the litigation depends in whole or in part. In re: Dynan, *supra*.

In the District Court proceeding I was a party, not a lawyer. Despite this, I feel that a lawyer as a party has the same obligations toward a court. I merely deny that I violated RPC 3.3 or 8.4 in regard to Ms. McGuin or Ms. Moreland. I did not lie at any stage of those proceedings.

The hearing officer, in her findings, went into great detail about the harm to the grievants, Ms. McGuin and Ms. Moreland. Yet she made it clear throughout the hearing that she would not allow testimony regarding lack of harm because of the decision in my previous case. TR 196.

It was also obvious that the hearing officer was going to allow the bar association to put in my general reputation whether we opened the door or not. TR 13-17 inclusive.

It is still my position that I had a legal right to offset the money owed to me by Ms. McGuin against the restitution ordered.

The position of the Bar is that if Ms. McGuin owed me a million dollars that I would have no right to offset the restitution amount against that debt. To me that is ridiculous. The fact is that I had sent many statements to Ms. McGuin and those statements were never contested. After the fact, she denied that she had received any statements. The record shows clearly that she in fact had made periodic payments. Why would she do this if the contract was a contingent fee agreement.

#### **B. Roxie Moreland Matter**

On August 16, 2004, I entered into an attorney-client relationship with Roxie Moreland. Reference has been made to the agreement we made. I have explained how that agreement came about in my opening brief.

On May 2, 2006, Ms. Moreland testified at the hearing that she had still not taken care of the mold remediation, although she had settled her case a significant time before. TR 335.

Prior to hiring me she had received the money from the insurance company to pay Lupo Construction but she refused to pay. When she hired me, she had the money in her bank account. TR 325, 373-374 inclusive.

I admit that once she hired me I advised her not to pay Lupo Construction since she was objecting to the workmanship.

Some of Roxie Moreland's testimony was contradicted directly by the testimony of Gary Randall, who had been hired by Ms. Moreland to make an estimate repairing the mold damage.

After I took the case, I never sent a bill to Roxie Moreland because I was on a contingent fee basis. When Roxie Moreland said she had no money at this time, this was a falsehood.

I did not get the final estimate on damages until the end of October or the beginning of November, 2004. Ms. Moreland testified that the new estimates from Gary Randall did not have any significant changes in them. However, Gary Randall admitted that significant changes had been made in the final estimates. TR 320.

During the testimony regarding the complaint of Roxie Moreland, it became very apparent that the hearing officer was not going to give me a fair hearing.

She continually would ask questions of the witnesses to support the Bar Association's complaint. She was also very arbitrary regarding objections made by me and objections made by Bar counsel. TR 288, 293-294 inclusive, 298, 365-366 inclusive, TR 416-418 inclusive.

Particularly egregious was the situation regarding my statement to my counsel under my breath that the testimony of Gary Randall was "bullshit." It was not directed to Mr. Randall, or to Mr. Burke, or to the Court. TR 281. I explained that I did not think that anyone had heard me, that I was trying to talk to my attorney. TR 281. The hearing officer continued to make that an issue, even though bar counsel had not heard what I had said. TR 282. She also referred to it in her findings. Also, reference is made regarding the hearing officers overruling my objection regarding reputation evidence. TR 296.

The court should also consider the testimony by Ms. Moreland that she could read but did not understand what she read and therefore she did not understand the contract that she entered into with me and the provision regarding the non-refundable \$2,000.00 fee. TR 382.

In direct contradiction of her testimony about her ability to read, she testified that it took her less than an hour to read the insurance policy. TR 356.

I submit that there is no evidence in the record that either Ms. McGuin or Ms. Moreland were vulnerable clients when I represented them.

It is true that I contend that the Findings of Fact are not supported by substantial evidence and that I did not receive a fair hearing.

I deny that my challenges to the Findings of Fact are deficient. I believe that my reasons for challenging the Findings are clearly set forth in my original brief. RAP 10.3(g). The hearing officer entered 184 findings of fact. I clearly challenged all of them except for those indicated in the brief. My arguments applied to each of the challenged findings on the basis that there was not substantial evidence to support them.

To have set out each finding separately would have been unduly repetitive and confusing. I would have also have had to exceed the page limitations on briefs.

As previously pointed out, in the brief of the Bar Association reference is made to findings instead of reference to the record to support the findings. I deny that the hearing officer's findings should be considered verities on appeal.

I did not receive a fair hearing. The hearing officer did not give due consideration to expert witness testimony regarding the charges against me. Even though some testimony was allowed, she made it clear that she would not consider it. TR 42-43 inclusive. In particular on page 177 of the transcript she stated:

Now, I'll allow you some latitude to explore the issue under rule 1.3 of the question of diligence, and I am doing that out of an excess of caution, but it is my role as a hearing officer to interpret the rules of professional conduct as a question of law. It is not a standard-of-conduct question and that is why the expert testimony is of little or no value.

Furthermore, the Findings of Fact page 5 made by the hearing officer made it clear that any expert testimony was not going to be considered by the hearing officer. The hearing officer did this by arbitrarily ruling that the hypothetical questions were incomplete.

Judge Kirkwood made no opinion regarding my reputation for honesty. Despite that in the cross-examination of Judge Kirkwood, bar counsel was allowed to bring in all kinds of things that were certainly not relevant to my reputation for honesty, and if the door was opened, it was opened by bar counsel. Furthermore, at that point in time the hearing officer had indicated clearly that the cross-examination received from Judge Kirkwood was for the purposes of impeachment. TR 177.

Obviously, the tape regarding the small claims case between myself and Ms. McGuin was relevant as to the issue of whether or not I had displayed candor to the court. To consider it for any other purpose is a clear violation of due process of the law. Flory v. Dep't of Motor Vehicles, 84 Wn.2d 568, 527 P.2d 1318 (1974).

## II. REPLY TO LEGAL ARGUMENT

### A. Standard of Review

I believe that the standard of review is that the findings of the hearing officer must be supported by "substantial evidence." However, the hearing officer made it very clear that whether or not a violation of the Rules of Professional Conduct occurred are questions of law, not questions of fact. TR 177. As a result she indicated that it was her role to interpret the Rules of Professional Conduct as a question of law regardless of the facts. For this reason she indicated very clearly that she is going to give little or no value to expert testimony. TR 177.

Bar counsel in the bar association's brief also refers to how a court should review evidentiary rulings. Bar counsel however, is incorrect in the definition of abuse of discretion regarding those rulings.

The Rules of Evidence, as are all rules, should be considered the same as statutes. They must be given a reasonable interpretation and correctly applied. The true definition of abuse of discretion appears in Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990). The definition of abuse of discretion contained in bar counsel's brief is inaccurate. An abuse of discretion occurs if it is exercised on untenable grounds or for untenable reasons, considering the purposes for which the trial court is exercising discretion. A discretionary decision must be based upon principle and reason. The standard of whether any reasonable person would have made the same decision as the trial court is improper. See pages 504-507 in Coggle v. Snow, *supra*, regarding discussion of this matter. The Coggle definition was upheld by the Supreme Court in the case of State ex rel Citizens v. Murphy, 151 Wn.2d 226, 236 (2004).

In State v. Lough, 70 Wn. App. 302, 853 P.2d 920 (1993), affirmed 125 Wn.2d 847, 889 P.2d 487 (1995), the court held that in ER 404(b) rulings an Appellate Court will reverse only for abuse of discretion but an incorrect application of the law will be deemed an abuse of discretion. In United States v. Sanchez-Robles, 927 F.2d 1070, 1077 (9<sup>th</sup> Cir. 1991), the court held that the trial court's construction of the federal rules of evidence is reviewed de nova.

To adopt the definition of abuse of discretion that the bar counsel suggests would encourage arbitrary and capricious decisions, which could not be overturned on appeal. The evidentiary rules are statements of law. They should be so treated in their application and construction.

**B. Bar counsel states that I failed to demonstrate that any of the Findings of Fact are not supported by substantial evidence.**

Beginning on page 13 of my brief, I analyzed the testimony of each and every witness that was presented by the Bar Association in support of their case against me. It is obvious that none of their testimony supports the Findings that were made by the court.

It should be clear that the Bar Association hearing officer did not make her decision based upon the hearing before her, but based her decision on events previously before the bar association that I had already been punished for. On page 7 of her Findings, Conclusions and recommendations, the hearing officer stated:

As Ms. McGuin's disease process was apparently progressive, and because Ms. McGuin had previously testified under oath in matters involving the same parties, Ms. McGuin's testimony in the District Court proceeding was relied upon to support the factual findings described below. The factual findings are further supported by documentary evidence, Respondent's testimony and the unchallenged Findings of Fact and Conclusions of Law entered in the previous disciplinary action.

The information relied upon was "conclusory hearsay." Such conclusory findings are not a substitute for a hearing officer's independent determination on the law and facts. Bierlein v. Byrne, 103 Wn. App. 865, 14 P.3d 823 (2000).

Furthermore, the hearing officer does not even bother to indicate specifically what findings she considered and for what purpose. In fairness, how does one know and meet such evidence?

I submit that the hearing officer made her decision regarding my credibility based upon information, which was submitted for impeachment of Judge Kirkwood's testimony. First, I do not think that the questions were proper impeachment, nor do I think that the evidence should have been admitted. See my opening brief. Secondly, the main reason for the hearing officer's decision regarding credibility, other than her obvious prejudice, was the inadmissible evidence regarding the District Court transcript and the transcript of a judge's ruling in an entirely different case where the judge dismissed the case for discovery violations. It was unfair and improper. It graphically describes why I feel that I did not get a fair hearing.

In the District Court small claims hearing, there was no opportunity to cross-examine Ms. McGuin. In the case of Flory v. Dep't of Motor Vehicles, *supra*, this court held that in a civil case that a full due process hearing must provide an individual with the opportunity to confront witnesses, to present evidence and oral argument, and to be represented by counsel.

I did not have an opportunity to confront Ms. McGuin at the hearing before the bar association hearing officer, nor did I have the opportunity to confront her at the District Court small claims hearing. Certainly my license to practice law is as important as a drivers license.

**C. The Washington State Bar Association alleges that I received a fair hearing**

For the many reasons stated, I believe that I did not receive a fair hearing or due process. Certainly there was no appearance of fairness.

In order for the determination of whether or not I received a fair hearing, the fairness of the proceeding should be based on a view of the record of proceedings as a whole, not on a few isolated comments. Discipline of Haskell, 136 Wn.2d 300, 962 P.2d 813 (1998). I sincerely hope that each member of this court will review the entire transcript. A fair review of that transcript would show clearly that I did not receive a fair hearing. The mere fact that the hearing officer decided not to listen to the testimony of Ms. McGuin, and deny us an opportunity for cross-examination is one reason that I did not receive a fair hearing. Her decision of credibility based upon inadmissible evidence is another reason I did not receive a fair hearing. Her refusal to allow attorney John Farra to testify, or to give any credence to expert testimony regarding the facts in support of whether or not I violated the rules also indicates that I did not get a fair hearing. I beg the court to read the entire transcript even if that is not the usual procedure.

**1. The Bar Association states that I was given ample opportunity to present "expert witness" testimony.**

I believe that I have clearly explained that this was not the case.

**2. The Bar Association claims that the hearing officer properly allowed impeachment and rebuttal evidence on my character after I opened the door.**

No opinion was asked of Judge Kirkwood as to my honesty. It was only after cross-examination by the Bar counsel, and after the hearing officer has allowed extrinsic evidence as to other alleged acts of misconduct on my part, that my attorney asked Judge Kirkwood about my reputation. TR 71-72.

The hearing officer at that time told Bar counsel:

"...and I think you have opened up her right to deal with his reputation."

TR 71.

It should be remembered however that on direct examination, no opinion was made regarding my character for truthfulness or for any other particular character trait.

To open the door, a witness brought forward by a party must first testify to a trait of character. State v. Avendano-Lopez, 79 Wn. App. 706, 716, 94 P.2d 324 (1995).

Furthermore, on cross-examination, it was not proper to elicit specific acts of alleged misconduct even if character was an issue. State v. Putzell, 40 Wn.2d 174, 242 P.2d 180 (1952).

For purpose of evidence rules, character means general traits such as honesty, temperance, or peacefulness. 5 Washington Practice § 44.2, p. 383.

ER 404(b) expresses the traditional view that evidence of prior crimes, wrongs or acts is inadmissible to demonstrate a person's general propensities.

It is obvious that rule 404(b) is based upon a belief that such evidence is too prejudicial. The policy reasons for this rule is set forth in State v. Bowen, 48 Wn. App. 187, 190, 738 P.2d 316 (1987), to wit:

In determining whether evidence of other crimes, wrongs, or acts were properly admitted under ER 404(b), the court first must analyze whether the evidence is logically relevant to prove an "essential ingredient" of the charged crime rather to show that the defendant had a propensity to act in a certain manner which he followed on that particular occasion. (citation omitted). Second, the court must determine whether the evidence of other criminal acts is legally relevant i.e., whether probative value of the evidence is substantially outweighed by its prejudicial effect. Third, if the evidence is admitted, the court must limit the purpose for which it may be considered by the jury. (citation omitted). Whether the proper evidence meets the above criteria is a discretionary determination made by the trial court; its decision will not be overturned absent manifest abuse of discretion. (citations omitted) Nonetheless, in doubtful cases, the scale should be tipped in favor of the defendant and exclusion of the evidence.

The hearing officer committed prejudicial error in allowing evidence under ER 404(b). The requirements for doing this are set forth in State v. Baker, 89 Wn. App. 726, 950 P.2d 486 (1997), as follows:

Before admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of the evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect.

The clear trend is toward excluding such evidence unless a careful analysis shows that the evidence truly is probative on a disputed, material issue, other than the person's general tendency toward misconduct. State v. Stanton, 68 Wn. App. 855, 845 P.2d 365 (1993), 61 WsL 1213, 1218.

Furthermore evidence that satisfies the requirement of rule 404(b) is not automatically admissible. All of the other rules of evidence continue to apply. The evidence that satisfies rule 404(b) may still be objectionable on the basis of general irrelevance, hearsay, or other rules of evidence.

As stated on page 1218 of 61 WsL 1213, "once the court identifies the specific purpose for which the evidence is relevant, under Washington case law it must state on the record the reason for the underlying relevancy. It must, therefore, identify why a particular "magic password" applies to the instant case.

The hearing officer did not comply with any of these rules or indicate what the evidence was relevant to. TR 630-642 inclusive.

The most egregious error made by the hearing officer is that "pattern of misconduct" was judged relevant to the violations charged, and was not confined to determining sanctions. It is my position that first the Bar Association had a duty to prove that I had done something wrong in regard Ms. McGuin or Ms. Moreland. Then and only then, would any previous sanctions given by the Bar Association be relevant to the sanctions that should be imposed for doing something wrong in regard to Ms. McGuin and Ms. Moreland. Instead, all of those things, together with every other conceivable act of misconduct in the mind of the Bar Association, was used to prove that I had done something wrong as far as the complaint accusing me of unethical treatment of Ms. McGuin or Ms. Moreland.

Further reference should be made to the reputation evidence allowed by the hearing officer. In particular, scrutiny should be made of the testimony of Gary Randall. TR 290, 293-298 inclusive. The case of Guijosa v. Wal-Mart Stores, 101 Wn. App. 777, 6 P.3d 583 (2000), held that for the purpose of admitting evidence of a reputation for truthfulness in the community, the community must be both a general and neutral environment. None of the testimony of Gary Randall should have been considered or allowed.

The Findings of Fact entered by the hearing officer were not based upon any testimony at the hearing, but were all based upon improper hearsay evidence. Ex. A3 was a newspaper article, which was admitted into evidence. TR. 59-60. Ex. A11, which was a transcript before the hearing examiner in the prior McGuin proceeding, was admitted as substantive evidence, and not as impeachment evidence. TR 164-165.

Exhibits 33-36 inclusive, all had to do with the prior discipline actions, and was used to determine whether or not the alleged charges in this action were proven. TR 258-259. The court also allowed as substantive evidence my deposition, Ex. A47, Judge McCauley's ruling on sanctions on an unrelated case Ex. A48, and the Court of Appeals unpublished decision on that case Ex. A49. See TR 639. All of this was allowed into evidence for the purpose of determining whether or not the complaint of the Bar Association had been proven.

Throughout the hearing, the hearing officer would repeatedly make objections or ask questions to support the Bar Association's case. TR 380-386 inclusive, 416-418 inclusive, 428-429 inclusive, 441-442 inclusive, 462, 504, 523, 527-528 inclusive, 531, 546, 648-649 inclusive, 654.

### III. REFLECTIONS

In the case of In re: Hawkins, 77 Wn.2d 777, 466 P.2d 147 (1970), the court held that disciplinary action should be taken against an attorney only when a clear preponderance of the evidence shows that the acts charged have been done, and were prompted by improper motive. Doubts are to be resolved in the attorney's favor. That case has never been overruled. That holding was certainly ignored by the hearing officer.

This court in the case of In re: Fraser, 83 Wn.2d 884, 523 P.2d 921 (1974), held that, in the absence of a showing of excessive and unconscionable fees either charged or collected by an attorney, the proper forum for resolution of whether an express fee agreement existed between an attorney and his client and, if so, its terms is a court of law, not a disciplinary proceeding. This court subsequently overruled that decision in Fraser in the case of Discipline of Boelter, 139 Wn.2d 81, 96, 985 P.2d 328 (1999). It is suggested that the court should return to the rule set in In re Fraser, supra. It is submitted that the Supreme Court's present position as stated in Discipline of Boelter, supra, interferes with a person's ability to contract and violates the United States Constitution, Art. 10, clause c and the Washington State Constitution, Art. I, § 23, regarding impairing the obligations of contracts.

Furthermore, my claim of right to keep the money that was paid by Ms. Moreland for me to take the case on a contingent fee basis is supported by the case of In re: Caplinger, 89 Wn.2d 828, 576 P.2d 48 (1978). The court held in that case that an attorney's withholding of a client's money or his appropriation of a client's property under an honest claim of right does not constitute misappropriation of the client's funds for purposes of attorney discipline.

### IV. SANCTIONS

It is my position that I did nothing wrong regarding either Ms. McGuin or Ms. Moreland. I have legal support for every decision I made, including the right to offset against the restitution ordered by the Bar Association all of those fees that I clearly believe that were owed to me by Ms. McGuin. I had worked for her for over ten years and my net fees were less than \$4,000.00.

In regard to my contract with Ms. Moreland, I had legal precedent that supported the position I took.

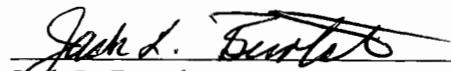
However, if the Court finds that I did in fact violate ethical rules, I think that disbarment is not proportional. I refer to some old cases, but I think they made sense. In re: Coons, 41 Wn.2d 599 (1952) and In re: Miller, 95 Wn.2d 453, 625 P.2d 701 (1981).

I also refer to portions of the brief supplied by my counsel to the disciplinary board. Those portions are in the appendix as A1-A4 inclusive. Specifically, I refer to section F, page 26-30 inclusive. I also ask you to consider In re: Fraser, supra, as lack of diligence was a factor in that case. I should point out that I have always been busy in my practice, that I had many other cases pending, and that I had had the case approximately four months before I was discharged. I also did not receive the final damage estimates until shortly before I was discharged.

**V. CONCLUSION**

I request that the Court reverse the decision of the hearing officer and the disciplinary board and find that I did not receive a fair hearing, and that the charges be dismissed. I certainly request that this Court not make a finding of disbarment.

Respectfully submitted this 27 day of June, 2007.

  
\_\_\_\_\_  
Jack L. Burtch, pro se  
WSBA #4161

1  
2 Mr. Jack Burtch was admitted to the Washington State Bar in September of 1955. In 1989,  
3 while Mr. Burtch was going through a particularly stressful divorce, he received a suspension from  
4 the Washington State Bar Association. *In Re Burtch*, 112 Wn.2d 19, 770 P.2d 174 (1989). At the  
5 time, the Hearing Officer made no findings that Mr. Burtch had committed any dishonest act, nor  
6 was there a finding that Mr. Burtch operated with a dishonest or selfish motive. *Id.* The  
7 Washington State Supreme Court found that Mr. Burtch's personal and emotional problems at the  
8 time were a mitigating factor. *Id.* In 2002, he received an admonition based on his conduct while  
9 representing Ms. McGuin. The admonition was not actually filed until February 2004,  
10

11 In 1991, the Washington State Bar Association reprimanded Mr. Burtch, again related to the  
12 1989 stressors. Mr. Burtch's position is that the 1991 reprimand was a part of the same incidents  
13 complained about in 1989 and should have been covered in the 1989 action.  
14

15  
16 **A. SANCTION STANDARDS** – If misconduct is found, then two-tier process to determine  
17 proper sanction. The Board must determine a presumptive sanction by considering:

- 18 **1.) The ethical duty violated;**  
19 **2.) The lawyer's mental state;** *(the Board must determine whether the lawyer acted*  
20 *intentionally, knowingly or negligently) McMullen 127 Wn.2d 169 citing ABA 3.0*  
21 **3.) Extent of the actual or potential harm caused by the misconduct** *(the Board*  
22 *should consider the harm to the client, the legal system or profession that is reasonably*  
23 *foreseeable at the time of the lawyer's misconduct – the potential for injury by the*  
24 *lawyer's misconduct need not be actually realized.*

25 With respect to Mr. Burtch's mental state, the Respondent submits that he was at most,  
26 negligent and that he did not act intentionally to harm either Ms. McGuin or Ms. Moreland.  
27 Moreover, Mr. Burtch disputes that he harmed either client. In fact, the testimony indicates that  
28 Ms. Moreland successfully dealt with her legal issues and had a fair outcome. Ms. McGuin was  
paid the amount of restitution ordered by the small claims court. The Board could have and  
arguably should have reduced the monetary restitution to judgment. The Board acknowledged to

1 Ms. McGuin that restitution is not always paid. EX A-39. However, Ms. McGuin used the small  
2 claims court action to collect – which she did successfully. EX A-4. This appears to be an issue of  
3 first impression relating to whether a court judgment overrides an administrative admonishment.  
4 However, as the WSBA has offered no case law on the issue, the issue should be resolved in Mr.  
5 Burtch's favor.  
6

7 The second tier of analysis is whether there are aggravating or mitigating factors that  
8 should lead to an alteration of the presumptive sanction or affect the length of suspension.

9 Mitigating factors include:

- 10 (a) absence of a prior disciplinary record;  
11 (b) absence of a dishonest or selfish motive;  
12 (c) personal or emotional problems;  
13 (d) timely good faith effort to make restitution or to rectify consequences of misconduct;  
14 (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;  
15 (f) inexperience in the practice of law;  
16 (g) character or reputation;  
17 (h) physical disability;  
18 (i) mental disability or chemical dependency including alcoholism or drug abuse . . . ;  
19 (j) delay in disciplinary proceedings;  
20 (k) imposition of other penalties or sanctions;  
21 (l) remorse;  
22 (m) remoteness of prior offenses.

23 ABA STANDARDS Std. 9.32(1991 ed. & Feb. 1992 Supp.).

24 Aggravating factors include:

- 25 (a) prior disciplinary offenses;  
26 (b) dishonest or selfish motive;  
27 (c) a pattern of misconduct;  
28 (d) multiple offenses;  
29 (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with  
30 rules or orders of the disciplinary agency;  
31 (f) submission of false evidence, false statements, or other deceptive practices during the  
32 disciplinary process;  
33 (g) refusal to acknowledge wrongful nature of conduct;  
34 (h) vulnerability of victim;  
35 (i) substantial experience in the practice of law;  
36 (j) indifference to making restitution;  
37 (k) illegal conduct including voluntary use of controlled dangerous substances.

38 Mitigating Factors -

1 Mr. Burtch submits the following mitigating factors that are supported in the hearing  
2 transcript: (b) absence of a dishonest or selfish motive; (c) personal or emotional problems  
3 (medical); (e) full and free disclosure to disciplinary board or cooperative attitude toward  
4 proceedings; (g) character or reputation; (j) delay in disciplinary proceedings; (k) imposition of other  
5 penalties or sanctions; and (m) remoteness in time from actions.  
6

7 Although delay in bringing a case doesn't automatically result in reduction of sanction, in  
8 this case it should. *In Re Disciplinary Proceeding against Dann*, 136 Wn.2d 67, 960 P.2d 416 (*En*  
9 *Banc*, 1998). Similar to the Dann case, the proceedings regarding Ms. McGuin are old and the  
10 WSBA took three years to bring the charges on incidents that date back to an attorney client  
11 relationship that began in approximately 1988. The age of the complaint is a factor to be  
12 considered. *In re Tasker*, 141 Wn. 2d 557, 9 P.3d 822 (*En Banc*, 2000).  
13

14 Another factor to be considered is Mr. Burtch's mental state. *In Re Kronenberg*, 155 Wn.2d  
15 184, 117 P.3d 1134 (*En Banc*, 2005). In addition, although it is not specifically referenced as a  
16 mitigating factor, this tribunal should consider that some of the complaints now made by the WSBA  
17 are a result of an unclear Admonition, which if had not occurred, may not have resulted in further  
18 action relating to Ms. McGuin. See, *In Re Anschell, supra*, 149 Wn.2d 484, 519-20, 69 P.3d 844  
19 (2003), and *In Re Kagele, supra*, 149 Wn.2d 793, 820-21, 72 P.3d (2003).  
20

#### 21 Aggravating Factors-

22 Mr. Burtch concedes that he has (a) prior disciplinary offenses; and (i) substantial  
23 experience in the practice of law, which are also in the hearing transcript. The other aggravating  
24 factors alleged by the Bar Association are neither supported by evidence in the record, nor by the  
25 interpretation of the aggravating factors by the Co

26 The Supreme Court has noted that it is not proper for an aggravating condition to be the  
27 refusal to acknowledge wrongful nature of conduct. *In Re Kronenburg, supra*. The *Kronenburg*  
28

1 Court specifically noted that non-admission of wrongdoing should not be considered by the  
2 Hearing Officer. Id. Mr. Burtch asks that this tribunal not consider this factor per Kronenburg.

3 The WSBA alleges that the clients involved in these two grievances were vulnerable.  
4 However, Ms. McGuin may be a vulnerable adult now, but was not when the incidents occurred.  
5 In fact, she pursued her own remedy in small claims court and prevailed. EX A-4. Ms. Moreland  
6 was not vulnerable in the ways contemplated in case law either. See, *In Re Heard*, 136Wn. 2d 405  
7 963 P.2d 808 (1998) where client was brain injured, had history of drug and alcohol abuse, sexual  
8 abuse and became sexually involved with her attorney; see also, *In Re Halverson*, 140 Wn.2d 475,  
9 9998 P.2d 833 (2000), sexual relationship with client in a divorce. The Supreme Court in *In Re*  
10 *Anschell, supra*, 149 Wn.2d 484, 69 P.2d 844 (2003) the court indicated that the hearing record did  
11 not establish that any client was particularly vulnerable or suffered from a physical or mental  
12 disability. The hearing record in this case also does not demonstrate to the required burden of  
13 proof that vulnerability is an aggravating factor.

14  
15 **F. DISBARMENT IS A DISPROPORTIONAL RESULT FOR VIOLATIONS RELATING TO**  
16 **MS. MCGUIN AND SUSPENSION IS A DISPROPORTIONAL RESULT FOR ANY**  
17 **VIOLATIONS RELATING TO MS. MORELAND.**

18 The final portion of analysis relates to whether, if a sanction is imposed, that sanction is  
19 proportional discipline as compared to other cases. *In Re Discipline of Poole*, 125 P.3d 954, 156  
20 Wn.2d 196 (*En Banc*, 2006). This is not a case like *Poole*, in that the allegations involve an  
21 interpretation of a legal issue, not a material misstatement of fact to a tribunal. See also, *In Re*  
22 *Whitt*, 149, Wn.2d 707, 72 P.3d 173 (*En Banc*, 2003). The alleged falsity of statement depends  
23 upon the context and the time in which Mr. Burtch presented his legal basis for requesting an  
24 offset. The testimony in question did not address the conversion from fee agreement to a  
25 contingent fee, back to a request for hourly fees on a quantum meruit basis. At most, Respondent  
26 believes censure or admonition would be appropriate.  
27  
28

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In Re Discipline  
of Jack L. Bertel  
Bar No. 4161

no. 200469-5  
affidavit of  
mailing

Jack L. Bertel certifies as follows:

- (1) ON June 28, 2007 I mailed  
by first class mail a copy of  
Reply Brief of Appellant to Jonathan  
N. Burke, Disciplinary Council,  
c/o Washington State Bar Association,  
1325 4th Avenue - Suite 600  
Seattle, Washington 98121-2330.
- (2) at said time the postage was  
paid in full.

I declare under the penalty of perjury  
under the laws of the State of Washington  
that the foregoing is true and correct:

Abodeen, Washington  
June 28, 2004

Jack L. Bertel  
Signature