

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 MAR 21 P 3:12
BY RONALD R. CARPENTER
RRC
CLERK

No. # 200,536-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE
BRADLEY G. BEHRMAN
(WSBA No. 13420),
an Attorney at Law (WSBA No. 13420)

OPENING BRIEF OF APPELLANT BEHRMAN

Submitted by
Bradley G. Behrman (WSBA No. 13420),
Appellant (*pro se*)
232 Queen Anne Ave. N. #106
Seattle, WA 98109
Telephone 206-284-0490

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	5
A. Errors Relating to Determinations of Injury, Mental State, and Presumptive Sanctions	5
B. Errors Relating to Mitigating Factors and Aggravating Factors ..	8
C. Other Errors	11
D. Issues Pertaining to the Various Errors	11
III. STATEMENT OF THE CASE RELATING TO COUNTS 1-4 AND BEHRMAN'S REPRESENTATION OF MS. BLOOM	15
A. General Background on Behrman's Representation of Ms. Bloom	15
B. November 2002 Events: (1) Near-Completion of Behrman's Representation of Ms. Bloom, (2) Disbursements of Cash Collected Through Behrman's Representation of Ms. Bloom, and (3) Agreement on Retention of \$2,500 in Attorney Wes Bates's Trust Account Pending Behrman's Submission of a Complete Billing Statement	18
C. Behrman's Uncommunicativeness, Unresponsiveness, and General Lack of Follow-Through for Ms. Bloom After November 2002 ...	20
D. Contrasts Between Behrman's Conduct After November 2002 and His Previous Conduct	21
E. The Parade of Personal, Medical, and Emotional Problems That Befell Behrman Starting in December 2002	23
The Death of Behrman's Father	23
Detached Retina, Unsuccessful Eye Surgeries, and Permanent Blindness in Behrman's Left Eye	23
Eye-Related and Surgery-Related Difficulty in Working	24
Descent into Overwhelm, Depression, Disorganization, and Extreme Deterioration in Productivity	24
2004-2006 Acupuncture Treatment for Depression, Reduction of Caseload, and Eventual Progress Toward Recovery	25
F. The June 2004 Default of the Party Planet Tenants, Ms. Bloom's July 2004 Assignment of All Rights and Obligations Relating to the Lease Including All of Her Rights to a Share of the Party Planet Debt, and Her July 2004 Dismissal of Behrman and Submission of Her Written Grievance Against Him.	26

G. Behrman's September 2004 Acceptance of Liability for Ms. Bloom's Uncollected \$2,922.31 Share of the Party Planet Debt and Explanation as to Why His Compensation to Ms. Bloom Would Be Through a Fee Offset Rather than a Cash Payment	28
H. Allegations, Findings, and Conclusions Regarding Client Injury	29
I. Refusal by the Hearing Officer and the Disciplinary Board to Consider Any of Behrman's Fee-Related Defenses	30
IV. ARGUMENT ON MENTAL STATE, INJURY, RESTITUTION, AND THE PRESUMPTIVE SANCTIONS FOR COUNTS 1-4	32
A. Regarding Counts 1-3, Behrman's Mental State Was Negligence Without Any "Pattern of Neglect" Within the Meaning of the <i>ABA Standards</i> for Any Count.	32
B. Ms. Bloom Suffered "Little or No Actual or Potential Injury" Within the Meaning of the <i>ABA Standards</i>	36
1. Rather Than Being Used Against Behrman as Grounds for According No Validity and Zero Value to His Unpaid Fees, the Bar Association's Stipulation that All of Behrman's Fees Are Reasonable and in Compliance with RPC 1.5(a) Should Be Recognized as Grounds for Treating All of Behrman's Unpaid-Fee Claim as <i>Fully Valid</i> for Purposes of Making Money-Related Determinations Within This Disciplinary Proceeding.	38
2. The Evidence in the Record Amply Documents and Establishes that Ms. Bloom Owes Behrman Over \$12,000 for Earned, Unpaid Fees Even After Being Credited for the \$2,922.31 Compensatory Fee Credit Relating to Behrman's Failure to Collect the Debt and for the \$500 Amount of the Trust-Account Withdrawal Behrman Made as a Fee Payment.	40
3. The Record Would Contain Additional Evidence Supporting Behrman's Unpaid-Fee Claim If Not for the Hearing Officer's Improper Refusal to Allow Behrman to Introduce It.	41
4. Regarding All Counts, the Record Shows that Ms. Bloom Suffered "Little or No Actual or Potential Injury" within the Meaning of the <i>ABA Standards</i>	42
Crucial Significance of the Determinations Regarding Injury Based on "Deprivation of Funds"	42
The Logical Impossibility of Ms. Bloom's Having Suffered Any <i>Actual</i> Deprivation of Funds in View of the Size and Timing of Behrman's Earned, Unpaid Fees	43
The Logical Impossibility of Ms. Bloom's Having Suffered Any <i>Potential</i> Deprivation of Funds in View of the Size and Timing of Behrman's Earned, Unpaid Fees	46

C. On Top of the Magnitude and Stipulated Reasonableness of Behrman's Unpaid-Fee Claim, There Are Additional Reasons Why Behrman's Misconduct in Counts 2-4 Must Be Considered to Have Caused "Little or No Actual or Potential Injury" to Ms. Bloom Within the Meaning of the <i>ABA Standards</i>	47
1. The Portion of Finding 89 Blaming Behrman for Subjecting Ms. Bloom to Unspecified "Serious Economic Consequences" Has No Support in the Record and Should Be Stricken.	47
2. Even Ignoring Behrman's Unpaid-Fee Claim, the Record Does Not Support Finding that Behrman's Count 2 or Count 3 Misconduct Caused Ms. Bloom Any Actual or Potential Injury.	48
D. The Recommendation that Behrman Be Required to Pay Restitution Based on the \$500 Amount of the Trust Account Withdrawal Is Not and Cannot Be Supported by a Proper Finding That He Actually Owes Anything to Ms. Bloom on the Basis of the \$500 Withdrawal.	49
E. The Appropriate Presumptive Sanction for Each Count Among Counts 1-4 is Admonition Rather than a Suspension.	50
V. STATEMENT OF THE CASE RELATING TO COUNT 5 AND BEHRMAN'S CONDUCT IN CONNECTION WITH THE BAR ASSOCIATION'S INVESTIGATION	50
A. Strengths and Deficiencies in Behrman's Cooperation with the Bar Association's Investigation	50
B. Pre-Hearing Offers by Behrman to Resolve This Proceeding Through Stipulation to a Reprimand	52
VI. ARGUMENT ON INJURY AND THE PRESUMPTIVE SANCTION RELATING TO THE COUNT 5 DEFICIENCIES IN COOPERATION WITH THE WSBA'S INVESTIGATION	52
VII. ARGUMENT ON AGGRAVATION AND MITIGATION	53
A. The Record Compellingly Supports Removing the "Indifference to Restitution" Aggravator (ABA Standard 9.22(j)) and Granting Behrman Mitigation for "Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct" (Standard 9.32(d)).	53
B. The Record Compellingly Supports Removing the "Refusal to Acknowledge Wrongful Nature of Conduct" Aggravator (ABA Standard 9.22(g), Granting Behrman Mitigation for "Remorse" (Standard 9.32(m)), and Striking Finding 90.	55
C. The Hearing Officer and the Disciplinary Board Improperly Refused to Grant Behrman Mitigation Based on "Personal or Emotional Problems" as Set Forth in ABA Standard 9.32(c).	57

D. Relative Weight Accorded to the Various Mitigating and Aggravating Factors	60
VIII. ARGUMENT REGARDING IMPROPER EXCLUSIONS OF EVIDENCE, IMPROPER FACTUAL FINDINGS NOT ADDRESSED ABOVE, AND STANDARD OF REVIEW	60
IX. ARGUMENT REGARDING PROPORTIONALITY	61
A. Proportionality Cases Presented at the Hearing	61
B. Additional Cases	63
C. Censure, Reprimand, or Admonition for Conduct Similar to or Worse Than Behrman's	67
X. CONCLUSION	69

TABLE OF AUTHORITIES

Cases

<i>In re Burtch</i> , 112 Wn.2d 19 (1989)	59
<i>In re Longacre</i> , 155 Wn.2d 723 (2005)	33, 35
<i>In re Salazar</i> , WSBA No. 6273, WSBA Review No. 02#00022 (decided by Disciplinary Board Aug. 24, 2004)	33, 35

Rules

ABA Standards for Imposing Lawyer Sanctions

Standard 4.41	35
Standard 4.42	35

I. INTRODUCTION

This is an attorney disciplinary case in which the appellant, Brad Behrman, appeals from the hearing officer's and Disciplinary Board's recommendation that he be suspended for nine months and required to pay \$500 in restitution to his former client, Malka Bloom. Especially in the absence of being given the benefit of any mitigation based on "personal or emotional problems," Behrman also appeals the recommendation that he be "required to undergo evaluation and counseling for his personal and professional problems."

The recommendation of suspension is based exclusively on stipulated misconduct relating to Behrman's multi-faceted, multi-year representation of one client—Ms. Bloom.^{1/} That misconduct consisted of (a) Behrman's making a \$500 trust-account withdrawal as a payment on earned, unpaid fees without giving Ms. Bloom the notice required by RPC 1.15A(h)(3), formerly RPC 1.14(h)(3) (Count 4); and (b) Behrman's lack of diligence, his uncommunicativeness, and his unresponsiveness relating to his failure to collect a debt before the debtors' financial deterioration and eventual bankruptcy made the debt uncollectible (Counts 1-3).^{2/} Ms. Bloom's share of the debt was \$2,922.31, and she received full compensation without ever being deprived of any funds to which she was entitled.

1. This proceeding did not involve any grievance by anyone other than Ms. Bloom. Behrman's stipulations are contained in the Stipulation to Misconduct _____, which was adopted by the hearing officer as Findings 1-86 at pages _____ of the hearing officer's decision dated _____.

2. Behrman's misconduct in his representation of Ms. Bloom did not involve and was never alleged to have involved any missing of any statute-of-limitations deadline, any court deadline, or any other legal deadline.

Out of a multitude of representational objectives Ms. Bloom assigned to him, collection of the debt was the only one Behrman did not diligently and fully accomplish. Behrman's representation undisputedly brought Ms. Bloom net financial benefits of substantially more than \$100,000 even after factoring in the \$500 amount of the trust-account withdrawal, Ms. Bloom's additional \$7,900 in fee payments, and whatever Ms. Bloom may eventually pay on her remaining unpaid-fee balance of over \$12,000—all of which the Bar Association has stipulated to be reasonable under RPC 1.5(a).

The Bar Association has *never* accused Behrman of any misappropriation or commingling of funds, any RPC-violating retention of funds, any RPC-violating unreasonableness concerning any fees, or any bad faith or impropriety in electing to use an offset against unpaid fees rather than a cash payment as his method of compensating Ms. Bloom for her \$2,922.31 share of the uncollected debt. The hearing officer's decision as affirmed by the Disciplinary Board makes no finding of dishonesty, deceit, fraud, misrepresentation, or bad faith of any kind against Behrman. The decision also finds and concludes that Behrman is entitled to mitigation on the basis of "absence of a dishonest or selfish motive" under standard 9.32(b) in the *ABA Standards for Imposing Lawyer Sanctions*.

Though the Disciplinary Board corrected several of the many errors made by the hearing officer, the uncorrected errors remaining in the hearing officer's findings, conclusions, and recommendations as amended by the Disciplinary Board are so extensive in number and magnitude that, unless corrected by the court, the decision in this case will establish many major precedents that are each irreconcilable with the plain wording of the *ABA*

Standards, existing case law, or both. Unless overturned, the findings, conclusions, and recommendations being appealed would apparently make Behrman the very first attorney ever to be subjected to any of the following adverse disciplinary treatment:

(a) being treated as deserving of a suspension on the basis of a finding that neglect relating to a single client (rather than multiple clients) constituted a "pattern of neglect" even though the neglect did not involve the missing of any statute-of-limitations deadline, court deadline, or other legal deadline (Counts 1-3);

(b) having the *stipulated reasonableness* of *all* of his paid and unpaid fees (as established by the stipulated lack of any violation of RPC 1.5(a)'s prohibition against unreasonable fees) treated as grounds for depriving him of having *any* of his earned unpaid fees considered as a defense against allegations that he subjected his client to actual or potential monetary injury, that he owes his client restitution, and that his using an offset against unpaid fees rather using a cash payment to compensate his client for failure to collect a debt on her behalf demonstrated "indifference to restitution";^{3/}

(c) being treated as deserving of a suspension for allegedly having subjected a client to actual or potential injury through an actual or potential "deprivation of funds" even though the full amount of the funds the client was allegedly actually or potentially deprived of was at all relevant times thousands of dollars less than the unpaid balance of earned fees that the Bar Association stipulated to be free of any unreasonableness that would violate RPC 1.5(a) (Counts 1-4);

3. See the Bar Association's June 20, 2007 responsive brief at 14 (lines 13-19).

(d) being treated as deserving of a suspension for allegedly having subjected a client to potential injury based solely on his failure to give his client the required notice of a trust-account withdrawal (in this case, a \$500 withdrawal) that was made as a payment on an unpaid-fee balance that the client consistently acknowledged was higher than the amount of the withdrawal (in this case, \$2,500 being what the client identified as the accrued balance of earned, unpaid fees) and that the Bar Association stipulated to have been reasonable under RPC 1.5(a) (Count 4);^{4/}

(e) being treated as subject to aggravation based on "refusal to acknowledge wrongful nature of [mis]conduct" under ABA standard 9.22(g) despite having entered a pre-hearing stipulation to each and every RPC violation and count of misconduct that was later sustained against him and without ever having in any way renounced any of those stipulations;

(f) being treated as not qualifying for any mitigation whatsoever based on "personal or emotional problems" under ABA standard 9.32(c) while at the same time being found to have suffered from "personal and professional problems" that are treated as grounds for being ordered "to undergo evaluation and counseling" for those problems;

(g) having the absence of a *formal medical diagnosis* of depression or other physical or mental disability treated as an automatic, absolute disqualification for any mitigation based on "personal or emotional problems" under ABA standard 9.32(c) (as distinguished from mitigation based on "mental disability or chemical dependency" under ABA standard 9.32(i)).

4. See Hearing Officer's Decision at page 26, lines 6-18.

In presenting his appeal, Behrman emphasizes that he does not seek to justify or even excuse the various ways in which he violated professional responsibilities and otherwise let his client down. Furthermore, even though monetary injury is the only client injury that was raised in the Bar Association's complaint and was the only client injury found by the hearing officer as amended by the Disciplinary Board, he acknowledges and regrets that his uncommunicativeness, unresponsiveness, and lack of diligence subjected Ms. Bloom to frustration, stress, and anxiety that neither she nor any other client should ever have to endure because of problems with one's attorney.^{5/}

II. ASSIGNMENTS OF ERROR

A. Errors Relating to Determinations of Injury, Mental State, and Presumptive Sanctions

*Error 1: It was error for the hearing officer and the Disciplinary Board to treat the entirety of Behrman's over-\$16,000 unpaid-fee claim and of the compensatory fee offset he gave Ms. Bloom as being outside the scope of the proceedings and as having no validity and zero value for purposes of making determinations of client injury, restitution, and other money-related issues.

*Error 2: Regarding Behrman's misconduct under Counts 1-3,^{6/} it was error for suspension rather than admonition to be designated the appropriate

5. Behrman also regrets failing to give his client the required notice in advance of making the \$500 trust-account withdrawal.

6. Count 1 is lack of diligence in collecting the "Party Planet debt," which was owed by the successor tenants known as "Party Planet." Count 2 is failure to communicate regarding fees, including failure to promptly provide a billing statement. Count 3 is lack of responsiveness to Ms. Bloom's requests for communication regarding the uncollected debt, including Behrman's failure to promptly provide the full case file upon Ms. Bloom's June 2002 request.

presumptive sanction. That error arose from and rests improperly upon each of the following errors 2.1-2.4:

*Error 2.1: Regarding each count among Counts 1-3,^{7/} it was error to conclude that Behrman engaged in a "pattern of neglect" within the meaning of the *ABA Standards* rather than just negligence.

*Error 2.2: Regarding Finding 92 and each count among Counts 1-3,^{8/} it was error to determine that Behrman's misconduct caused Ms. Bloom significant "actual or potential injury" rather than "little or no actual or potential injury" within the meaning of the *ABA Standards*—especially in view of the errant treatment of the entirety of Behrman's unpaid-fee claim and of his \$2,922.31 compensatory offset to Ms. Bloom as having no validity and zero value.

*Error 2.3: Even if it had been proper to ignore the entirety of Behrman's fees and of the compensatory fee offset, it was error to find that there was any causal connection between any of Behrman's Count 2 or Count 3 misconduct^{9/} and the noncollection of the debt that has been identified as the only injury in Counts 2 and 3.

*Error 2.4: In Finding of Fact 89, it was error (i) to suggest that any of Behrman's misconduct other than his failure to collect the "Party Planet" debt was causally connected to any monetary loss of any kind to anyone; (ii) to state that intervention in the form of "Wesley Bates[s] competent legal representation ... prevented Ms. Bloom from experiencing serious economic consequences" otherwise legitimately blamed on misconduct by Behrman;

7. For a description of Counts 1-3, see footnote 6.

8. For a description of Counts 1-3, see footnote 6.

9. For a description of Counts 2-3, see footnote 6.

and (iii) to suggest that any of Behrman's misconduct had ever subjected Ms. Bloom to a risk of any "economic consequences" of any kind.

*Error 3: Regarding Behrman's Count 4 misconduct—which consisted exclusively of *failure to give Ms. Bloom notice* required by RPC _____ when making the \$500 trust-account withdrawal as a payment on earned, unpaid fees—it was error for suspension rather than admonition to be designated the appropriate presumptive sanction. That error arose from and rests improperly upon each of the following errors 3.1-3.2:

*Error 3.1: Even ignoring the impropriety of treating all of Behrman's over-\$16,000 unpaid-fee claim as having zero validity and zero value (see Error 1), it was error to find that Behrman's Count 4 misconduct^{10/} subjected Ms. Bloom to any actual or potential deprivation of funds or any other loss (as distinguished from "little or no actual or potential injury") within the meaning of the *ABA Standards*.

*Error 3.2: Even apart from the errors regarding the determination of injury, it was error to treat Count 4 as being subject to ABA standard 4.12 or any other part of *ABA Standards* section 4.1, the stated scope of which is confined to "cases involving the failure to preserve client property."

*Error 4: Even ignoring the impropriety of treating the entirety of Behrman's over-\$16,000 unpaid-fee claim as having no validity and zero value (see Error 1), the recommendation that Behrman be ordered to pay Ms. Bloom \$500 in restitution for his Count 4 failure to give her notice of his \$500 trust-account in payment of earned, unpaid fees is in error.

10. For a description of Behrman's Count 4 misconduct, see Assignment of Error 3 and _____. Also see _____.

*Error 5: The hearing officer's supplemental findings and conclusions dated _____ in response to the Bar Association's ____, 2007 motion for modification erred in stating that the \$2,500 held in trust by attorney Wes Bates and his firm should be released to Ms. Bloom as funding for restitution owed to her.

*Error 6: Regarding Count 5, it was error for reprimand rather than admonition to be designated the appropriate presumptive sanction. That error arose from and rests improperly upon each of the following errors 6.1-6.2:

*Error 6.1: It was error to treat Count 4 as being subject to ABA standard 7.3 or any other part of *ABA Standards* section 7.0, the stated scope of which does not encompass any of the misconduct Behrman has been found to have committed.^{11/}

*Error 6.2: Even if section 7.0 of the *ABA Standards* were applicable to Count 5, it was error to treat reprimand under standard 7.3 rather than admonition under standard 7.4 as the applicable presumptive sanction because there has never been any finding of any significant "actual or potential injury" (as distinguished from "little or no actual or potential injury") relating to Count 5 and because the record does not support making such a finding.

B. Errors Relating to Mitigating Factors and Aggravating Factors

11. Section 7.0 states that the standards it encompasses apply "in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct." Behrman was never even alleged to have committed any of those various forms of misconduct.

*Error 7: It was error for Behrman to be denied mitigation based on his eye problems, the unsuccessful eye surgeries, his depression, and his other "personal or emotional problems" under ABA standard 9.32(c). That error was inconsistent with other findings by the hearing officer, and it arose from and rests improperly upon each of the following errors 7.1-7.5:

*Error 7.1: It was error for the hearing officer as affirmed by the Disciplinary Board to treat "clear preponderance of the evidence" rather than simple preponderance of the evidence as Behrman's burden of proof for purposes of establishing the applicability of "personal or emotional problems."

*Error 7.2: It was error for the hearing officer as affirmed by the Disciplinary Board to treat "medical evidence," formal medical diagnosis, and other requirements stated in ABA standard 9.32(i) regarding "mental disability or chemical dependency" as requirements for establishing the applicability of mitigation based on "personal or emotional problems" under ABA standard 9.32(c).

*Error 7.3: It was error to prevent Behrman from presenting testimony by (a) his ophthalmologist (regarding Behrman's eye problems and regarding negative emotional effects arising from vision loss) and (b) his acupuncturist (who provided treatments for the explicit purpose of addressing Behrman's depression).

*Error 7.4: It was error to find that Behrman "has not seriously sought treatment" for his depression.^{12/}

12. See lines 24-25 at page 23 of the hearing officer's decision.

*Error 7.5: It was error to characterize the record as indicating that the only alleged cause of Behrman's "alleged ... depression" was the death of Behrman's father.

*Error 8: It was error to subject Behrman to aggravation based on "indifference to restitution" under ABA standard 9.22(j) and to deny Behrman mitigation based on "timely good faith effort to make restitution or to rectify consequences of misconduct" under 9.32(d).

*Error 9: It was error to subject Behrman to aggravation based on "refusal to acknowledge wrongful nature of [mis]conduct" under ABA standard 9.22(g).

*Error 10: It was error to deny Behrman mitigation based on "remorse" under ABA standard 9.32(m). That error arose from and rests improperly upon Finding 90, which errantly states that Behrman has "demonstrated no remorse in this matter" and improperly treats Behrman's having "sent a very large bill" to Ms. Bloom documenting his unpaid-free claim as a justification or explanation for asserting that Behrman had "demonstrated no remorse."

*Error 11: It was error to deny Behrman mitigation based on "cooperative attitude toward proceedings" under ABA standard 9.32(e).

*Error 12: Regarding Behrman's prior admonition, which was issued in 1997 based on negligent misconduct that ended on 1992[**]), it was error to treat that prior negligent misconduct as being too similar to allow Behrman to qualify for mitigation based on "remoteness of prior offenses" under ABA standard 9.32(n) but too different for the admonition that was imposed as the sanction for that misconduct to be treated as a precedent for selecting

admonition as the presumptive sanction for the corresponding negligent misconduct that is at issue in this proceeding.

*Error 13: It was error not to conclude that the applicable mitigating factors strongly and compellingly outweigh the applicable aggravating factors so as to warrant imposing on Behrman a sanction that is significantly less than the presumptive sanction.

C. Other Errors

*Error 14: *[Insert assignments of error regarding exclusions of evidence and refusals to consider relevant evidence.]*

*Error 15: Each finding among Findings of Fact 88-92 involves error that renders it improper. *[+Modify to eliminate redundancy with factual errors assigned above and to make the remaining references more specific and concrete.+]*

*Error 16: The hearing officer and the Disciplinary Board both erred by refusing to perform any proportionality analysis whatsoever regarding any of the cases Behrman presented for such analysis and by failing to keep their recommendations consistent with the comparable cases that were brought to their attention.

*Error 17: In the course of making not only the errors identified above but also several additional errors that were corrected by the Disciplinary Board, the hearing officer erred by approaching this proceeding in a manner that was manifestly biased against Behrman and was manifestly unfair.

*Error 18: The Disciplinary Board erred by giving undue deference to findings and conclusions made by the hearing officer.

D. Issues Pertaining to the Various Errors

*Issue 1 (Relating to Errors 1, 2, 3, 3.2, 4, & 10): Upon Behrman's raising his claim of earned, unpaid fees as a defense against the accusations that he had injured Ms. Bloom by subjecting her to actual or potential "deprivation of funds," was it proper for the hearing officer and the Disciplinary Board to treat all of those fees and the related compensatory fee offset as having no validity and zero value for purposes of adjudicating "deprivation of funds" and restitution in the absence of any determination that the fees are "unreasonable" within the meaning of RPC 1.5(a) and in the absence of any other substantive determination of invalidity?

*Issue 2 (Relating to Errors 3 & 3.1): When an attorney's neglect of client matters in violation of disciplinary rules affects only one client, what must be proven regarding the nature, timing, and scope of that neglect in order for the neglect to be properly considered a "pattern of neglect" under the *ABA Standards* rather than just negligence without such a pattern?

*Issue 3 (Relating to Errors 3 & 3.3): Can Behrman's Count 2 neglect and delays in providing billing statements to Ms. Bloom legitimately be treated as having actually or potentially caused Ms. Bloom to be deprived of any portion of her share of the uncollected Party Planet debt in the absence of any explanation or showing of such a causal connection?

*Issue 4 (Relating to Errors 3 & 3.3): Can Behrman's Count 3 unresponsiveness to Ms. Bloom's communications including his failure to promptly comply with her June 2004 request to provide her the full case file legitimately be treated as having actually or potentially caused Ms. Bloom to be deprived of any portion of her share of the uncollected Party Planet debt in view of (a) Behrman's having previously given Ms. Bloom the only

document needed for pursuing collection of the debt (*i.e.*, the April 2001 lease-assignment agreement, Exhibit ____); and (b) the complete absence of any communication by Ms. Bloom or on her behalf prior to the bankruptcy of the debtors indicating to Behrman or anyone else that Ms. Bloom believed she needed another copy of the lease-assignment agreement or anything else from Behrman in order to move forward with her alleged desire to pursue collection of the debt on her own or with the aid of another attorney?

*Issue 5 (Relating to Errors 3 & 3.4): Is the portion of Finding 89 referring to "serious economic consequences from [Behrman's] neglect of her case" proper in the absence of any specific identification or explanation of those consequences, and is Finding 89 properly supported by the record?

*Issue 6 (Relating to Errors 4 & 4.1): Can Behrman's Count 4 failure to give Ms. Bloom the required notice when making the November 2002 trust-account withdrawal as a payment on earned, unpaid fees properly be considered to have subjected Ms. Bloom to actual or potential deprivation of funds in the absence of any finding or even an allegation that the \$500 amount of the withdrawal exceeded what was then the unpaid balance of Behrman's earned fees, in the absence of any finding that any of the fees to which Behrman applied the \$500 withdrawal were "unreasonable" in violation of RPC 1.5(a), and in the absence of any allegation that the lack of notice injuriously misled Ms. Bloom in any way?

*Issue 7 (Relating to Errors 4 & 4.2): Does ABA standard 4.12 or any other standard that is part of section 4.1 of the *ABA Standards* properly apply to Behrman's Count 4 misconduct, which was never even alleged to have involved any misappropriation or commingling of trust funds or any other

"failure to preserve client property" within the meaning of section 4.1's statement of the scope of its applicability?

*Issue 8 (Relating to Errors 4 & 4.3): Is it proper for restitution based on the \$500 amount of the trust-account withdrawal to be ordered or recommended in view of the absence of any finding of actual injury and the absence of any finding that Behrman legitimately owes Ms. Bloom any money?

*Issue 9 (Relating to Errors 6 & 6.1): Does ABA standard 7.3 or any other standard that is part of section 7.0 of the *ABA Standards* properly apply to Behrman's Count 5 misconduct, which has never even been alleged to have involved any "unreasonable or improper fees" or any other misconduct of a type falling within section 7.0's statement of the scope of its applicability?^{13/}

*Issue 10 (Relating to Errors _____): What is the proper remedy for the hearing officer's various exclusions of evidence submitted or proffered by Behrman?

*Issue 11 (Relating to Errors _____): In view of the nature, volume, and magnitude of the hearing officer's various errors and in view of the lack of any statement in the hearing officer's decision indicating that any of his factual findings are actually based on evaluations of the credibility of the witnesses who presented live testimony,^{14/} should any of the findings of fact

13. See the first paragraph of the text of section 7.0 of the *ABA Standards*. Also see footnote ____+, above.

14. The hearing officer's only explicit or implicit invocation of credibility as the basis for any of his findings was in his explanation of his denial of mitigation based on "personal or emotional problems." In that instance, only credibility evaluation being made was to refuse to accord credibility to anyone not qualifying as a medical expert. See Hearing Officer's Decision at ____, DP ____.

now being appealed by Behrman be given deference rather than being subjected to *de novo* review?

When the errors and issues identified above are all resolved, what is the applicable presumptive sanction for each count?

*Issue 12 (Relating to Errors _____): When the errors and issues identified above are all resolved, what is the applicable presumptive sanction for each count?

*Issue 13 (Relating to Errors _____): When the errors and issues identified above are all resolved, what is the applicable presumptive sanction for each count?

*Issue 14 (Relating to Errors _____): *[fill in remaining issues after argument completed +++++]*

III. STATEMENT OF THE CASE RELATING TO COUNTS 1-4 AND BEHRMAN'S REPRESENTATION OF MS. BLOOM

A. General Background on Behrman's Representation of Ms. Bloom

Even after factoring in deductions covering all of (a) what was originally Ms. Bloom's \$2,922.31 share of the Party Planet^{15/} debt Behrman failed to collect, (b) the \$500 amount of Behrman's November 2002 trust-account withdrawal plus all \$7,900 of all other fee payments made by Ms. Bloom or on her behalf, and (c) the over-\$12,000 amount of Behrman's remaining unpaid-fee claim, Behrman's representation of Ms. Bloom undisputedly brought her more than \$100,000 in net financial benefits.^{16/}

15. The debt was owed by "Party Planet" and its owners. Party Planet is the name of the business that in the role of a successor tenant took assignment of Ms. Bloom's and her partner's commercial lease under the lease-assignment agreement described below.

16.

In summer 2000 when Ms. Bloom initially retained Behrman to represent her, she was in a financially complicated and difficult situation requiring action on many fronts. Efforts with a business partner to launch a night club on Capitol Hill had been going poorly. In the process of renovating and remodeling the leased space for the night club, Ms. Bloom had made large expenditures of money and, along with her business partner, had incurred over \$80,000 in unpaid debt. But the club was a long way from being ready to open. Ms. Bloom and her partner were both personally liable on a lease that required rent payment of over \$3,800 per month (over \$45,600 per year) and would not expire until 2006. On top of all of that, friction and distrust had arisen between Ms. Bloom and her business partner, and Ms. Bloom was concerned that her business partner might have been taking improper financial advantage of her.^{17/}

Initially, the objectives Behrman was asked to work on included trying to determine whether Ms. Bloom's business partner had been defrauding or otherwise acting improperly toward her; trying to get constructive communication going with the business partner and his attorney; dealing with the various creditors; and maintaining good communications and a spirit of goodwill with the landlord. Later, after Ms. Bloom and her business partner both decided that they didn't want to put any more money or effort into trying to launch the night club, Ms. Bloom directed Behrman to work on negotiating agreements on four fronts to enable her to cut her losses: (a) a lease-assignment agreement with the landlord not only providing for successor tenants to take over the lease but also enabling Ms. Bloom and her business

17.

partner to collect significant money from the successor tenants to use in paying outstanding debts and otherwise mitigating the financial losses Ms. Bloom and her partner had incurred;^{18/} (b) an agreement with successor tenants providing for assignment of the lease and committing the successor tenants to pay substantial money to Ms. Bloom and her partner in addition to paying rent to the landlord;^{19/} (c) an agreement with Ms. Bloom's business partner on apportionment of responsibility for payment of rent and other

18. The transaction included finding successor tenants or subtenants who would pay substantially more in rent than Ms. Bloom and her partner had been paying under their 2000-2006 lease. Accordingly, the original lease was renegotiated and replaced with a new lease under which the base monthly rent was \$_____ per month, or \$_____ per month more than the corresponding rent figure in the original lease. Under the new replacement lease, Ms. Bloom and her former partner continued to be personally liable, but the business known as "Party Planet" took over the leased premises as assignee tenants. The over \$_____ in financial benefits received by Ms. Bloom and her business partner through this transaction was funded by a share of the rent increase and other

fees collected by the landlord under the new replacement lease.

19. (See previous footnote.)

expenses and on apportionment of whatever revenues would be obtained through the agreements with the landlord and the successor tenants; and (d) agreements whereby various creditors of Ms. Bloom, her partner, and their business would settle their claims at a discounted rate in connection with receiving payment that was funded through the agreements with the landlord and the successor tenants.^{20/}

While Behrman worked in tandem with Ms. Bloom's business partner's attorney, Wes Bates, on the various tasks at hand, Behrman did most of the work in negotiating the agreements with the landlord and the successor tenants.^{21/} As a result of agreements negotiated and written by Behrman and completed in April 2001, Ms. Bloom and her business partner became entitled to receive a net amount of \$139,000 on top of getting the successor tenants to cover Ms. Bloom's and her partner's continuing obligation to pay over \$45,600 per year in rent on their lease, which was to remain in effect until 2006.^{22/} Ms. Bloom's cash share of the \$139,000 after payments to creditors (but before payment of any of Behrman's legal fees) turned out to be \$27,996.08.^{23/}

B. November 2002 Events: (1) Near-Completion of Behrman's Representation of Ms. Bloom, (2) Disbursements of Cash Collected Through Behrman's Representation of Ms. Bloom, and (3) Agreement on Retention of \$2,500 in Attorney Wes Bates's Trust Account Pending Behrman's Submission of a Complete Bulling Statement

20.

21.

22.

23.

Under the terms of the lease-assignment agreement among Ms. Bloom, Marcus Lalario (Ms. Bloom's former business partner), the landlord (Spiros Savvides), and the successor tenants doing business as "Party Planet," most of the funds to which Ms. Bloom became entitled from the lease assignment needed to be paid to creditors, with most of the balance that would eventually be released to Ms. Bloom and her former business partner needing to be held in the trust account of Wes Bates until final resolution of the claims of the various creditors.^{24/}

It was in November 2002 that the required resolution of creditors' claims was completed as needed for Ms. Bates to disburse Ms. Bloom's share and her partner's share of the remaining balance of the funds collected from the successor tenants. Ms. Bloom's share was \$17,996.08 (which was in addition to a previous \$10,000 disbursement for her).^{25/}

Unfortunately, although Behrman had been making detailed contemporaneous timekeeping notes and records along the way,^{26/} he had failed to translate a large portion of those notes into billing entries entered into the software program he uses for generating invoices. As a result, when Ms. Bloom's \$17,996.08 share of the final disbursement of lease-assignment revenues became available as described above, Behrman did not know and could not readily determine exactly how much Ms. Bloom then owed him for

24.

25. +

26. See Exhibit 47, which is the 57-page printout of telephone notes and timekeeping notes that Behrman made using software called "Ecco" and that were referred to in the Bar Association's hearing brief as the "Echo notes." See also Behrman's related testimony at pages 205-222 of the hearing transcript.

accrued but unpaid fees. Behrman wanted to collect a fee payment out of the newly available \$17,996.08, but also wanted to be careful to avoid withholding an excessive portion of the \$17,996.08 to cover fees. He therefore proposed to Ms. Bloom that \$2,500 of the \$17,996.08 be disbursed to him as a fee payment, with the remaining \$15,496.08 of the \$17,996.08 going to Ms. Bloom (or, as requested by Ms. Bloom, to her parents as repayment of a loan they had made to her).^{27/} Behrman's idea was to collect the remaining balance of his unpaid fees over and above the \$2,500 after submitting his billing statement to Ms. Bloom.^{28/}

Ms. Bloom has never disputed that any portion of the \$2,500 Behrman requested in November 2002 as a fee payment was owed to him, but rather than having the \$2,500 disbursed immediately to Behrman she wanted to have the \$2,500 withheld in Mr. Bates's trust account as a holdback until Behrman submitted a complete billing statement.^{29/} Behrman agreed to this. Accordingly, on November 2____, 2002, Behrman and Ms. Bloom then jointly instructed Mr. Bates to disburse from his trust account \$15,496.08 of the \$17,996.08 on behalf of Ms. Bloom to Ms. Bloom's parents and to withhold the remaining \$2,500 until receiving further joint disbursement instructions. Mr. Bates promptly fulfilled those instructions.^{30/}

C. Behrman's Uncommunicativeness, Unresponsiveness, and General Lack of Follow-Through for Ms. Bloom After November 2002

27. +

28. +

29. At the hearing, Ms. Bloom explicitly testified that her only reason for wanting to have the \$2,500 withheld was to ensure that she would receive a final billing statement. Hearing Transcript at 20, lines 14-17.

30. +

As of late November 2002 when the \$15,496.08 was released to Ms. Bloom's parents at Ms. Bloom's request and when the \$2,500 was held back in Wes Bates's trust account, Behrman's representation of Ms. Bloom had been successfully completed on all fronts except for collection of the Party Planet debt.^{31/} Thus, only two tasks remained for Behrman to perform in order to successfully complete his representation of Ms. Bloom: (a) collecting the debt, of which Ms. Bloom's share was originally \$2,922.31; and (b) providing Ms. Bloom a complete, up-to-date billing statement.^{32/}

Regrettably, Behrman failed to follow through. As of June 2004 when Ms. Bloom dismissed Behrman as her attorney and filed her grievance with the Bar Association, Behrman still hadn't collected the debt and still hadn't provided Ms. Bloom with the requested billing statement. Moreover, Behrman after November 2002 was highly uncommunicative and repeatedly failed to respond to telephone messages and emails Ms. Bloom sent him. On the few occasions when Behrman did respond to Ms. Bloom, he made promises to resolve the two pending matters soon, but he failed to fulfill those promises.^{33/}

D. Contrasts Between Behrman's Conduct After November 2002 and His Previous Conduct

Behrman's uncommunicativeness and unresponsiveness after November 2002 were both in sharp contrast to Behrman's conduct during the more than two years from the summer 2000 commencement of his representation of Ms.

31.

32.

33.

Bloom through the November 2002 events described above. All the evidence presented regarding Behrman's uncommunicativeness and his unresponsiveness to Ms. Bloom's calls and emails was from the period between the December 2002 death of Behrman's father and Ms. Bloom's June 2004 dismissal of Behrman as her attorney.^{34/} In her testimony at the hearing, Ms. Bloom acknowledged that before December 2002 she had never had any difficulty getting Behrman to respond to emails or phone calls, and that there had never been any problem with his communicativeness (other than the lack of a billing statement).^{35/} Confirming testimony on the absence of any problems communicating with Behrman before December 2002 came from both Wes Bates (who as described above had represented Ms. Bloom's business partner in connection with the multitude of issues regarding which Behrman had represented Ms. Bloom) and Ms. Bloom's commercial landlord, Spiros Savvides (whom Behrman had dealt with extensively regarding the lease Ms. Bloom and her business partner had entered with Mr. Savvides and regarding the negotiation and signing of the lease-assignment agreement); both Mr. Bates and Mr. Savvides affirmed that Behrman had been excellent to work with.^{36/}

Furthermore, although Behrman prior to December 2002 undisputedly exhibited lack of diligence regarding billing statements and regarding collection of the Party Planet debt, he was undisputedly diligent and effective in handling all of the broad array of other matters that were involved in his

34.

35.

36.

representation of Ms. Bloom—and which were successfully completed between summer 2000 and November 2002.^{37/} An especially prominent example of Behrman's diligence was his having done most of the work in negotiating and writing the lease-assignment agreement that was ultimately entered in April 2001 by Ms. Bloom, her business partner, Mr. Savvides as landlord, and the new "Party Planet" tenants who were taking assignment of the lease.^{38/}

E. The Parade of Personal, Medical, and Emotional Problems That Befell Behrman Starting in December 2002

The Death of Behrman's Father. As Behrman communicated to Ms. Bloom in December 2002, Behrman's father died that month, and Behrman needed to go out of town to attend to the matter.^{39/} Unfortunately, the death of Behrman's father turned out to be only the beginning of what turned out to be a parade of problems that befell Behrman during the period he was supposed to be collecting the Party Planet debt and giving Ms. Bloom a billing statement.

Detached Retina, Unsuccessful Eye Surgeries, and Permanent Blindness in Behrman's Left Eye. In February 2003, Behrman developed a detached retina in his left eye. Due to highly unusual and serious complications, Behrman's situation turned out to be much more difficult and troublesome than a detached retina would ordinarily be. The first medical attempt to repair the retina was unsuccessful and actually caused serious permanent

37. See stipulated Finding of Fact ____, which notes that everything done by November 2002.

38. Stipulated Finding ____.

39.

damage. Between February 2003 and September 2003, Behrman underwent four hospital surgeries on his eye. Leading up to each of the first three, Behrman was led to believe that the next surgery would be the last. Unfortunately, each of the surgeries turned out to be unsuccessful. By September 2003, when Behrman had the last of those surgeries, he was informed that the blindness that had arisen in his left eye could not be repaired.^{40/}

Eye-Related and Surgery-Related Difficulty in Working. During the course of the surgeries, Behrman's ability to work in his capacity as a solo practitioner was severely impaired. For a full month after the first surgery, which was in February 2003, Behrman could hardly work at all because he was under instructions from his doctor to keep his head down and to look down virtually all the time. After that first month, he was able to resume working without keeping his head down and looking down, but his energy was way below normal and so was his productivity.^{41/}

Descent into Overwhelm, Depression, Disorganization, and Extreme Deterioration in Productivity. As he struggled to stay afloat in his solo practice, Behrman became overwhelmed, depressed, and increasingly disorganized in ways that he had never before experienced. His productivity fell to a small fraction of what had previously been normal for him.^{42/}

40. Behrman is now "worse than blind" in his left eye in the sense that what he sees in that eye is nothing but interference with what he sees in his relatively good eye.

41.

42.

Behrman's ability to make necessary adaptations and adjustments was severely hampered by his slowness in recognizing that he was suffering from depression rather than merely "feeling down" and being "low on energy." In addition, he repeatedly underestimated how long it would take him to do particular work, and he also grossly underestimated how long it take for him to start heading back to normal.^{43/}

2004-2006 Acupuncture Treatment for Depression, Reduction of Caseload, and Eventual Progress Toward Recovery. In spring 2004, Behrman finally recognized that he was suffering from significant depression that he needed professional help to address. Accordingly, in April 2004 he contacted an acupuncturist, April Hulvershorn, who had been recommended to him for a special kind of acupuncture that can help alleviate depression. His began seeing Ms. Hulvershorn for treatments at the time of her next opening in her schedule, which was in May 2004. During the period from May 2004 to the November 2006 hearing, Behrman received ____ acupuncture treatments for his depression, which reflected an average of more than ____ treatments every month.^{44/}

In conjunction with receiving those treatments, Behrman made progress in getting better, but the progress was slow and difficult.^{45/} Behrman continued to be seriously impaired compared to his previous normal self until shortly before the November 2006 hearing. Accordingly, in addition to

43.

44. Exhibit ____/.

45. [Detailed citations to supporting testimony from Behrman, Alene Arakawa, and Trisha Cacabelos regarding depression, etc.]]

getting the acupuncture treatments, Behrman cut back on his caseload as a means of trying to keep his professional commitments within the depression-based physical and emotional limits on his productivity.^{46/}

Detailed testimony on Behrman's personal and emotional problems came not only from Behrman but also from two friends, Trisha Cacabelos and Alene Arakawa.^{47/} Those witnesses also testified on the signs and timing of Behrman's progress toward recovery.^{48/}

Behrman sought to call two additional witness on that issue: April Hulvershorn, the acupuncturist who administered most of the ____ treatments Behrman received for purposes to treating his depression between May 2004 and November 2006; and Dr. Michael Nguyen, who became Behrman's ophthalmologist after and performed the four eye surgeries described above between February and September 2003 in the wake of the unsuccessful procedure performed by Behrman's previous ophthalmologist. Upon the motion of the Bar Association, the hearing officer refused to allow Behrman to call either of those witnesses.

F. The June 2004 Default of the Party Planet Tenants , Ms. Bloom's July 2004 Assignment of All Rights and Obligations Relating to the Lease Including All of Her Rights to a Share of the Party Planet Debt, and Her July 2004 Dismissal of Behrman and Submission of Her Written Grievance Against Him.,

The Party Planet tenants who in 2001 had taken assignment of the lease from Ms. Bloom and her partner failed to make their rent payment for June 2004 and went into default. Party Planet never made another payment. The

46.

47.

48.

next month, in July 2004, Ms. Bloom entered an agreement with her former business partner, Marcus Lalario, under which Mr. Lalario would take assignment of all of Ms. Bloom's rights and obligations relating to the lease and the previous lease-assignment agreement. In the process, Ms. Bloom got out of personal liability for any rent payments in the wake of Party Planet's default, and Mr. Lalario was able to move forward in a new business venture with new partners using the leased premises. As part of the assignment, Mr. Lalario also received all of what had been Ms. Bloom's \$2,922.31 share of the Party Planet debt Behrman had failed to collect.

Concurrently with or shortly after entering this assignment agreement with Mr. Lalario, Ms. Bloom dismissed Behrman as her attorney and submitted her written grievance to the Bar Association. Apparently regarding the uncollected debt as uncollectible, and notwithstanding her agreement assigning all of her interest in the debt to Mr. Lalario, Ms. Bloom accompanied her grievance with a request for compensation from the WSBA Lawyers' Fund for Client Protection^{49/}

The only request Ms. Bloom made in her grievance was for a payment of \$3,422.31 plus interest. The \$3,422.31 figure reflected the sum the \$500 amount of Behrman's November 2002 trust-account withdrawal plus what had been her \$2,922.31 share of the Party Planet debt until she made the assignment to Mr. Lalario. She wanted the payment to be made through

49. July 22, 2004 email from Malka Bloom to Brad Behrman (Ex. 27).

release of the \$2,500 being held in Wes Bates's trust account plus a payment from Behrman in the amount of \$922.31 plus interest.^{50/}

G. Behrman's September 2004 Acceptance of Liability for Ms. Bloom's Uncollected \$2,922.31 Share of the Party Planet Debt and Explanation as to Why His Compensation to Ms. Bloom Would Be Through a Fee Offset Rather than a Cash Payment

Behrman never tried to deny culpability or liability for any uncollectible portion of the \$2,922.31, and he never tried to charge Ms. Bloom for any of the small amount of work he'd done in trying to collect on the debt. In September 2004, not yet realizing that Ms. Bloom in July 2004 had already received full compensation for her share of the debt by assigning that share to Marcus Lalario in return for not having to pay any rent in the wake of the default of the "Party Planet" tenants, issued a written acknowledgment and acceptance of full liability to Ms. Bloom for any and all of her share of the debt that was uncollectible. This acceptance was presented in Behrman's September 14, 2004 response to Ms. Bloom's grievance.^{51/} At the same time, Behrman explained that because the unpaid balance of Behrman's earned fees were much larger than the total amount Ms. Bloom was demanding as compensation, Behrman would be using a credit or offset against those unpaid fees as his method of giving Ms. Bloom full compensation.^{52/} Upon later learning of the bankruptcy of Party Planet and its owners, Behrman stipulated to the uncollectibility of the entire debt.

50.

51.

52.

In her testimony at her hearing, Ms. Bloom confirmed that she'd viewed what Behrman had written in his September 10, 2004 letter as demonstration that he was appropriately "taking responsibility" for the money he'd failed to collect.^{53/}

H. Allegations, Findings, and Conclusions Regarding Client Injury

In keeping with what Ms. Bloom had presented in her written grievance, the only client injury that Bar Association's formal complaint in this proceeding alleged to have occurred was deprivation of funds consisting of (a) what was originally (before the assignment described in Finding 53) Ms. Bloom's \$2,922.31 share of the debt Behrman failed to collect plus (b) the \$500 trust-account withdrawal Behrman made in November 2002 without giving Ms. Bloom the required notice.^{54/}

The hearing officer found that Behrman's failure to collect the debt had caused Ms. Bloom *actual* injury in the amount of not only what was originally Ms. Bloom's \$2,922.31 share of the debt Behrman failed to collect but also the additional \$1,460.94 portion of the debt that at all times had been the share owed to Ms. Bloom's former business partner, Marcus Lalario. In addition, the hearing officer found that Behrman's failure to give Ms. Bloom the required notice of his \$500 trust-account withdrawal had subjected Ms. Bloom to *potential* injury (but not actual injury) in the amount of the withdrawal. The hearing officer recommended that Behrman be ordered to pay Ms. Bloom restitution in the amount of \$4,833.25 (\$2,922.31 plus

53. Testimony of Malka Bloom, Hearing Transcript at 82, especially lines 19-22.

54. Complaint referred to failure to give notice or obtain approval. The relevant RPC, RPC ____, states a notice requirement but says nothing about approval. Exhibit ____/

\$1,460.94 = \$4,383.25 based on the uncollected debt plus \$500 based on the trust-account withdrawal).

Behrman submitted a motion for modification requesting in part that the restitution recommendation be amended so as to cure the inconsistency with _____ stipulated findings of fact that the hearing officer had adopted: (a) Findings ____, which indicated that Ms. Bloom had never been entitled to more than a \$2,922.31 share of the \$4,383.25 Party Planet debt that the hearing officer was treating as the basis for \$4,383.25 of his restitution recommendation; and (b) Finding ____, which explicitly stated that Ms. Bloom had released to Marcus Lalario all of her share in the uncollected Party Planet debt. The hearing officer denied all of Behrman's recommendation without any explanation.

Relying on stipulated finding 53, in which the hearing officer had found Ms. Bloom to have released all of her interest in the uncollected debt in exchange for being released from all lease obligations including the obligation to pay rent after the successor tenants had stopped making rent payments and gone into default, the Disciplinary Board found that Ms. Bloom was not entitled to any restitution based on the uncollected debt and therefore overturned the recommendation that Behrman be required to pay restitution based on the debt. At the same time, the Disciplinary Board recommended that Behrman be required to pay restitution in the amount of the \$500 trust-account withdrawal plus interest.^{55/}

I. Refusal by the Hearing Officer and the Disciplinary Board to Consider Any of Behrman's Fee-Related Defenses

55.

In making their various determinations regarding actual and potential client injury, regarding restitution, and other matters, the hearing officer and the Disciplinary Board at the request of the Bar Association refused to allow Behrman to assert any part of his unpaid-fee claim and the related compensatory offset as a defense. In doing so, without offering any explanation in the written decision, they relied on the Bar Association's assertion that there was a lack of jurisdiction to consider the merits of any portion of Behrman's unpaid-fee claim because none of Behrman's fees had been alleged to violate RPC 1.5(a)'s prohibition against unreasonable fees; in other words, the hearing officer and the Disciplinary Board refused to allow Behrman to assert any of his fees as a defense not because of any substantive finding of unreasonableness, excessiveness, or questionableness of the fees, but instead because the Bar Association stipulated that all of Behrman's fees were reasonable under RPC 1.5(a).

The refusal by the hearing officer and the Disciplinary Board extended not only to the portion of Behrman's fees that Ms. Bloom has disputed but also to the \$2,500 portion that has never been disputed and that Ms. Bloom both in her grievance and in her hearing testimony acknowledged to be earned and unpaid.^{56/}

Thus, as part of the decision to treat all of Behrman's fee-related defenses as outside the scope of this proceeding, the hearing officer and the Disciplinary Board totally disregarded all of Behrman's unpaid-fee claim and also the \$2,922.31 compensatory fee offset when making all of their determinations on injury, restitution, and all other monetary issues in this

56.

proceeding; in making those determinations, they treated the entirety of Behrman's unpaid-fee claim and of his compensatory fee offset to Ms. Bloom as if they had no validity and zero value.

IV. ARGUMENT ON MENTAL STATE, INJURY, RESTITUTION, AND THE PRESUMPTIVE SANCTIONS FOR COUNTS 1-4

A. Regarding Counts 1-3, Behrman's Mental State Was Negligence Without Any "Pattern of Neglect" Within the Meaning of the *ABA Standards* for Any Count.

Regarding Counts 1-3 (concerning diligence and communication),^{57/} the hearing officer as affirmed by the Disciplinary Board erred in finding and concluding that Behrman's misconduct constituted a "pattern of neglect" within the meaning of ABA standard 4.42(b) rather than negligence without such a pattern within the meaning of standards 4.43 and 4.44.

"Pattern of neglect" was the only explicit finding or conclusion made by the hearing officer or the Disciplinary Board concerning Behrman's mental state relating to Counts 1-3. There was no explicit or implicit finding of a "knowing" mental state relating to Counts 1-3. Consequently, correcting the error regarding "pattern of neglect" would mandate reducing the presumptive sanction for Counts 1-3 from suspension under Standard 4.42(b) to reprimand under Standard 4.43 or admonition under Standard 4.44 (depending on the injury finding made for each count).

A comprehensive Westlaw examination of published cases^{58/} reveals that negligence by attorneys has been treated as constituting a "pattern of neglect" within the meaning of the standards in section 4.4 of the *ABA Standards* in

57. For a more detailed description of Counts 1-3, see footnote 6.

58. Attached as Appendix Exhibit A is a March 9, 2008 printout of all Washington Supreme Court cases found by Westlaw using "pattern of neglect" as the search term.

only two types of situations, neither of which is applicable to Behrman. The first type of situation is when the attorney was guilty of extensive, multiple instances of negligence involving two or more clients whose grievances were being addressed in the same disciplinary proceeding.^{59/} The other type of situation—which is the only one applicable to misconduct involving only one client—was when the misconduct involved extensive, repetitive missing of legal deadlines such as court deadlines, INS deadlines, or statute-of-limitations deadlines.^{60/}

There is no case in which the holding supports the hearing officer's and the Board's treating Behrman's conduct in Counts 1-3 as a "pattern of neglect" within the meaning of ABA standard 4.42(b) rather than simply as negligence without such a pattern under standards 4.43 and 4.44, but there are at least two cases that show the "pattern of neglect" label to be inapplicable to Behrman: *Salazar* and *Longacre*.^{61/}

The misconduct addressed in *Salazar* related to five different clients. Regarding an immigration client, the Mr. Salazar's misconduct included

59. See, e.g., *Blanchard, Kagele*, and the ____ other multiple-client cases identified in Exhibits _____

60. See, e.g., _____ and the other ____ one-client cases identified in Exhibits _____. Putting aside the ____ cases finding "pattern of neglect" within the meaning of ABA standard 4.41 or 4.42 in multi-client context putting aside the ____ cases finding such a pattern in connection with the repetitive missing of specific legal deadlines, the remaining ____ of the 17 cases that the Westlaw search identified as containing the phrase "pattern of neglect" were as follows: ____ of the cases were not attorney discipline cases, ____ of the cases did not find a "pattern of neglect" to have been present, and ____ of the cases used the term in the context of "cumulative discipline" cases in which the term "pattern of neglect" was used in reference to extensive and repetitive neglect exhibited by attorneys with regard to multiple clients whose grievances arose in the course of multiple rounds of disciplinary proceedings in a manner that triggered _____.

61. *In re Salazar*, WSBA No. 6273, WSBA Review No. 02#00022 (decided by Disciplinary Board Aug. 24, 2004); *In re Longacre*, 155 Wn.2d 723 (2005).

extended lack of diligence involving not one but three rounds of failure between February 2000 and May 2001 in the face of known time limitations to submit work-visa application materials in a manner that was both timely and compliant with IRS requests for content, and the result was three rounds of denial of the application of Mr. Salazar's client.^{62/} Mr. Salazar's misconduct also included failure to communicate and failure to be responsive to the immigration client despite the client's making ongoing, repetitive affirmative effort to inquire about the status of her work-visa application and to see if anything further was needed from her,^{63/} As a result of Mr. Salazar's misconduct, the client suffered actual injury^{64/} that apparently included the client's being prevented from working in the United States for a period of time and her being required at least once to return to Japan due to expiration of her previously obtained visa. Beyond the immigration client, Mr. Salazar's misconduct additionally included failure to refund unreasonable or unearned fees to another client, and failure to respond promptly to the Bar Association's investigative requests regarding both of the clients already referred to plus three additional clients.^{65/}

The hearing officer concluded that Mr. Salazar had engaged in a "pattern of neglect" within the meaning of standard 4.42(b) of the *ABA Standards*

62. *Salazar* Hearing Officer's Opinion at 3-7, especially findings 11, 13, 16-20, 22-23, 25, 33-36, 38-39.

63. *Id.* at 4-7, especially findings 17-19, 32-35, @@+7.

64. *Id.* at 5-7, especially findings 26, 29.

65.

regarding the immigration client,^{66/} but the Disciplinary Board *overruled the hearing officer on that issue and modified the findings and conclusions to reflect that the respondent's misconduct was simply "negligent" without any "pattern of neglect."*^{67/} Insofar as Mr. Salazar's conduct was vastly more extensive, culpable, and injurious than Behrman's the *Salazar* case is a strong precedent for finding and concluding that Behrman's mental state regarding Counts 1-3 was negligence without any "pattern of neglect."

In *Longacre*, the respondent was a criminal-defense attorney who had repetitively failed to provide his client information on the various plea offers made by the prosecutor and on relevant sentencing information. As in *Salazar*, the hearing officer found that the respondent's mental state had been negligence with a "pattern of neglect," but was overturned on that issue by the Board. The Washington Supreme Court upheld the Disciplinary Board's finding and conclusion that Mr. Longacre's mental state had been negligent without any pattern of neglect.^{68/}

In view of *Salazar*, *Longacre*, and the lack of any cases in which "pattern of neglect" within the meaning of ABA standard 4.41 or 4.42 has been found on the basis of misconduct relating to only one client in the absence of substantial, repetitive violations of fixed legal deadlines such as court deadlines and statute-of-limitations deadlines, the court should overturn the previous "pattern of neglect" determination and should find and conclude that

66. *Id.* at 16 (conclusion 76 regarding Counts 1-2).

67. *Salazar* Disciplinary Board's Order at 3 (lines 5-11 amending paragraph 76 of the hearing officer's opinion).

68. *Longacre*, 155 Wn.2d at 729-31, 732-33, 743, 745.

Behrman's misconduct under Counts 1-3 involved a mental state of negligence without any "pattern of neglect."

B. Ms. Bloom Suffered "Little or No Actual or Potential Injury" Within the Meaning of the *ABA Standards*.

The recommendation of suspension is built upon numerous monetary determinations that the hearing officer and the Disciplinary Board made adversely to Behrman—including but not limited to the determinations that Behrman's misconduct caused Ms. Bloom actual or potential injury through actual or potential "deprivation of funds" involving two and only two identified components: the never-collected "Party Planet debt" in which Ms. Bloom originally had a \$2,922.31 share, and the \$500 trust-account withdrawal that Behrman made as a payment on earned, unpaid fees without giving Ms. Bloom the required notice.^{69/}

As is explained below, the various monetary determinations made by the hearing officer and the Disciplinary Board involved a number of errors. The most serious, pervasive, and prejudicial of those money-related errors was the hearing officer's and the Board's decision to treat the entirety of Behrman's unpaid-fee claim as outside the scope of this proceeding on the grounds that the Bar Association had stipulated that none of Behrman's fees were in violation of RPC 1.5(a)'s prohibition against unreasonable fees and so should not be subject to disciplinary evaluation.^{70/} In the process, the hearing officer and the Disciplinary Board treated the entirety of Behrman's unpaid-fee claim as if it had no validity and zero value, and they did so without giving any

69.

70.

portion of Behrman's unpaid-fee claim any substantive consideration beyond acknowledging the Bar Association's stipulation that all of Behrman's fees were reasonable and free of any impropriety under RPC 1.5(a).

But for reasons that are further explained below, the issue of how much Ms. Bloom owed Behrman at various times for earned, unpaid fees is intrinsically and vitally relevant to each of those determinations regarding deprivation of funds and client injury and therefore to all determinations of presumptive sanctions for Counts 1-4. By refusing to substantively consider any of Behrman's fee-based defenses on the merits and by treating all of Behrman's fees the same as if they had no validity and no value, the hearing officer and the Disciplinary Board adjudicated all money-related issues by considering the Bar Association's side of the case while refusing to consider Behrman's side of the case. Such a one-sided approach to adjudication would constitute a major violation of due process in any trial court, and it was likewise a major violation of Behrman's right to due process in this disciplinary proceeding.

This due-process violation was not only major but has been pervasively and decisively prejudicial to Behrman's severe and improper detriment in this proceeding. The determinations of client injury through deprivation of funds are of fundamental and decisive importance in this proceeding, because they serve as linchpins in the pending recommendation that Behrman be suspended for nine months. If the hearing officer and the Disciplinary Board had properly considered the evidence presented to substantiate Behrman's unpaid fees rather than treating the undisputed reasonableness of those fees under RPC 1.5(a) as grounds for according no validity and zero value to the

fees, they would have had to find that Ms. Bloom suffered no actual or potential deprivation of funds relating to the debt or the trust-account withdrawal and that there was therefore no client injury. In the absence of any client injury—or, in the terminology of the *ABA Standards*, if the injury determination had been that Behrman's misconduct caused Ms. Bloom "little or no actual or potential injury"—then the presumptive sanction mandated by the ABA Standards for each count among Counts 1-4 would have been *admonition* rather than suspension even in the absence of correction of the error identified above regarding "pattern of neglect."

Moreover, even in the absence of correction of any other errors apart from the conclusions regarding client injury and presumptive sanction relating to Counts 1-4, there would not have been any count for which the presumptive sanction was suspension; the total line-up of conclusions regarding presumptive sanctions would have been admonition rather than nine-month suspension for each count among Counts 1-4 (regarding Behrman's misconduct relating to Ms. Bloom) and reprimand for Count 5 (regarding the delays and other deficiencies in Behrman's submission of documents and written responses in response to requests from the Bar Association).

1. Rather Than Being Used Against Behrman as Grounds for According No Validity and Zero Value to His Unpaid Fees, the Bar Association's Stipulation that All of Behrman's Fees Are Reasonable and in Compliance with RPC 1.5(a) Should Be Recognized as Grounds for Treating All of Behrman's Unpaid-Fee Claim as *Fully Valid* for Purposes of Making Money-Related Determinations Within This Disciplinary Proceeding.

Behind all the limitations on the jurisdiction of disciplinary proceedings to evaluate a respondent attorney's fees is a consistent purpose: to honor the

general rule that an attorney should not be subjected to any disciplinary sanctions on the basis of actual or alleged invalidity of fees that are not shown to be unreasonable or otherwise improper under Rule 1.5(a).^{71/} In view of that purpose, the Bar Association's stipulation that none of Behrman's unpaid-fee claim involves any unreasonableness or other impropriety under RPC 1.5(a) should be treated as establishing that *all* of what Behrman has stated to be the amount of his unpaid-fee claim should be treated as *fully valid* with regard to determinations of monetary injury to Ms. Bloom, of restitution, and of other issues to which fees are relevant.

What the hearing officer and the Disciplinary Board have done in treating all of Behrman's fee-related defenses as outside the scope of this proceeding is *diametrically opposed* to the purpose of the limit on disciplinary jurisdiction over fees. Instead of serving the intended purpose of sparing Behrman from being subjected to discipline on the basis of any dispute over fees that are all found to be reasonable and proper under RPC 1.5(a), the limitation on disciplinary jurisdiction over fees has been twisted and misused in this proceeding so as to improperly prevent Behrman from deriving any benefit from any of his fee-based defenses against disciplinary allegations that have been made against him regarding client injury, restitution, and other issues.

Moreover, even if the Bar Association, the hearing officer, and the Disciplinary Board were correct that consideration of Behrman's fee-based defenses is properly treated as being outside the jurisdictional scope of this proceeding, then all the monetary issues to which Behrman's fee-based

71. (Fraser. See also Kagele. Same under previous rules.)

defenses are relevant would also have to be treated as outside the jurisdictional scope of this proceeding. Treating any of the monetary issues raised by the prosecution in this case as being within the scope of this proceeding without also treating all of Behrman's fee-based defenses as being within the scope of this proceeding is fundamentally unfair and a violation of due process.

2. The Evidence in the Record Amply Documents and Establishes that Ms. Bloom Owes Behrman Over \$12,000 for Earned, Unpaid Fees Even After Being Credited for the \$2,922.31 Compensatory Fee Credit Relating to Behrman's Failure to Collect the Debt and for the \$500 Amount of the Trust-Account Withdrawal Behrman Made as a Fee Payment.

The Amount of Behrman's Unpaid-Fee Claim. As Behrman stated in his September 10, 2004 written response to Ms. Bloom's grievance^{72/} and as he has repeatedly reaffirmed ever since, the unpaid balance of fees Behrman earned in the course of representing Ms. Bloom has at all relevant times been far more than the \$3,422.31 sum of the \$2,922.31 and \$500 figures that Ms. Bloom has claimed to be owed. More specifically, as fully documented in his final billing statement dated November 2, 2006,^{73/} the net unpaid balance of Behrman's earned fees is \$12,815.19 even *after* applying credits for (a) the \$2,922.31 fee offset he gave Ms. Bloom as compensation for what was originally her share of the debt he failed to collect and (b) the \$500 payment made through Behrman's November 2002 trust-account withdrawal. Not

72.

73. This billing statement appears in the record as Ex. 54.

including interest, the total balance of unpaid fees before applying the \$2,922.31 fee offset and the \$500 payment is \$16,237.90.^{74/}

Although the incomplete draft billing statement Behrman submitted to the Bar Association at his July 17, 2006 deposition^{75/} shows a lower unpaid balance than the November 2006 final billing statement because of not including the specified charges that appear in the November 2006 statement with a "^^^" marking at the beginning of the description of each charge,^{76/} it still documents an unpaid balance of thousands of dollars even after applying credits for the \$2,922.31 fee offset and the \$500 payment.^{77/}

As substantiated by both billing statements,^{78/} most of Behrman's fees were earned before Behrman agreed in _____ 2001 to handle collection of the Party Planet debt. Behrman did not charge Ms. Bloom for anything he did after the November 2002 disbursement of over \$15,000 to Ms. Bloom's parents as directed by Ms. Bloom or after Behrman made the November trust-account withdrawal as a payment on fees.

3. The Record Would Contain Additional Evidence Supporting Behrman's Unpaid-Fee Claim If Not for the Hearing Officer's Improper Refusal to Allow Behrman to Introduce It.

Behrman attempted to obtain testimony from Ms. Bloom and from Wes Bates that he believes would have further substantiated the validity of all of

74.

75. The July 17, 2006 incomplete draft billing statement is included in the record as Ex. 48

76. Examples of the charges that are so marked with "^^^" to identify them as charges that did not appear in the July 17, 2006 incomplete draft billing statement are the charges appearing in the November 2, 2006 statement for 2/28/01, 3/1/01, and 3/2/01. See the November 2, 2006 billing statement at page 10 in Ex. 54.

77.

78. See Ex. 48 and Ex. 54.

his unpaid-fee claim, but he was prevented from doing so by the hearing officer's granting the Bar Association's objection and motion to have Behrman's unpaid-fee claim treated as outside the scope of this proceeding.^{79/}

4. Regarding All Counts, the Record Shows that Ms. Bloom Suffered "Little or No Actual or Potential Injury" within the Meaning of the ABA Standards.

Crucial Significance of the Determinations Regarding Injury Based on "Deprivation of Funds". Regarding Counts 1-4—which are the only counts involving misconduct in Behrman's representation of Ms. Bloom and the only counts regarding which suspension was selected as the presumptive sanction—a core issue is whether Behrman's misconduct subjected Ms. Bloom to any actual or potential deprivation of funds to which she was entitled. Deprivation of funds was the only client injury alleged in Ms. Bloom's written grievance, the only client injury alleged in the Bar Association's formal complaint, and the only client injury found by the hearing officer and the Disciplinary Board.

According to Ms. Bloom's written grievance, the Bar Association's formal complaint, and the hearing officer's decision as amended by the Disciplinary Board, there were two and only two components identified components of the alleged actual or potential deprivation of funds: (a) what was originally Ms. Bloom's \$2,922.31 share of the Party Planet debt Behrman failed to collect; and (b) the \$500 amount of the November 2002 trust-account withdrawal Behrman made as a payment on fees. Therefore, if the findings and conclusions regarding actual or potential deprivation of funds based on the \$2,922.31 and \$500 figures were overturned, then there would

79. Tr. at ____.

be "little or no actual or potential injury" to Ms. Bloom within the meaning of the ABA standards applicable to Counts 1-4, and the presumptive sanction mandated by those standards for each count among Counts 1-4 would be *admonition rather than suspension.*^{80/}

The Logical Impossibility of Ms. Bloom's Having Suffered Any Actual Deprivation of Funds in View of the Size and Timing of Behrman's Earned, Unpaid Fees. For Behrman's misconduct to have ever actually injured Ms. Bloom through a deprivation of funds, there must have been a particular time or range of times when, if not for Behrman's misconduct, Ms. Bloom would have received funds to which she would have been entitled. But the Bar Association has never even attempted to identify such a time or time range, and the hearing officer's decision as amended by the Disciplinary Board makes no finding whatsoever on that issue.

If one considers both the amount and timing of the fees Behrman earned through his representation of Ms. Bloom as shown by the evidence in the record, it is clear that in fact there was *never* a time when Behrman's misconduct deprived Ms. Bloom of any funds to which she was entitled. Even if Behrman had somehow collected all of the Party Planet debt on the same day in ____ 2001 when he was asked to collect the debt and agreed to do so, Ms. Bloom would not have been entitled to receive a disbursement of any of the proceeds because Behrman would have been entitled to retain all of the proceeds as a payment on the much larger amount of Behrman's earned, unpaid fees; as the November 2, 2006 billing statement entered into

80.

the record as Exhibit 54 shows, the unpaid balance of Behrman's earned fees was over \$15,000 at all times from spring 2001 up to the present.

The results of this analysis are the same regardless of when one might believe the proceeds from the debt would have been collected if Behrman had been duly diligent in his collection efforts, and regardless of when one might believe Behrman should have given Ms. Bloom compensation for her share of the debt in the absence of his following through properly with collection. At all times from Behrman's agreeing in ____ 2001 to handle collection of the debt up to the present day, the unpaid balance of Behrman's earned fees has been *over \$16,000* before applying credits for the \$2,922.31 compensatory fee offset and the \$500 trust-account withdrawal, and the unpaid balance after applying credits for both those items has been *over \$12,000*. Consequently, there was never a time when Behrman's collecting the debt with proper diligence would have resulted in Ms. Bloom becoming entitled to anything more than having her share of the proceeds collected by Behrman being applied as a credit against her unpaid fees—which is exactly what Behrman in fact did by granting Ms. Bloom the compensatory \$2,922.31 fee offset described above.

The analysis is essentially the same regarding the \$500 amount of Behrman's November 2002 trust-account withdrawal. Behrman's misconduct relating to the trust-account withdrawal—which consisted solely of Behrman's making the withdrawal without giving Ms. Bloom the required notice of the withdrawal (as distinguished from misappropriation, commingling, improper retention, or other mishandling of trust-account funds or client funds)—cannot properly be considered to have deprived Ms. Bloom

of any funds because there was never any time when she would have received or become entitled to receive any part of the \$500 even if not for Behrman's failure to give the required notice and even if not for Behrman's making the withdrawal..

The \$500 in trust-account funds that Behrman had been holding on Ms. Bloom's behalf and also the \$17,996.08 that Wes Bates had been holding on Ms. Bloom's behalf both became ripe for disbursement for the first time in November 2002, when settlement and payment of the debts incurred by Ms. Bloom and her former partner had been completed as required by the terms of the Ms. Bloom's and her partner's lease-assignment agreement with the Party Planet tenants and the landlord. At that point, Behrman became obligated under RPC 1.15A to withdraw the \$500 from his trust account and to apply it to his unpaid fees. Though Ms. Bloom was undeniably entitled to the required notice, she was never entitled to have the \$500 disbursed to her and was not even entitled to require Behrman to keep the \$500 in this trust-account.

This was especially true because there has never been any dispute that as of the time of the \$500 trust-account withdrawal, the unpaid balance of Behrman's earned, unpaid fees was undisputedly no less than \$2,500—which is what Ms. Bloom has repeatedly asserted to be the true unpaid balance rather than the higher amount claimed by Behrman.^{81/}

The Logical Impossibility of Ms. Bloom's Having Suffered Any Potential Deprivation of Funds in View of the Size and Timing of Behrman's

81.

Earned, Unpaid Fees. In the section on definitions within Article III of the *ABA Standards*, "potential injury" is defined as follows:

"Potential injury" is the harm ... that is *reasonably foreseeable at the time of the lawyer's misconduct*, and which, but for some intervening factor or event, would *probably* have resulted from the lawyer's misconduct. [Emphasis added.]

Thus, for Ms. Bloom to be properly considered to have suffered any "potential" deprivation of funds that would constitute a "potential" injury within the meaning of the *ABA Standards*, there must have been some monetary deprivation that was "reasonably foreseeable" to Behrman at the time of committing some misconduct that "would probably have resulted" in a monetary deprivation to Ms. Bloom in the absence of "some intervening factor or event."

In the absence of improperly treating all of Behrman's unpaid fees as having zero validity and zero value, there is no basis for any such "potential" deprivation or other monetary injury. Because the unpaid balance of earned fees since before ____ 2001 has continuously been more than \$12,000 higher than the \$3,422.31 sum of Ms. Bloom's \$2,922 debt share and the \$500 trust-account withdrawal, it was never "reasonably foreseeable" to Behrman or anyone else that Behrman's lack of diligence in collecting the debt or his failure to give Ms. Bloom the required notice regarding the trust-account withdrawal was subjecting Ms. Bloom to any risk whatsoever of being deprived of any funds to which she was entitled. The only risk that was foreseeable was that if the debt became uncollectible before Behrman succeeded in collecting the proceeds, he would be liable for the loss and

would need to give Ms. Bloom a compensatory offset against his unpaid fees—which is precisely what he did.

The \$500 trust-account withdrawal did not involve any "reasonably foreseeable" risk of financial deprivation to Ms. Bloom because not only was the net unpaid balance of Behrman's earned fees at the time of the withdrawal over \$12,000, but the undisputed portion of the unpaid fees was \$2,500. Behrman obviously was wrong in failing to give Ms. Bloom the required notice, but that misconduct did not generate anything that could legitimately be considered a "reasonably foreseeable" risk of monetary loss to Ms. Bloom or any other "potential injury" within the meaning of the *ABA Standards*.

C. On Top of the Magnitude and Stipulated Reasonableness of Behrman's Unpaid-Fee Claim, There Are Additional Reasons Why Behrman's Misconduct in Counts 2-4 Must Be Considered to Have Caused "Little or No Actual or Potential Injury" to Ms. Bloom Within the Meaning of the *ABA Standards*.

1. The Portion of Finding 89 Blaming Behrman for Subjecting Ms. Bloom to Unspecified "Serious Economic Consequences" Has No Support in the Record and Should Be Stricken.

The third sentence of Finding 89 should be struck on each of two grounds: (1) excessive vagueness and (2) lack of support in the record. That sentence is as follows:

Wesley Bates[']s competent representation of her former partner prevented Ms. Bloom from experiencing serious economic consequences from Respondent's neglect of her case.

Neither the hearing officer nor the Disciplinary Board has offered any explanation or identification of what the "serious economic consequences" consisted of or involved apart from Ms. Bloom's share of the uncollected debt and apart from the \$500 amount of the trust-account withdrawal. Nor is there any explanation or identification as to which of Behrman's counts of

misconduct allegedly subjected Ms. Bloom to any risk of "experiencing serious economic consequences" distinguishable from noncollection of the debt and from the trust-account withdrawal.

Moreover, neither Ms. Bloom's written grievance nor the Bar Association's formal complaint nor anything else in the record even raises any allegation or issue as to any adverse "economic consequence" that any of Behrman's misconduct purportedly would have or might have caused for Ms. Bloom if not for the intervening factor of "Wesley Bates[']s competent representation." The third sentence of Finding 89 is not a valid finding of potential injury or of anything else.

2. Even Ignoring Behrman's Unpaid-Fee Claim, the Record Does Not Support Finding that Behrman's Count 2 or Count 3 Misconduct Caused Ms. Bloom Any Actual or Potential Injury.

The record contains no evidence or even any allegation that Behrman's Count 2 delay in submitting his final billing statement to Ms. Bloom or any other deficiency in Behrman's communication with Ms. Bloom regarding fees ever had even the remotest causal link to the noncollection of the debt that is the only alleged basis for making a finding of anything other than "little or no actual or potential injury."

At the hearing, Ms. Bloom claimed that she had wanted to pursue collection of the Party Planet debt on her own, and that she was prevented from doing so by Behrman's failure to promptly send her the complete case file as requested in the July 28, 2004 termination email she sent him. But all other evidence in the record contradicts that claim. For example, Ms. Bloom did not dispute Behrman's claim that he had already given Ms. Bloom the one document that was relevant to collecting the debt, which was the April 2001

lease-assignment agreement through which Party Planet had agreed to pay the debt. Ms. Bloom's explanation as to why she didn't have it was that her files had been destroyed. Neither Ms. Bloom nor anyone communicating on her behalf ever notified Behrman that she had lost her copy of the lease-assignment agreement or that her having lost her copy was holding her back from seeking to collect the debt. Ms. Bloom and Wes Bates both testified that in a phone conversation Ms. Bloom says occurred shortly before she sent Behrman the termination notice and request for the case file, she had orally agreed to assign her interest in the lease to Marcus Lalario. Mr. Bates testified that Ms. Bloom had said that she emphatically did ever *not* want to get involved in trying to collect any debt, and that her agreement to assign her interest in the lease to Mr. Lalario included assignment of all of her share of the uncollected debt.^{82/}

D. The Recommendation that Behrman Be Required to Pay Restitution Based on the \$500 Amount of the Trust Account Withdrawal Is Not and Cannot Be Supported by a Proper Finding That He Actually Owes Anything to Ms. Bloom on the Basis of the \$500 Withdrawal.

It is axiomatic that an award of restitution is appropriate only as compensation for actual loss. But there has been no finding that Ms. Bloom ever suffered any actual injury because of Behrman's failure to give Ms. Bloom the required notice of the \$500 trust-account withdrawal or because of anything else Behrman improperly did or failed to do relating to the \$500 withdrawal. As explained above, the only finding of fact made regarding injury caused by Behrman's misconduct relating to the \$500 withdrawal was that Behrman had caused *potential* injury related to the \$500.

82.

For reasons presented above, there is no support in the record for finding any actual or potential injury to have been caused to Ms. Bloom in connection with any aspect of Behrman's handling of the \$500 trust-account withdrawal. Requiring Behrman to pay any restitution based on that withdrawal or on any other basis would therefore be improper.

E. The Appropriate Presumptive Sanction for Each Count Among Counts 1-4 is Admonition Rather than a Suspension.

For the reasons explained above, the only proper determination regarding injury in connection with each count among Counts 1-4 is "little or no actual or potential injury" within the meaning of the *ABA Standards*. On the basis of that injury determination, the *ABA Standards* mandate that the presumptive sanction for each count among Counts 1-4 be *admonition and not suspension*.

**V. STATEMENT OF THE CASE RELATING TO COUNT 5
AND BEHRMAN'S CONDUCT IN CONNECTION WITH
THE BAR ASSOCIATION'S INVESTIGATION**

A. Strengths and Deficiencies in Behrman's Cooperation with the Bar Association's Investigation

[Replace with fact-based chronology that focuses on what I did, including not only entering the stipulation but also the early stipulation of guilt.]

Behrman's cooperation or lack thereof with the Bar Association's investigation has been among the issues in this proceeding. On one hand, Behrman was undeniably slow in presenting the completed final billing statement, the "Ecco notes," and other items requested by the Association, and never succeeded in retrieving some other items. But those problems were rooted in the acute depression and disarray into which Behrman had deteriorated in the course of his eye problems and depression rather than any intention or desire to obstruct or resist the Bar Association's investigation.

Indeed, the hearing officer explicitly found that "[Behrman's] violation did not appear to be intentional or with intent to deceive."^{83/} Moreover, there has never been any allegation that any of the materials Behrman failed to provide were even relevant to any aspect of any of the charges against Behrman apart from proof of RPC violations to which Behrman had readily stipulated and apart from facts that were not in dispute.

In all other respects, Behrman has at all times been highly open and cooperative in answering questions about facts of the case and in admitting his misconduct. This was consistently reflected in his deposition testimony, in his answer to the formal complaint in this proceeding, and in the extensive and intensely time-consuming cooperation he provided in working through the 21-page Stipulation to Facts and Misconduct that was finalized on Saturday, November 4, 2006 (two days before the start of the hearing).^{84/} Behrman readily agreed to participate in hammering out such a stipulation at his July 17, 2006 deposition when Bar Counsel first raised the concept. At the time, Bar Counsel said she would prepare the first draft and submit it to him in "about a month." He received the first draft from her on Monday, October 30, 2006—one week before the hearing. Nevertheless, Behrman was prompt and extremely cooperative in working with Bar Counsel to produce a mutually acceptable final version.

Behrman had been similarly cooperative from the very beginning in acknowledging his wrongdoing. This was true in his September 2004 acceptance of liability for Ms. Bloom's share of the uncollected debt, in his

83. Hearing Officer's Opinion at 26, line 21.

84. The Stipulation was entered into the record as Exhibit 52.

deposition testimony, and in his answer to the Bar Association's formal complaint. In that answer, Behrman stipulated to virtually every RPC violation that was subsequently found against him.

Behrman's openness and cooperativeness were essential in producing a situation in which the only RPC violations found by the hearing officer were violations to which Behrman had stipulated in advance. His openness and cooperativeness were also essential in producing a situation in which not only were most relevant facts and all but one of the alleged RPC violations stipulated to, but at least 19 of the 28 pages of text submitted by the hearing officer as his opinion in this proceeding consisted of text incorporated from the 21-page Stipulation to Facts and Misconduct that Behrman joined Bar Counsel in preparing and submitting.

B. Pre-Hearing Offers by Behrman to Resolve This Proceeding Through Stipulation to a Reprimand

In March 2006 and again in July 2006, Behrman not only acknowledged wrongdoing but also offered to stipulate to a reprimand for his misconduct.^{85/}

VI. ARGUMENT ON INJURY AND THE PRESUMPTIVE SANCTION RELATING TO THE COUNT 5 DEFICIENCIES IN COOPERATION WITH THE WSBA'S INVESTIGATION

Regarding Count 5 (Failure to Promptly Provide Documents and Other Written Information Upon Request by the Bar Association), there has not been any finding of "actual or potential injury" (as distinguished from "little or no actual or potential injury") as needed to establish suspension rather than admonition as the appropriate presumptive sanction. On that basis, the presumptive sanction should be reduced from reprimand to admonition.

85.

Furthermore, it was improper for the hearing officer to use ABA standard 7.3 as a basis for imposing a reprimand because none of Behrman's misconduct falls within what section 7.0 of the *ABA Standards*—of which standard 7.3 is a part—states to be the scope of section 7.0's applicability. Therefore, section 7.0 and standard 7.3 are both inapplicable.

Finally, while it was misconduct for Behrman to fail to promptly provide everything requested by the Bar Association, he was not ever intentionally trying to defy or evade the Bar Association's investigation, and he never acted in good faith—and the hearing officer entered an explicit finding to that effect. The delays and other deficiencies in Behrman's cooperation with the Bar Association's investigation were a matter of negligence and were part of the same diminished functioning that befell Behrman throughout his life including his Count 1-3 misconduct during the period from December 2002 to 2006.

There is an additional reason why Behrman's Count 5 shortcomings should be considered to have caused "little or no actual or potential injury": Behrman all along the way had readily confessed to his RPC violations and had provided substantiating information. Rather than significantly inhibiting or delaying the Bar Association's investigation, Behrman's deficiency was limited to delay or related deficiency in providing documents that had no relevance to any disputed material issue in this proceeding.

VII. ARGUMENT ON AGGRAVATION AND MITIGATION

A. The Record Compellingly Supports Removing the "Indifference to Restitution" Aggravator (ABA Standard 9.22(j)) and Granting Behrman Mitigation for "Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct" (Standard 9.32(d)).

The record shows that far from ever being "indifferent to restitution," Behrman should be credited for "timely good faith effort to make restitution or to rectify consequences of misconduct" in a manner deserving of mitigation under ABA Standard 9.32(d). In his September 2004 response to Ms. Bloom's summer 2004 grievance, Behrman admitted his lack of diligence, explicitly accepted financial responsibility and liability to Ms. Bloom for the full \$2,922.31 of her share of the debt he failed to collect, and explained that he would be providing Ms. Bloom full compensation through an offset against the much larger amount of his earned, unpaid fees. In the process, he made it clear that the reason he was choosing not to give Ms. Bloom cash compensation rather than just a fee offset was that he believed Ms. Bloom owed him money rather than the other way around even after giving her full credit for all monetary loss that Ms. Bloom claimed his failure to collect the debt had caused.^{86/}

As with the uncollected debt, Behrman declined to pay restitution based on his \$500 trust-account withdrawal on the grounds that the \$500 had been applied as a payment against the much larger amount of his earned, unpaid fees, and that no restitution of any kind was actually owed regarding the \$500. (See section ____, above.)

For the reasons explained above, it is inaccurate and contrary to the record to characterize Ms. Bloom as having been subjected to any or potential deprivation of funds. As far as restitution and other monetary compensation are concerned, there is nothing that Behrman should have done beyond what

86.

he has actually done for her on the issue of monetary compensation and restitution.

B. The Record Compellingly Supports Removing the "Refusal to Acknowledge Wrongful Nature of Conduct" Aggravator (ABA Standard 9.22(g), Granting Behrman Mitigation for "Remorse" (Standard 9.32(m)), and Striking Finding 90.

It was error for the hearing officer to find that Behrman had refused to acknowledge the wrongful nature of his misconduct and that Behrman had "demonstrated no remorse."^{87/}

The record is replete both with Behrman's acknowledgments of the wrongful nature of all his misconduct and with expressions of remorse.^{88/} Both in his answer to the Bar Association's formal complaint in this proceeding and in the 21-page written stipulation that he entered with Bar Counsel prior the hearing and that the hearing officer adopted as part of his written opinion, Behrman stipulated to guilt regarding almost all of the RPC violations of which the Bar Association accused him. The only alleged RPC violation to which he never stipulated was the alleged violation of RPC 1.5(b). Insofar as the hearing officer's opinion did not find any violation of RPC 1.5(b) (see Hearing Officer's Opinion at 24), Behrman turned out to have stipulated to each and every RPC violation that the hearing officer found against him.

[Strong mitigation under Christopher or C____ for stipulation]

The only explanation the hearing officer gave regarding his finding on Behrman's alleged refusal to acknowledge the wrongful nature of his

87.

88.

misconduct was that Behrman's refusal "is particularly evident in the unauthorized disbursement of funds from his trust account"^{89/}—apparently referring to Behrman's handling of the \$500 trust-account withdrawal. But Behrman unequivocally acknowledged and stipulated to the wrongfulness of his making the withdrawal without giving Ms. Bloom the required notice. Though he testified that he did not realize he was acting improperly at the time he committed the misconduct,^{90/} he never disputed that the misconduct was wrongful.

The only explanation the hearing officer gave for regarding his refusal to grant Behrman mitigation on the basis of "remorse" was presented in Finding 90, which states:

Respondent has demonstrated no remorse in this matter. At the hearing Respondent revealed that he has sent a very large bill to Ms. Bloom^{91/}.

The "very large bill" referred to in Finding 90 is the final billing statement that was dated November __, 2006 and is included in the record as Exhibit _____. The only conceivable relevance of the "very large bill" to the issue of whether Behrman has demonstrated remorse is that the hearing officer must have been perceiving Behrman's submission of the "very large bill" to constitute a *per se* basis for treating all of Behrman's expressions of remorse as insincere, invalid, and therefore constituting nothing more than "empty words" involving no true demonstration of remorse.

89.

90.

91.

There is no legitimate basis in law or fact for the hearing officer's treating Behrman's assertion of his unpaid-fee claim as evidence of lack of remorse—especially in view of the Bar Association's stipulation that none of Behrman's unpaid-fee claim is unreasonable or otherwise improper under RPC 1.5(a).

The hearing officer's approach and the refusal to grant Behrman mitigation on the basis of remorse is incompatible with the court's ruling in *Blanchard*. In that case, Mr. Blanchard's expressions of remorse apparently consisted only of brief statements at his initial disciplinary hearing and at the subsequent Disciplinary Board hearing—far less than Behrman's expressions of remorse that are in the record. In addition, Mr. Blanchard had placed client funds in his general account in excess of any earned, unpaid fees and despite client requests still had not returned any of those funds when his case reached the court. The court held that Mr. Blanchard's expressions of remorse were sufficient to support granting of mitigation based on remorse.^{92/}

C. The Hearing Officer and the Disciplinary Board Improperly Refused to Grant Behrman Mitigation Based on "Personal or Emotional Problems" as Set Forth in ABA Standard 9.32(c).

Behrman was entitled to have "personal or emotional problems" treated as a mitigating factor. His sustained nosedive in communicativeness, responsiveness, diligence, and productivity starting in December 2002 and continuing well past Ms. Bloom's dismissing him as her attorney was directly

92. *Blanchard*, 2006 Slip Opinion - 200,316-8 [get permanent citation now available]. The court stated: "At the [initial] hearing, Mr. Blanchard stated that he was 'very sorry that I basically just stuck my head in the sand on two clients.' Tr. of Proceedings (Dec. 7, 2004) at 270. Before the Board, Mr. Blanchard again expressed remorse stating, 'I want the Board to realize how sorry I am about being here and the fact of what gave rise to this action.' Tr. of Proceedings (Sept. 16, 2005) at 4. These admissions are sufficient to support the hearing officer's finding of remorse."

influenced by the parade of such problems that began for him with the December 2002 death of Behrman's father, hugely intensified between February 2003 and September 2003 in the course of Behrman's suffering his detached retina and undergoing four unsuccessful hospital surgeries on the retina, and expanded further as Behrman fell into overwhelm, depression, disorganization, and a related collapse in productivity.^{93/}

The hearing officer's and the Board's refusal to grant Behrman mitigation based on "personal or emotional problems" is acutely inconsistent with the hearing officer's finding and recommendation that Behrman should "be required to undergo evaluation and counseling for his personal and professional problems."^{94/}

The refusal involves several additional errors as well. First, the hearing officer wrongly imposed on Behrman the "clear preponderance of the evidence" standard rather than the "simple preponderance" standard as the burden of proof. While the rules mandate every element required for imposing a sanction to be proven by a "clear preponderance," they in no way justify raising any part of a respondent attorney's burden of proof above the "simple preponderance" standard that applies generally in civil court proceedings when demonstrating mitigators.

Second, the hearing officer and the Board improperly subjected Behrman's claim for mitigation based on "personal or emotional problems" under ABA standard 9.32(c) to requirements that are applicable only to mitigation based on "mental disability or chemical dependency" under ABA

93. See _____

94.

standard 9.32(i) and not to 9.32(c). As part of this error, the hearing officer treated Behrman's claim of depression as being deficient on the grounds that there was "no expert testimony" or other similarly credible evidence to establish that Behrman's depression constituted a "serious medical condition,"^{95/} which reflects an errant application of the "medical evidence" requirement that appears in standard 9.32(i)(1) but does not apply to mitigation under standard 9.32(c). He also stated that Behrman had "not seriously sought treatment for this alleged condition."^{96/} This finding reflects an errant application of the "rehabilitation" and "recovery" requirements that appear in standard 9.32(i)(3)-(4)'s set forth in standard 9.32(i)(3)-(4) but do not apply to mitigation under standard 9.32(c). It also apparently reflects a decision to treat all of the _____ acupuncture treatments Behrman underwent for his depression between May 2004 and November 2006 as lacking validity and seriousness because of the acupuncturist's not being a medical doctor who could provide a medical diagnosis.

The hearing officer's and the Board's treatment of Behrman's claim for mitigation based on "personal or emotional problems" under standard 9.32(c) is contrary to the court's holdings in several cases. In *In re Burtch*, 112 Wn.2d 19 (1989), the court held that extensive leniency was appropriate on the basis of the mitigating factor of the attorney's "personal or emotional problems," which in that case consisted of severe financial problems compounded by what the court characterized as ensuing "[d]epression [that]

95.

96.

naturally set in for Burtch and his wife."^{97/} In *In re Christopher*,

In *In re Dornay*, _____.

**D. Relative Weight Accorded to
the Various Mitigating and Aggravating Factors**

As the Washington Supreme Court has indicated, there is discretion to place different weights on different mitigating factors and aggravating factors. The hearing officer gave no indication of what differentiation if any he made between the various factors in terms of weight.

Under the factual circumstances of this case, the factors meriting the greatest weight are the mitigating factors of "absence of a dishonest or selfish motive" (as found by the hearing officer), "personal or emotional problems," and "remorse." One reason is that in this case those three factors are most pertinent to assessing the risk of future misconduct and of future actual or potential injury to clients, to the public, and to the legal system. Along with the important fact that Ms. Bloom did not in fact suffer any actual or potential monetary injury, those three factors give strong reason to regard Behrman's collapse in functionality in the final chapter of his representation of Ms. Bloom as aberrational and *extremely* unlikely to be repeated.

[Add weighting ref. to Burtch and to Christopher or ___ on compelling mitigation]

**VIII. ARGUMENT REGARDING IMPROPER EXCLUSIONS OF
EVIDENCE, IMPROPER FACTUAL FINDINGS NOT
ADDRESSED ABOVE, AND STANDARD OF REVIEW**

97. 112 Wn.2d at 28.

+++

IX. ARGUMENT REGARDING PROPORTIONALITY

The doctrine of proportionality, as recognized and applied by this court, requires that any sanction imposed be proportional and consistent the sanctions imposed in comparable cases. The cases cited below involve misconduct that was comparable to or worse than Behrman's in terms of culpability, injuriousness, and other aspects. Those cases establish that the recommendations of a nine-month suspension regarding each count among Counts 1-4 (the counts relating to Behrman's representation of Ms. Bloom) and the overall recommendation of a nine-month suspension are extreme and excessive. Analysis of the cases presented below shows that no suspension is justified for Behrman and that the appropriate sanction would be at worst a reprimand. A number of the cases presented below indicate that an admonition would be appropriate.

[Condense and rearrange cases below, including Funk and Blanchard]

A. Proportionality Cases Presented at the Hearing

As stated by the Washington Supreme Court in *In re Blanchard*^{98/} and numerous other cases, the imposition of disciplinary sanctions should be consistent and proportional. In his hearing brief and in oral argument, Behrman identified two disciplinary cases for the hearing officer to consider as part of the required proportionality analysis: *Blanchard* and *In re Funk*.^{99/}

98. Washington Supreme Court, Slip Opinion for Docket 200.316-8 (2006).

99. The Disciplinary Board's final order dated September 16, 1994 and the hearing officer's findings, conclusions, and recommendations dated October 12, 1994 were presented as part
(continued...)

Both cases were originally presented by the Bar Association in response to Behrman's having previously requested an identification of comparable cases supporting the one-year suspension the Association has been seeking.^{100/} The Bar Association's hearing brief characterized the misconduct involved in those cases as "strikingly similar" to Behrman's and argued that the cases "demonstrat[e] that a one-year suspension in [Behrman's] case is consistent with sanctions received by lawyers in similar situations."^{101/}

In *Funk*, the respondent received a six-month suspension on the basis of three separate trust-account withdrawals totaling the entire \$3,067.52 that clients who later dismissed the respondent had placed on deposit. Before making the withdrawals, the respondent had been explicitly informed by her former clients' new attorney that the entirety of the trust funds was in dispute. The hearing officer in *Funk* recommended a suspension of four months, and the Disciplinary Board increased the suspension to six months. In doing so, the Disciplinary Board reversed the hearing officer's adoption of "[a]bsence of any dishonest or selfish motive" as a mitigating factor—a factor that the hearing officer in this proceeding found to apply to Behrman. While *Funk* apparently did not involve any allegations of lack of diligence or lack of communication on the respondent's part other than her failure to notify her clients when she was making the withdrawals, there can be no question that

99. (...continued)
of the appendix to the
Bar Association's hearing brief in this proceeding.

100. See Bar Association's Hearing Brief at p. 18, line 11-14.

101. Bar Association's Hearing Brief at p. 18, lines 12-14; p. 20, line 1. There was one other case identified by the Bar Association as a comparable case along with *Funk* and *Blanchard: In re Eichhorn*. For reasons discussed at length at pages 17-18 of Behrman's hearing brief, *Eichhorn* should be disregarded as a hugely non-comparable case.

the respondent's misconduct relating to the trust-account funds was far worse than the trust-account-related misconduct that the hearing officer in this proceeding found to merit a presumptive a nine-month suspension.

In *Blanchard*, the respondent received a six-month suspension for misconduct that occurred during representations of two separate clients. On three occasions, the respondent deposited retainer checks directly into his general account rather than his trust account and thereby collected unearned fees totaling \$4,000. He failed to expedite litigation, failed to keep his clients fully informed, and failed to return unearned fees. He was found guilty of two counts of failing to cooperate with the Bar Association's investigation (one count regarding each of the two clients). The aggravating factors of prior disciplinary offenses, multiple offenses, substantial experience in the practice of law, and indifference to making restitution were all found. The mitigating factors found were remorse and absence of selfish or dishonest motive. In terms of pervasiveness, repetitiveness, injuriousness, and culpability, the respondent's misconduct was vastly worse than Behrman's.

B. Additional Cases

Though the respondents' misconduct in both *Funk* and *Blanchard* was much worse than Behrman's, Bar Counsel characterized both cases as being "strikingly similar" to Behrman's and providing strong support for the one-year suspension she seeks. Other cases, not having been hand-picked by Bar Counsel, present strong support not just for imposing a sanction less severe than a six-month suspension, but instead for imposing a sanction of *less than suspension*.

In *In re Burtch*, 112 Wn.2d 19 (1989), the respondent received a 45-day suspension for pervasive, wide-ranging, repetitive, sustained, injurious misconduct affecting six different clients. In using *Burtch* last year as a relevant comparable case, the *Blanchard* court noted the following tally of Burtch's acts of misconduct:

(1) three violations of RPC 1.5(b) (failure to communicate fees); (2) six violations of RPC 1.3 and 3.2 (lack of diligence and failure to expedite litigation); (3) two violations of RPC 1.4 (failure to keep client fully informed); (4) two violations of RPC 1.15(d) (failure to return client documents and unearned fees); (5) one violation of RLD 13.3 (failure to timely file trust account declaration); and (6) one violation of RLD 2.8 (failure to cooperate with disciplinary investigation).^{102/}

The *Burtch* court summarized Burtch's misconduct as follows:

His conduct shows a **pattern of neglect, failure to communicate, failure to properly handle fee arrangements, lack of diligence, violation of the trust account requirement, and failure to cooperate in the Bar Association's investigation.**

Our recitation of the facts shows **serious and repeated violations** as described.

The findings of the hearing officer on their face demonstrate **actual injury in some cases, such as the necessity of hiring another lawyer and the deprivation of unearned fees. Potential injury was present in every instance. Burtch seems to fail to recognize the very real harm he has caused to those persons who put their trust and confidence in his care.** People involved in a dissolution, a child custody conflict or a lawsuit often are in a period of emotional and financial turmoil.^{103/}

The *Burtch* court noted that six aggravating factors were found:

(a) prior disciplinary offenses, (b) a pattern of misconduct, (c) multiple offenses, (d) bad faith obstruction of the disciplinary

102. *Blanchard* (see slip opinion) citing the relevant portion of the opinion in *Burtch*, 112 Wn.2d at 20.

103. *Burtch*, 112 Wn.2d at 26-27.

proceedings by intentionally failing to comply (Burtch contends his lack of cooperation was not intentional), (e) substantial experience in the practice, and (f) indifference to making restitution. The last point is his failure to refund unearned fees and requiring a client to sue on one instance.^{104/}

The *Burtch* court observed that "[p]ossibly 7" mitigating factors were present, but then went on to indicate that though several of those were questionable or otherwise deserving of little weight in the case.^{105/}

The *Burtch* court held, however, that it was appropriate to treat Burtch's "personal and emotional problems" that started with purely financial problems and led into "[d]epression" as a "major and decisive mitigating factor" "justifying more leniency" than the court would otherwise grant. In doing so, the court made absolutely no mention of any requirement that its findings and conclusions regarding the treatment of Burtch's "personal and emotional problems" as a mitigating factor required or involved any formal medical diagnosis. Instead, the court treated "[d]epression" as a natural and understandable result of financial problems Burtch had been facing. It also treated the depression as a credible explanation (though not a justification or excuse) for Burtch's misconduct:

The major and decisive mitigating factor stems from personal and emotional problems which may have led to a degree of mental impairment. A dispute with a former partner led to a 1983 judgment against Burtch in excess of \$100,000. Financial disaster ensued. Burtch was unable to supersede the judgment while it was on appeal. Bank accounts were garnished, execution issued against his books and equipment, he lost his home and office building. **Depression naturally set in for Burtch** and his wife who had been

104. *Id.* (emphasis added).

105. *Id.*, 112 Wn.2d at 27.

his long time bookkeeper. They separated. His long-time secretary left. He and his wife filed a Chapter 11 proceeding.^{106/}

The *Burtch* court determined that a 45-day suspension combined with a probationary period would be appropriate.^{107/} The *Burtch* court's analysis—which was cited approvingly and relied upon last year by the *Blanchard* court in its proportionality analysis—demonstrates that the hearing officer erred when rejecting Behrman's "personal and emotional problems" within the meaning of ABA Standard 9.32(c) as an applicable mitigating factor. In view of Burtch's misconduct having been vastly more pervasive, repetitive, and injurious than Behrman's and in view of Behrman's having a set of mitigating and aggravating factors that are at least as favorable as those of Burtch, there can be no question that comparison with *Burtch* provides especially striking and compelling judicial grounds for rejecting the hearing officer's recommendation of a nine-month suspension as grossly disproportionate and excessive.

106. *Id.*, 112 Wn.2d at 28 (emphasis added).

107. *Id.*, 112 Wn.2d at 29.

In *In re Lux*^{108/} and *In re Salazar*, the respondents received suspensions of 30-60 days on the basis of misconduct that involved multiple clients, was vastly more pervasive, repetitive, injurious, and culpable than Behrman's, and unlike Burtch and Behrman did not involve any mitigation based on "personal or emotional problems" or other temporary impairment. (See footnotes 36-37 for details.)

C. Censure, Reprimand, or Admonition for Conduct Similar to or Worse Than Behrman's

Respondents have received censure, reprimand, or admonition for conduct similar to or worse than Behrman's in numerous cases: *In re George*,^{109/} *In re Seago*,^{110/} *In re McLees*,^{111/} *In re Jones*,^{112/} *In re Kram*,^{113/} *In*

108. In *In re Lux*, the respondent following a stipulation was suspended for 60 days for misconduct involving lack of diligence in representing three different clients, lack of responsiveness to clients' requests for information and refunds, failure to refund unearned fees, and dishonest conduct that included making misrepresentations to clients and telling his paralegal to make untrue statements to the Bar Association during its investigation. *Wash. St. Bar News*, July 2003 in section on Disciplinary Notices.

Note: Copies of the findings, conclusions, and decision entered in *Lux* and in all other cases regarding which the *Bar News* is presented as a reference will be retrieved from the Bar Association and submitted to the Disciplinary Board as part of a supplementary appendix to this brief.

In citing *Lux* and other cases involving stipulated sanctions, Behrman is mindful that the Washington Supreme Court has held that cases resolved through stipulation are not precedent for the court. However, such cases are still worthy of consideration by the *Disciplinary Board* in view of its obligation to ensure that the sanctions imposed in cases subjected to Board review properly reflect consistency and proportionality.

109. In *In re George*, the respondent following a hearing was censured for lack of diligence and for uncommunicativeness that lasted for at least two full years and led to loss or delay of child support for the client and also loss of residential placement of the client's child to the child's father. *Wash. St. Bar News*, Dec. 2001.

110. In *In re Seago*, the respondent, pursuant to a stipulation approved by the Disciplinary Board received two censures, one for each of two cases in which he committed misconduct. Regarding one client, the respondent lacked diligence in arranging a settlement and collecting upon it, failed to give the client credit for \$1,005 in payments when apportioning disbursements from the settlement between the client and the respondent's fees, and failed to respond to the client's inquiries about the disbursement. Regarding the respondent's other client, the respondent failed to take action to correct a miscalculation in an offender score
(continued...)

re Seibly,^{114/} *In re Esau*,^{115/} *In re Poole*,^{116/} *In re Guthrie*,^{117/} *In re Malone*,^{118/}

110. (...continued)

that had been used in a criminal sentencing of the client. The respondent's lack of diligence, which included failure to appear at a scheduled hearing, caused or contributed to a 13-month loss in the credit the client received for time served. *Wash. St. Bar News*, Feb. 2001

111. In *In re McLees*, the respondent, based on a stipulation approved by the Disciplinary Board, was reprimanded for lack of diligence and uncommunicativeness that included failure to respond to his client's calls during the 13-month period ending when the client retained another lawyer, and for having missed the statute-of-limitations deadline applying to the tort claim he'd been hired to handle. He did not provide the client compensation for the resulting loss until about three years later when he paid the client \$3,000 plus interest. *Wash. St. Bar News*, July 2001.

112. In *In re Jones*, the respondent, pursuant to a stipulation approved by the Disciplinary Board, was reprimanded for lack of diligence and communicativeness in handling an insurance claim. He did nothing on the claim beyond submitting a demand letter, he failed to respond to the client's phone calls, and he missed the statute-of-limitations deadline. *Wash. St. Bar News*, June 1999.

113. In *In re Kram*, the respondent was admonished by a review committee of the Disciplinary Board for failure to do timely filing of an appeal of an EEOC decision and failure to do timely filing of the client's civil lawsuit in federal court. As a result, the client lost the opportunity to contest the EEOC's decision. *Wash. St. Bar News*, Feb. 2003.

114. In *In re Seibly*, the respondent was admonished by a review committee of the Disciplinary Board for failure to act with reasonable diligence and promptness and for failure to respond to client requests for information. The client did not get any response until retaining a new attorney. *Wash. St. Bar News*, March 2003.

115. In *In re Esau*, the respondent, pursuant to a stipulation approved by the Disciplinary Board, was reprimanded for having deposited a client's retainer deposit of \$1,700 directly into his general account rather than his trust account and for having refused to return the unearned funds to the client after the client discharged him. The funds were not returned to the client until a month and a half after the client obtained a district-court judgment against the respondent. *Wash. St. Bar News*, Dec. 2000.

116. In *In re Poole*, the respondent following a hearing was reprimanded for generally failing to properly maintain his trust account, for depositing into his general account \$500 that the client had provided to be used as payment for an expert witness, and for subsequently trying to get his client to pay the expert witness until after the client filed a grievance. *Wash. St. Bar News*, July 2004.

117. In *In re Guthrie*, the respondent, following a stipulation approved by the Disciplinary Board, was reprimanded for withdrawing from her trust account without the client's authorization \$2,418 in funds that had been diverted from a spousal maintenance check without the client's authorization and that were subject to a fee dispute with the client. *Wash. St. Bar News*, Dec. 2003.

118. In *In re Malone*, the respondent was admonished by a review committee of the Disciplinary Board for having failed to deposit and keep \$5,000 in disputed funds in his trust
(continued...)

In re Stomsvik,^{119/} *In re Means*,^{120/} and *In re Unger*.^{121/}

X. CONCLUSION

Proper application of the evidence and the *ABA Standards* to this case does not support a suspension. It supports at worst a reprimand even if Behrman is denied the benefit of "personal and emotional problems" and the various other mitigating factors he has cited and even if aggravating factors are found to strongly outweigh the mitigating factors.

Respectfully submitted this _____ day of March 2008.

Bradley G. Behrman (Bar No. 13420),
Appellant/Movant (*pro se*)
232 Queen Anne Ave. N. #106
Seattle, WA 98109
Telephone 206-284-0490

**FILED AS ATTACHMENT
TO EMAIL**

118. (...continued)
account. *Wash. St. Bar News*, Dec. 2002.

119. In *In re Stomsvik*, the respondent was admonished by a review committee of the Disciplinary Board for failing to deposit \$500 in client funds into a trust account, for failure to render an accounting to the client, and for keeping the \$500 even after the client requested a refund in circumstances that were determined to constitute charging of an unreasonable fee. *Wash. St. Bar News*, March 2006.

120. In *In re Means*, the respondent was admonished by a review committee of the Disciplinary Board for having failed to respond to the Bar Association's written request for information about a client grievance, failed to attend her deposition on the scheduled date, and showed up two hours late for the rescheduled deposition. This noncooperation was on top of having charged the client an unreasonable fee and having failed until the day of a small-claims-court hearing brought by the client to return the portion of the client's advance payment that was not earned. *Wash. St. Bar News*, Oct. 2002.

121. In *In re Unger*, the respondent was admonished following a hearing for failing to promptly and properly respond to the Bar Association's request for information relevant to a grievance. The respondent asserted an objection and refused to comply. *Wash. St. Bar News*, Oct. 2004.

OFFICE RECEPTIONIST, CLERK

From: Brad Behrman [BGBehrman@hotmail.com]
Sent: Friday, March 21, 2008 3:00 PM
To: OFFICE RECEPTIONIST, CLERK; ~~Sachia Stonerfield Powell~~
Subject: In re Behrman, Supreme Court No. 200,536-5, WSBA No. 13420
Attachments: BehrmanOpeningBrief080321.pdf

The attached file contains the replacement version of my opening brief, as previously authorized by the court. It supersedes my previously filed brief.

Because of being longer than the 25-page limit for emailed appendices, the appendix is being filed through delivery of a hard copy.

Brad Behrman (WSBA 13420)
232 Queen Anne Ave. N. #106
Seattle, WA 98109
Telephone 206-284-0490
BGBehrman@hotmail.com