

No. 200,521-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

JEFFREY G. POOLE,
Attorney at Law

Bar Number 15578

REPLY BRIEF OF RESPONDENT POOLE

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**I. THE HEARING OFFICER'S ALTERNATIVE FINDINGS
DO NOT MEET THE BURDEN OF PROOF.**

How can the Bar have met its burden of proof if the hearing officer could not decide which of her alternative and contradictory set of facts were correct? The Bar does not seem to grasp that the hearing officer could not decide between two mutually alternative facts. The word "or" is not a conjunctive, it is a disjunctive. If both were proven, then she would have said so by using "and" - not "or". The Bar cannot have met its burden of proof because the Hearing officer could not decide which act was proven. Since the Hearing officer could not conclude which set of facts were proven it must be concluded that the Bar did not prove either one. Faulty alternative findings of fact result in faulty conclusions of law as there can be no actual connection between the findings (which have not been proven) and the conclusions of law which rely upon them. The unproven conflicting and contradictory facts in this case are the underpinnings for Conclusions of Law 1-5 and 10, which therefore must be vacated. This court has and does make determination that findings of fact were not proven at the hearing.¹

¹ *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, ___,157 P.3d 859 (2007); *In re Poole*, 156 Wn.2d 196, 216, 219, 125 P.3d 954 (2006); *In re Disciplinary Proceeding Against Huddleston*,137 Wn.2d 560,569-571, 974 P.2d 325 (1999).

Mr. Poole could have rested after the Bar presented its case. The hearing officer then would have had to decide what happened. Mr. Poole was not required to prove his innocence and the presumption is that he is innocent until the Bar proves otherwise

In 1952 the Court said in *In re Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952):

*The respondent in such a matter [attorney discipline proceeding] is, upon his admission to the bar, certified by the court to have then attained high moral and professional standards. **It is to be presumed that he has maintained them** and has performed his duty as an officer of the court in accordance with his oath. Every doubt should be resolved in his favor, and only upon a clear preponderance of the evidence that the acts charged have been done, and were prompted by improper motives, should disciplinary action be taken. The privilege - and it is **a privilege, not a right - to practice his profession cannot be lost to the practitioner upon slight evidence.** [emphasis added.]*

The court has recently stated that the “*every doubt should be resolved in his [the lawyer’s] favor*” language is not to be construed to mean that a beyond a reasonable doubt standard applies. *In re Discipline of Guarnero*, 152 Wn.2d 51, 61-62, 93 P.2d 166 (2004). Still, Mr. Poole is entitled to a presumption of ethical behavior which can only be overcome by evidence that is only slightly lower than beyond a reasonable doubt. His privilege to practice law cannot be lost upon slight evidence.

In this case the hearing officer's findings fundamentally demonstrated that the hearing officer could not determine what happened, *i.e.* what act actually occurred. Because bar discipline cases are quasi-criminal proceedings, deal with a lawyer's license to practice law, and cannot be proven by "slight evidence", the Hearing officer's inconclusive findings cannot be upheld as the basis for invoking discipline.

The Bar asserts that it make no difference which set of facts are the correct set - It *does* matter that the hearing officer could not specify the act on which the violation was found. The Bar erroneously relies on *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). *State v. Kitchen* was subsequently modified in *State v. Coleman*, 159 Wn.2d 509, 150 P.3d 1126 (2007). *State v. Coleman* holds that when the prosecution presents evidence of multiple acts of like misconduct for one charge, each of which could form the basis of the count charge, either the State must elect which act is relied upon for conviction, or the court must instruct the jury to agree on the specific criminal act committed by unanimity. *Id.* at 511. Under these circumstances in criminal law, there must be unanimity as to which act or incident constituted the crime. The Hearing officer's "or" findings are not and cannot be considered to be an election of which acts formed the basis for the proof of the charge – the Hearing officer acknowledges that she could not conclude which she was relying upon.

The importance of this is shown because the alternative findings also have different import. One alternative finding produces knowing and intentional conduct and the other finding results in negligent conduct. These two result in significantly different sanctions. The decision in this case must be invalidated. If the hearing officer could not conclude what Mr. Poole was guilty of, the Bar failed to prove its case.

The Bar's also argues that because Mr. Poole does not cite legal authority in making this argument that it "*need not be considered on appeal.*" The Bar ignores the reality that this issue has not ever been presented to this court. The Bar chose not to move for reconsideration of these alternative findings. Now that it finds itself on the horns of a dilemma, the Bar wants the court to simply ignore the whole thing.

The Bar either wants to have this court ignore this issue or hold that both alternative set of facts were proven. Both arguments must be soundly rejected. The burden of proof cannot be ignored and two mutually exclusive, alternative "or" findings cannot be used to prove the same count. Therefore, RFFCLR 9, 31, 56 and 59 must be stricken and the counts on which they rely on must then be dismissed (Nos. 1 - 5 and 10).

RFFCLR 9 states:

“Moreover, in order to contend in the Moore Grievance that he had found and corrected his inadvertent mistakes, Respondent either found all bills with old time, or he failed or refused to look for them”.

Both cannot be true and the Bar failed to prove which. Furthermore, this finding is not based on Moore. Instead *Moore* found that Mr. Poole did correct errors once they were brought to his attention. Moore, RFFCLR 12 and 20. There was no finding that Mr. Poole had found every bill containing every mistake. No substantial evidence supports RFFCLR 9.

RFFCLR 31² states:

“Either the objection that Respondent had asserted in his deposition and motion to the Disciplinary Board were unfounded (i.e. not based upon his knowledge, information or belief formed after a reasonable inquiry) or he withheld Volumes 1 and 2 of the file.”

Here again, it cannot be both. The Bar failed to prove which one it was because if it did, the hearing officer would have so found.

RFFCLR 56 states that Mr. Poole either:

“misrepresented the extent of his efforts to find responsive bills or he willfully failed in his duty to cooperate and look for them.”

² The Board found that the issues over Volumes 1 and 2 were not an issue at the hearing and “was not the subject of testimony at the hearing.” Thus, based on the Board’s finding and Mr. Poole’s arguments, this finding must be stricken. Furthermore, as set forth in the Opening Brief, this entire finding was based solely upon the Hearing officer’s conjecture and was unsupported by the record.

Once again, it cannot be both. The Bar again failed to prove which one was true.

RFFCLR 59 states:

“Respondent’s principle defense to the non-production of the SO file was that he had a legitimate basis for objecting to the production of a file dating back many years. But if he did, he failed to timely and properly assert it. Moreover, either the objection was made without looking at the file or it was untrue, or Respondent’s declaration stating that he could not find two volumes was untrue.”

The Bar again failed to prove which one it was.

The hearing officer was unable to determine which of the alternatives contained in these four findings was established by a clear preponderance of the evidence. These findings must be stricken. Counts 1, 2, 3, 4, 5 and 10 in one way or another are based on these alternative findings and therefore must be stricken. This court does not uphold the hearing examiner's of conclusions if they are not supported by the findings of fact. *In re Discipline of Felice* 112 Wn.2d 520, 525, 772 P.2d 505 (1989).

The Bar failed to prove what was done and what the conduct actually was. There can be no conclusion there was a violation when no act constituting a violation was found. The Bar nonetheless claims that by a clear preponderance Mr. Poole committed two mutually exclusive acts based on the same facts. This is not possible. Mr. Poole does not concede

that either occurred, he claims neither occurred. Nonetheless Mr. Poole did not have to prove what did or what did not happen, the Bar had to prove what happened.

This is the opportunity for this court to reemphasize that the Bar must prove the facts on which its counts are based and that the court is not going to take a lawyer's license and livelihood away because a hearing officer simply *thinks* the lawyer is guilty of something without proof of actual guilt. The hearing officer's speculative and improper decision should be vacated.

II. THE BAR'S CIRCUMSTANTIAL CASE RELATED TO THE PRODUCTION OF BILLINGS FILES IN RFFCLR 8, 17, 21 AND 23 WAS NOT PROVEN. IT FAILED TO PROVE THAT THERE WAS ONLY ONE REASONABLE CONCLUSION AS TO WHY CERTAIN BILLS HAD NOT BEEN PROVIDED IN 2004.

The Bar did not directly address or discuss Mr. Poole's argument that since the Bar's case was circumstantial, the Bar "*must produce facts from which only one reasonable conclusion may be inferred.*" *In re Guarnero*, 152 Wn.2d 51, 61, 93 P.3d 166 (2004). RFFCLR 7, 21 and 23 provides that all but one bill listed in Exhibit 15 had been sent were based solely on circumstantial evidence.

Mr. Poole is not rearguing the facts presented below. Instead, both the evidence and ordinary common sense establish that there was at least one

other reasonable conclusion that could have been reached as to why the billings were not produced. While Mr. Poole recognizes that the hearing officer found his explanation not credible, the reasonableness of an alternate conclusion is not dependent upon the lawyer proving he is innocent. The test in determining whether the Bar has met its burden in a circumstantial case is whether all other reasonable alternatives for another conclusion have been eliminated. Even without responding evidence, arguments that present reasonable alternatives to the Bar's conclusion are in and of themselves sufficient to defeat a circumstantial case. For example, it is just as reasonable that the subject bills were put in the file sometime after July 2004 than before and the Bar did not prove that this was not a reasonable possibility. The Bar must show that there is only one - one -, reasonable conclusion that can be made and no others. This is true even if the lawyer does not put on a case but instead presents at least one reasonable alternative conclusion in argument. Even if the hearing officer does not find the facts on which the argument is based is credible, if those arguments could result in another reasonable conclusion, the Bar has failed to meet its burden.

Mr. Poole presented argument at the hearing sufficient to establish there was at least one another reasonable alternative conclusion as to each bill. Even if the hearing officer determined that she was unwilling to find

that Mr. Poole proved what did happen, it does not mean that Mr. Poole's arguments as to what happened were unreasonable possible conclusions. The Hearing officer did not find that Mr. Poole's arguments as to what happened were unreasonable, only that she was unwilling to use them as the basis for proof of what did happen. For example, the testimony of Bar Counsel that she saw billing files in 2006 is no proof that either of those bills had been sent or were in the billing files in 2004. The presence of a bill in a folder in 2006 does not prove it was there in 2004.

Other findings based on circumstantial evidence fail to show that only one reasonable conclusion can be drawn from the facts. Particularly significant are those based on the opinion of the hearing officer as to what happened:

The mistake on the Moore billings and the investigation of the Moore Grievance should have resulted in Respondent's soring his files for all such billings errors so the he could make things right for his clients, *regardless of ODC requests for such billings.*" (emphasis in original).

RFFCLR 8 is simply the hearing officer's opinion and is not based on substantial evidence. In this the case the Bar did not charge Mr. Poole with any counts related to harm to "*his clients*" in connection with *Moore* type billing errors. Second, "*should have*" is the hearing's officer opinion. Third, it is irrelevant verbiage because there is no connection between "*billings errors*" and the information sought by the Bar because there may

well have been errors in bills that fell completely outside the Bar's 2004 request. RFFCLR 8 also conflicts with RFFCLR 57.

The Bar, the hearing officer and the Board all claimed, based on their opinion and speculation, that the outcome of the *Moore* hearing "might" have been different if all of the other bills would have been produced. No substantial evidence or even circumstantial evidence supports this speculative statement. The *Moore* decision itself belies this speculative determination.

There was essentially one act which led to almost all of the charges: the decision to bill previously unbilled time. Mr. Poole ensured that the work had been done and the time had not been billed. The incorrect and multiple billings were accounting errors, were not intentional, and were not motivated by greed or dishonestly as the Association conceded. The hearing office did not find any bad faith obstruction of the disciplinary process. The single decisions to bill the e old time should not be considered a pattern of conduct because there multiple clients affected by the single act. Decision, pg.11, Para. 25.

Another problem finding is RFFCLR 17 which is pure speculation and is not supported by substantial evidence: "***although they cannot be identified or quantified***, some of the bills in Ex. 14 were sent to client and were responsive to the July Request." (emphasis added). It is hard to imagine a more speculative finding than this.

A summary of Mr. Poole's testimony is set forth below that addressed each file identified in Exhibit 15. As discussed above, even if not accepted as proof of what did happen, they are at minimum, reasonable

explanations as to what could have happened and as such the Bar failed to meet its burden to prove its circumstantial case because there are other reasonable conclusions as to what might have happened. That is all that is required to refute a circumstantial case.

- The AR bill was corrected in February, 2002 and may not have been in the billing file at the time he looked. TP 724-725.
- The JA billing was not sent as JA was deceased at that time. TP 725-726.
- The Mr. B bill would not have been sent because there had be an agreement reached as to the old time prior to this bill, it would not have been sent out. TP 726-727.
- The MB bill would not have gone out because it contained mistake, was part of a PI case, there were hand written corrections in his notes and the bill went out in January 26, 2005 when the correction was made. TP 727-728. Furthermore, the time that appeared that fell within the time period in the Bar's letter was the wrong date and the correct date did was not within the time period contained in the request. TP 768-769
- The AR bill would not have gone out since AR had multiple billing files and A was a long standing client. The mistake would have been corrected and sent with a credit and would not have been in the billing file. TP 766-767.
- The KC bill would not have been sent out with stale time because this was a long standing client that would not have been asked to pay for this time. TP 770.
- The MC bill would not have gone to MC because MC was not being billed for this time, its insurance carrier was. TP 770-771.
- The billing for A & LC was a double billing for a flat fee case and would not have been sent out. TP 771-772.
- The billing for L&DC was not sent because the Cs were in bankruptcy and this the bill was going to be a write off. Other time was printed out in order to remove the time from active other active client billing slips to clean up the file. TP 772-773.
- The MD bill was a pro bono case and was not sent and the client did not even live at the address listed on the bill, as the client was homeless. TP 773-774.

- The TB billing was in already collections and the bill was run out simply after the suit had been filed. TP 774-775. The CBE bill had been run out after payment on a flat fee case to clean up the system. TP 775-776.
- The GD bill would not have gone out because GD was another long standing client and had paid for the work billed back in 1995 with the exception of those small amounts. Mr. Poole treated his clients differently. TP 776-77
- The JG bill was not sent because it had “hold” written on the bill. TP 779-780.
- The GB bill was a draft that was but in the file and not sent because it had the number and dates crossed off and was never finalized. TP 780.
- The RJ bill would not have been sent because the 2001 time did not come within the 6 month time frame in the Bar’s letter. TP 780-781.
- The RH bill was not sent since it was a bill for a trial that had already been billed and paid for. TP 782.
- The JCJ bill because this person was not the client that was to be billed and this bill had mispostings and “was screwed up.” TP 782-783.
- The Kennedy billing file was in a separate collection file and was not kept with the billing files at the time. RP 795-797. if he had located it he would have sent it. TP 797.
- The Jacobson bill was a client that had all files. Including the billing file, in a different location because it was in collections and Mr. Poole has “forgotten about it.” TP 798. Mr. Poole subsequently produced the bill in another matter prior to the hearing in this matter.
- One GB bill was produced at during the Moore hearing, which the Moore hearing officer stated: “*Mr. Poole could have refrained from mentioning them, but chose to identify them which is evidence of his sincere effort to correct past billing problems.*” The other GB bills were the same billing just repeated on for several months. Once Mr. Poole found the first bill he produced it at the hearing and stop looking further, believing he had found the responsive bill. TP 799-800; 784.
- The SO Billing file was kept in a separate location. TP 670. These findings also are not supported by substantial evidence because Mr. Poole testified he might have missed some by going too fast and made a mistake. TP 783. Mr. Poole testified in his deposition

and at the hearing that when he looked for files in response to the Bar's July request, he only looked in the billing file cabinet itself. TP 707; 713. Further, the Bar had to prove that the bills were in the billing file at the time Mr. Poole looked at the files in the cabinet. It produced no evidence of this. If a bill was found in a file in 2006, that it is not evidence that it in fact the bill was sent to client in 2004 nor is it evidence that it was in the billing file in 2004 when Mr. Poole conducted his review.

RFFCLR 8, 17, 21 and 23 are not supported by substantial evidence under this circumstantial case.

The Hearing officer concludes from her incorrect RFFCLRs that Mr. Poole must have acted "knowingly" when he did not produce the bills but this determination is based on RFFCLRs of fact which are not reliable since they are based on circumstantial evidence which cannot be sustained as there are other reasonable conclusions which can be drawn from the evidence presented by the Bar.

III. RFFCLR 25, 26, 27 AND 30 REGARDING THE SO BILLING FILE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND MUST BE STRICKEN.

The matter of the SO billing file is not an instance of a lawyer's failure or refusal to cooperate. Within two days after receipt of the auditor's letter Mr. Poole's counsel set forth his objections regarding this file. Mr. Poole promptly and completely supplied all other information

and documentation the auditor requested.⁵ The Bar then sent a letter several months later and again, Mr. Poole's counsel sent an E-mail 11 days later setting forth Mr. Poole's concerns and objections. Mr. Poole also produced what he believed were the relevant portions of the file that addressed the auditor's specific area of inquiry. The Bar argues that this constituted noncooperation. It did not.

The Bar proceeded while ignoring the facts that: (1) Mr. Poole suggested in writing that this matter be resolved by the Hearing officer who ordered the audits and that Mr. Poole would abide by the decision; and, (2) that the Chair of the Board hear the matter and that Mr. Poole would abide by that decision. Mr. Poole never refused to abide by any decision made in this matter. He wanted to make his objections and present his arguments. This is a fundamental right that is guaranteed to citizens, which includes Mr. Poole and any other lawyer involved with the WSBA. The Bar cannot take a lawyer's assertion of the due process rights and paint it as noncooperation. Mr. Poole then went so far as filing a motion for a protective order with this court before the Bar petitioned for

⁵ Mr. Poole responded to all of the rest of the auditor's letter on May 5, 2004, 10 days after his receipt of the letter. Ex. 20.

his interim suspension. When this court ordered Mr. Poole to turn the file over and gave him ten days to do so, he did. He is not guilty of noncooperation.

As a lawyer, Mr. Poole attempted to resolve this issue at the lowest level and with a minimal amount of time for each party. He initiated and came forward to work the matter out, not to engage in a six month fight and end up before this court facing suspension. It was the WSBA who continually rebuffed Mr. Poole's offers. Ex. 9; 000041. This situation is not an instance of a lawyer's failure or refusal to cooperate. It is a situation of a lawyer doing what good lawyers do – try to work differences out in a fair, inexpensive and expedited manner. The Bar refused to do so.

The hearing officer found that the first time Mr. Poole raised an objection to the production was at his deposition. RFFCLR 30. This is not supported by substantial evidence. It was undisputed that Mr. Poole's attorney wrote a letter to the auditor on April 24, 2004 - just *two days* after the auditor's inquiry letter, and then restated Mr. Poole's objections in a June 18, 2004 E-mail. His attorney's objection to the request for the entire SO billing file was asserted in writing from the onset of this matter:

I do not see how the [request for the entire billing file] relates to the issue of whether or not Mr. Poole has been properly keeping his trust account. (emphasis added). Ex. 18.

Mr. Poole also voluntarily provided a number of SO bills that specifically responded to and answered the auditor's questions regarding the amount of the SO bill and the trust funds. RP 677; 686-690. The WSBA auditor testified that Mr. Poole promptly and completely responded to every request made during the entire audit. RP 453-454.

No further response regarding the SO file was sent by Mr. Poole and the WSBA did not send a "ten-day letter." Instead, on June 7, 2004, the ODC sent a letter threatening to open a grievance file if the entire SO billing file was not produced. A second response was provided by Mr. Poole's counsel via e-mail on June 18, 2004, which again specifically objected to the Bar's demand.

*On the SO billing file – Mr. Poole has your letter about your file. He has provided an explanation of what happened which explains the trust account entries. This process is supposed to be one for making sure he is keeping his books right. He has demonstrated that. **His concern is that this can be an excuse to intrusively review of any or all of his files. That was not the purpose of the audit.** Perhaps there is a resolution of him providing discrete portions of the file. If so, what would the auditor require in order to verify her audit issues?*

*Mr. Poole is not being uncooperative but **feels the audit may be going beyond its intended scope.** If we cannot resolve the issue do you think that we take it back in front of Mr. Curran to review the scope of his audit decision?*

Ex. 24 (*emphasis added*). The hearing officer characterized this as a discussion of the forum to resolve the issue, not as an objection.

RFFCLR 28. Instead of taking Mr. Poole up on his suggestion to have Mr. Curran (the hearing officer in Mr. Poole's trust case) resolve the issue, the Bar opened a grievance⁶.

Both his April 24th letter and the June 18th E-mail were objections to the overly intrusive request for the entire SO billing file. Mr. Poole produced portions which addressed the specific issues raised by the auditor. The rest of that file had nothing to do with Mr. Poole's trust account. After again stating his objections to the request for the SO file at his deposition, he immediately filed a motion for protective order the very next day with the Board. The ODC responded by claiming the Board did not have jurisdiction and responded with a petition for interim suspension.

Mr. Poole's protective order and his response to the petition stated that request was an "*overbroad and unreasonable access to Mr. Poole's files*" and that he was seeking a limit on the scope of the Association's inquiry since it was an invasion of privacy, denial of due process and was an unreasonable search and seizure. Ex. 105, pg. 000007. The hearing officer's RFFCLR that Mr. Poole's motion was based simply that the file

⁶ "*We have been trying to obtain this file for over two months. It does not appear that we can resolve the question. I do not believe that the ELC provide any jurisdiction for taking this to Mr. Curran for review. The ELC appear to contemplate the pursuit of a separate grievance regarding such a matter.*" Ex. 9; 00041.

consisted of several volumes and covered many years is not supported by substantial evidence.

The Bar's claim that Mr. Poole has waived his claim regarding constitutional issues is also unfounded. The Bar filed a petition for interim suspension at the same time this court was considering the *Matson* case, which bar counsel knew. Facing the risk of suspension if he did not succeed and the possibility of prejudice to him in the *Matson* case, he then withdrew his objections and provided what he had. RP 583-587; 697-699.

Mr. Poole did not fail to cooperate with respect to the SO billing file. He stood his ground, on what he considered was a fishing expedition, while providing everything else requested by the auditor, plus portions of the SO file related to the audit. Mr. Poole took a position supported by good faith arguments under the facts and should not be disciplined for this. After the file was produced, the auditor made no further comment and did not even mention the SO file again.

IV. THE BAR FAILED TO REFUTE WHAT BOTH ITS OWN MEDICAL EXPERT AND THE HEARING OFFICER CLEARLY FOUND, WHICH WAS THAT PERSONAL AND EMOTIONAL PROBLEMS "SUBSTANTIALLY CONTRIBUTED TO THE ALLEGED MISCONDUCT," A RFFCLR WHICH THE BOARD ENHANCED BUT STILL FAILED TO APPLY.

Contrary to the RFFCLR that Mr. Poole's personal and emotional problems substantially contributed to the alleged misconduct, the Bar

attempts to minimize the effect of the mitigator by arguing that this mitigator “*should be accorded little weight*”. It also argues that the Board erred in amending the RFFCLR 91 by adding this mitigator.

The hearing officer noted in the RFFCLR that Dr. Jacobson, the Bar’s expert, testified that “[T]hese mental disorders have substantially contributed to the misconduct alleged.” TR 982. While the hearing officer did not find the mitigator, the Board did.

The record establishes personal or emotional problems that substantially contributed to the alleged misconduct. It was not necessary that Mr. Poole’s personal or emotional problems caused his misconduct for this to be a mitigator. The Hearing Officer construed the mitigator too narrowly. [fn omitted]. RFFCLR 91 (emphasis added).⁷

The purpose of the mitigator is to determine whether the lawyer should receive the presumptive sanction and/or whether reduce the presumptive sanction because the acts resulted in whole or in part from other circumstances in the lawyer’s life. The mitigator of personal and emotional problems lowers the level of the Mr. Poole’s culpability, as the mitigating factor substantially contributed to the misconduct. When such a mitigator is found, the presumptive sanction is considered too harsh and

⁷ The Board’s revised finding thus eliminates the hearing officer’s RFFCL 54 and 55.

the presumptive sanction is reduced. In this particular case, the Board found the mitigator existed but failed to apply it to Mr. Poole.

The Bar itself recognizes that lawyers do have problems and need assistance, rather than having discipline as the only alternative. The Bar created the Lawyer's Assistance Program to take preventative steps to allow lawyers who are have personal and emotional problems to continue to practice without the fear of being suspended. For some reason in this case, the Bar has chosen to completely minimize and discredit Mr. Poole's personal and emotional problems, problems even its own medical expert agreed "*substantially contributed to the misconduct alleged.*" TR 982.

The Bar incorrectly characterizes *In re Christopher*, 153 Wn.2d 669, 105 P.3d 976 (2005). That case does not apply here since the lawyer's conduct was intentional, not knowing. In that case there was insufficient evidence that the misconduct was largely (*i.e.* substantially) attributable to a qualifying condition. Here both experts testified that it did.

The Bar also erroneously attempts to construe the mitigator as a mental disorder and not personal and emotion problems. The Bar argued this both at the hearing and before the Board and its argument has been rejected twice. Even if the ABA Standards require a lawyer show a substantial connection, this was proven by the testimony of the Bar's

expert. Substantial evidence supports the RFFCLR that the mitigator is personal and emotional problems and not mental disorder.

In this case the hearing officer did not separate out the counts and did not apply the mitigator to each count. RFFCLR 85 lumped all counts into one and determined a suspension was the total single sanction. Thus, when looking at the overall picture, which is what the hearing officer did, the substantial mitigator of personal and emotional problems must be applied to the overall case. The presumptive sanction is six months. Yet the hearing officer and the Board found the entire cumulative impact justified a one year suspension. This is wrong.

The Bar is incorrect in arguing that the mitigator does not apply to any issues concerning SO billing file. It does apply, except for the objection Mr. Poole made to the auditor's request for the entire SO file based on what he believed was a fishing expedition. All other acts related to SO involved his personal and emotional problems.

Mr. Poole does not claim that his objections concerning the SO file were a result of these problems. However, his failure to locate documents (including the SO file), catch accounting errors, sloppiness in reporting back on matters or reporting slow, to carefully review matters and other errors committed were all matters that were substantially impacted by his personal and emotional problems. *E.g.* TP 783.

Even if the SO billing file count is accepted (which it should not be), its stands alone as one count, and the presumptive sanction is not a one year suspension. Given both the proportionality analysis and application of the other mitigators, the SO count does not even come close to resulting in a sanction of a one year suspension.

V. THREE AGGRAVATORS MUST BE DISMISSED BECAUSE THEY ARE BASED ON ERRONOUS ALTERNATIVE RFFCLRS AND LACK OF SUBSTANTIAL EVIDENCE.

Paragraph 90 includes three aggravators that must be dismissed. The dishonest and self motive aggravator is based on RFFCLR 56. As discussed, this RFFCLR is not supported by substantial evidence and is not even a RFFCLR in the first place ("or"). Additionally, with Counts 1-5 and 10 dismissed, the other aggravator of multiple counts should go also. Finally, the refusal to acknowledge the wrongful nature of the conduct must be dismissed because his objections to the SO file production were well based and made in good faith.

VI. MR. POOLE HAS DEMONSTRATED THAT THE SANCTION APPLIED IN THIS CASE IS DISPROPORTIONATE. IN ALL OF THE CASES CITED THE SANCTION WAS ENHANCED BY OTHER COUNTS OF SERIOUS MISCONDUCT, SUCH AS FALSIFYING EVIDENCE, MAKING FALSE STATEMENTS, FAILING TO APPEAR FOR DEPOSITIONS AND THE HEARING AND OTHER ACTS OF MISCONDUCT. NONE INVOLVED A MITIGATOR THAT IS PRESENT HERE.

The Bar does not cite any other cases in response on the matter of proportionality other than those cited by Mr. Poole in his opening brief. The Bar's attempts to minimize Mr. Poole's cases without offering any others for comparison. Mr. Poole's case fundamentally involves noncooperation and the cases he has cited for this analysis did also.

In both *Means* and *Germano*, the lawyers completely failed to respond to the Bar's inquiries, failed to attend depositions, refused to refund unearned fees, and had other multiple ethical violations unrelated to noncooperation. One received an admonition and the other a 60 day suspension. In *Unger* the lawyer objected to providing documents and then finally did. She received an admonition.

In *Salazar*, the lawyer was also found to have committed four other unrelated ethical violations (failure to communicate, failure to act with diligence and failure to account for fees). He also had failed to abide by the rules in prior disciplinary actions. The Board noted Salazar's prior "*problematic behavior towards his clients and the Association had not improved.*" Salazar not only had a prior disciplinary record, but he had failed to abide by the process before on multiple occasions. Yet the Board affirmed a 30 day suspension for his conduct.

The Bar argues that the lawyers in *Bell*, *Pack*, *Lehinger* and *DeRuiz*⁸ all received suspensions and thus a one year suspension for Mr. Poole is not disproportionate. The Bar simply lumps these cases together stating since the lawyer was suspended and the cases involved noncooperation, Mr. Poole's suspension is proportionate. Yet the Bar failed to provide any actual analysis to support this conclusion. None of these cases can be reconciled to justify a one year suspension. The lawyers in these cases each committed other multiple acts of misconduct unrelated to noncooperation, which Mr. Poole did not commit.

In *Bell*⁹, the lawyer provided *no* responses to the investigation, did not appear for the disciplinary hearing, had prior disciplinary offenses, engaged in bad faith obstruction of the disciplinary proceeding and had substantial experience in the practice of law. He was suspended 18 months. In *Pack*, the lawyer was suspended for 18 months for failing to timely file an appeal, three trust account violations for knowing behavior, two counts of failure to cooperate and engaging in bad faith obstruction by failing the answer the grievance and failing to attend the disciplinary hearing. In *Lehinger*, the lawyer practiced law while suspended, failed to

⁸ *In re Anthony P. DeRuiz*, 158 Wn.2d 558, 99 P.3d 881 (2004).

⁹ *John Grahame Bell*, Public No. 04#00003

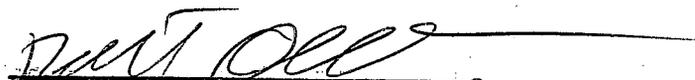
keep his clients informed, and intentionally made false statements to the Bar. He received a six month suspension from the hearing officer which the Board then increased to one year. In *DeRuiz*, the lawyer was found to have neglected client cases, failed to communicate, failed to refund unreasonable and unearned fees and failed to cooperate. He did not appear for a deposition, terminated the deposition when it occurred later, never followed up to reschedule, refused to provide information in another grievance until after being suspended, engaged in bad faith obstruction, submitted false evidence, made false statements, and engaged in deceptive practices in the disciplinary process. He received two 6 month suspensions which this court ordered run consecutively.

Mr. Poole's acts do not approach the level of culpability of these four lawyers. Of course in any proportionality analysis no case will be on all fours to the case at hand. There will always be some differences. The question is when looking at the cases overall in comparison to the case at issue would a fair minded person reach the conclusion that similar conduct has resulted in a similar sanction. As these cases demonstrate, Mr. Poole's one year suspension for noncooperation is substantially inconsistent with prior cases. The proportionality analysis establishes that Mr. Poole's one year suspension is clearly disproportionate. The Bar has failed to demonstrate otherwise.

VII. CONCLUSION

The Bar failed to prove this case. Even so, both the mitigator and proportionality require the sanction to be substantially reduced to no more than a single reprimand or an admonishment.

Dated this 5th day of May, 2008.

A handwritten signature in cursive script, appearing to read "R. T. Okrent", is written over a solid black horizontal line.

Richard T. Okrent, WSBA No. 15851
Attorney for the Respondent, Mr. Poole

CERTIFICATE OF SERVICE

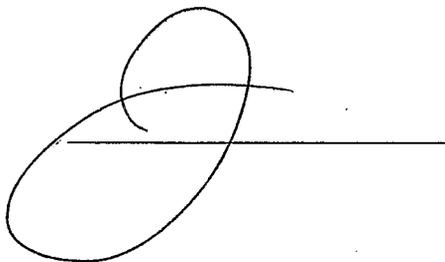
I declare under penalty of perjury of the laws of the State of Washington, that on May 5, 2008, I caused to be deposited in a First Class Mail United States Postal Service Facility, First Class Mail, postage prepaid, the original of THE RESPONDENT'S REPLY BRIEF to:

The Clerk of the Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929;

and a copy both by mail and E-mail (PDF) to:

Mr. Craig Bray
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Signed this 5th day of May, 2008 at Everett, Washington.



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