

No. 200, 577-2

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE:

BRADLEY R. MARSHALL,

Lawyer

WSBA NO. 15830

BRIEF OF APPELLANT MARSHALL

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A. Introduction

The Preamble of the Washington State Attorney Rules of Professional Conduct is entitled, "Fundamental Principles of Professional Conduct". The first four paragraphs guide us, as follows:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Rules of Professional Conduct point the way to the aspiring lawyer and provide standards by which to judge the transgressor. Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will

continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

The Bar acts as the body within the fabric of Washington society responsible for administering through this lofty aspiration. Every lawyer has a Constitutional right to a fair hearing in all phases of the disciplinary process, including notice and an opportunity to be heard before a competent and impartial tribunal. The Bar violated Bradley Marshall's due process rights under the United States and Washington State Constitutions in how they investigated, charged, prosecuted and conducted the disciplinary hearing.

Plaintiff, Bradley Rowland Marshall, has practiced law in the State of Washington and has been an active member of the Washington State Bar Association from 1986 until his suspension from the practice of law on May 10, 2007. The Bar now claims Mr. Marshall had conflicts of interest with his clients, where there were no conflicts, wrongfully charged clients fees or costs, although the fee agreements allowed such charges, entered into a flat fee agreement that was actually an hourly fee agreement and that he misrepresented matters, where in fact he was truthful.

B. Assignments of Error and Issues Pertaining Thereto

(1). Assignment of Error

1. The Board erred in entering finding of fact 9.
2. The Board erred in entering finding of fact 10.
3. The Board erred in entering finding of fact 12.
4. The Board erred in entering finding of fact 21.
5. The Board erred in entering finding of fact 30.
6. The Board erred in entering finding of fact 31.¹
7. The Board erred in entering finding of fact 32.
8. The Board erred in entering finding of fact 33.
9. The Board erred in entering finding of fact 35.
10. The Board erred in entering finding of fact 40.
11. The Board erred in entering finding of fact 41.
12. The Board erred in entering finding of fact 42.
13. The Board erred in entering finding of fact 45.
14. The Board erred in entering finding of fact 46.
15. The Board erred in entering finding of fact 48.
16. The Board erred in entering finding of fact 49.
17. The Board erred in entering finding of fact 50.
18. The Board erred in entering finding of fact 51.

¹ Although paragraph 31 was admitted in Mr. Marshall's Answer, it was disputed in the hearing and litigated by both parties. Its admission was a scrivener's error.

19. The Board erred in entering finding of fact 52.
20. The Board erred in entering finding of fact 53.
21. The Board erred in entering finding of fact 54.
22. The Board erred in entering finding of fact 56.
23. The Board erred in entering finding of fact 66.
24. The Board erred in entering finding of fact 67.
25. The Board erred in entering finding of fact 78.
26. The Board erred in entering finding of fact 79.
27. The Board erred in entering finding of fact 80.
28. The Board erred in entering finding of fact 81.
29. The Board erred in entering finding of fact 82.
30. The Board erred in entering finding of fact 83.
31. The Board erred in entering finding of fact 96.
32. The Board erred in entering finding of fact 101.
33. The Board erred in entering finding of fact 102.
34. The Board erred in entering finding of fact 106.
35. The Board erred in entering finding of fact 108.
36. The Board erred in entering finding of fact 114.
37. The Board erred in entering finding of fact 120.
38. The Board erred in entering finding of fact 127.
39. The Board erred in entering finding of fact 130.
40. The Board erred in entering finding of fact 132.
41. The Board erred in entering finding of fact 133.
42. The Board erred in entering finding of fact 134.
43. The Board erred in entering finding of fact 135.
44. The Board erred in entering finding of fact 136.

45. The Board erred in entering finding of fact 137.
46. The Board erred in entering finding of fact 138.
47. The Board erred in entering finding of fact 139.
48. The Board erred in entering finding of fact 140.
49. The Board erred in entering finding of fact 141.
50. The Board erred in entering finding of fact 142.
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60. The Board erred in entering finding of fact 152.
61. The Board erred in entering finding of fact 153.
62. The Board erred in entering finding of fact 154.
63. The Board erred in entering finding of fact 155.
64. The Board erred in entering finding of fact 156.
65. The Board erred in entering finding of fact 157.
66. The Board erred in entering conclusion of law to Count 1.
67. The Board erred in entering conclusion of law to Count 2.
68. The Board erred in entering conclusion of law to Count 3.
69. The Board erred in entering conclusion of law to Count 4.
70. The Board erred in entering conclusion of law to Count 8.

71. The Board erred in entering conclusion of law to Count 9.²
72. The Board erred in entering conclusion of law to Count 10.
73. The Board erred in entering conclusion of law to Count 11.
74. The Board erred in recommending sanction of disbarment.
75. The actions of Ms Killian and Mr. Danielson violated Mr.

Marshall's right to due process of the law under the state and federal constitutions.

76. To find Mr. Marshall has violated certain Rules of Professional Conduct where there was no factual allegation alleged to support a finding of a violation against Mr. Marshall or there was insufficient facts alleged to support the a finding of violation against Mr. Marshall, is a violation of Mr. Marshall's right to due process of the law under the state and federal constitutions.

77. To make Conclusions of Law that are unsupported by Findings of Fact or to make Conclusions of Law that are unsupported by allegations in the complaint is a violation of Mr. Marshall's right to due process of the law under the state and federal constitutions.

78. To the extent that the hearing officer found that Mr. Marshall acted knowingly, Mr. Marshall disputes those findings because

² Although Mr. Marshall denies the Conclusion of Law entered as to Count 5, 6, 8, and 9, these Conclusions are not briefed.

there is no basis on the record for such findings and therefore those findings should be stricken.

79. To the extent that the hearing officer found that Mr. Marshall's testimony was not credible, Mr. Marshall disputes those findings because there is no basis on the record for such findings and therefore those findings should be stricken.

(2). Issues Pertaining Thereto

1. Did the Bar violate Mr. Marshall's right to due process of the law as a result of the actions of Disciplinary Counsel, Ms Killian and Mr. Danielson? (Assignments of Error Nos. 66 - 75.)

2. Did the Bar violate Mr. Marshall's right to due process of law when it made findings of fact and conclusions of law on issues not set forth in the Bar's amended complaint or made conclusions of law not supported by findings of fact? (Assignments of Error Nos. 66 - 75.)

3. Did the Bar sustain its burden of proof that Mr. Marshall requested and/or received additional fees from Mrs. Wormack and Mrs. Harris for representation already paid for under a flat fee agreement? (Assignments of Error Nos. 6, 10, 11, 12, 66 - 75.)

4. Did the Bar sustain its burden of proof that Mr. Marshall made a misleading statement in his investigative deposition that he was

not requesting attorney fees but only costs from Mrs. Wormack and Mrs. Harris. (Assignments of Error Nos. 18, 19, 20, 66 - 75.)

5. Did the Bar sustain its burden of proof that Mr. Marshall agreed to represent Mrs. Harris over the objection of Mrs. Wormack, and later agree to represent Mr. Harris without obtaining consent in writing from Mrs. Wormack, Mrs. Harris and Mr. Harris, that this created a conflict of interest and that conflict of interest waivers required? (Assignments of Error Nos. 2, 3, 4, 66 - 75.)

6. Did the Bar sustain its burden of proof that Mr. Marshall, after agreeing in January 2003 to complete Mrs. Richard's case for a flat fee, then billed her \$21,787.50 in April 2003? (Assignments of Error Nos. 23, 24, 66 - 75.)

7. Did the Bar sustain its burden of proof that Mr. Marshall made one or more misrepresentations in his letters of June 17, 2002 and July 31, 2002? (Assignments of Error Nos. 42, 43, 53 - 55, 66 - 75.)

8. Did the Bar sustain its burden of proof that Mr. Marshall failed to abide by the decision of Mrs. Wormack and Mrs. Harris to not settle their claims against the Grand Chapter and continued to attempt to force a settlement contrary to his clients' wishes? (Assignments of Error Nos. 59 - 62, 66 -75.)

9. Did the Bar sustain its burden of proof that Marshall, as to any claim, acted knowingly, and his conduct caused potential serious injury and actual serious injury to his clients? (Assignments of Error as to all previously mentioned assignment of error.)

C. Statement of the Case

This is an appeal from the Washington State Bar Association's Disciplinary Board's Order Modifying the Hearing Officer's Decision.

D. Statement of the Facts

In late 2000 Essie Wormack asked Bradley Marshall to meet with Callie Rheubottom, Lorraine Harris, and approximately 25 other women and herself in order to obtain an accounting and reinstatement in the Prince Hall Grand Chapter Order of the Eastern Star ("Grand Chapter"). Mr. Marshall met with them, heard their stories and agreed to take on their representation. Several of the women had been expelled or suspended by the Grand Chapter and wished to be reinstated and to get an accounting of what many felt was misappropriation of the Grand Chapter's funds.

During the meeting, it was decided that a lawsuit would be filed and only several of the women would be named in the complaint. Initially, Mrs. Wormack and Mrs. Rheubottom came to Mr. Marshall's in preparation for the lawsuit.

Mr. Marshall sent written fee agreements to Mrs. Rheubottom and

Mrs. Wormack. EX 3. The agreements required clients to pay all costs and expenses, called for no further fees "unless otherwise agreed" and allowed for termination of representation at Mr. Marshall's discretion.

Mr. Marshall proceeded to file a lawsuit against the Grand Chapter and Mrs. Simpson on behalf of Mrs. Wormack and Mrs. Rheubottom. EX 201, 202. Approximately one month later, Mrs. Lorraine Harris asked Mr. Marshall to represent her also against the Grand Chapter and Mrs. Simpson.

Although Mrs. Wormack had initially introduced Mrs. Harris to Mr. Marshall, Mrs. Wormack raised concern as to the motivations of Mrs. Harris joining the litigation. Mr. Marshall arranged for Ms. Wormack to discuss the matter with Mrs. Harris. Both reported to Mr. Marshall they were in agreement and Mrs. Wormack's was no longer concerned with Mrs. Harris joining the lawsuit. Mr. Marshall prepared an amended complaint and mailed it to Ms. Wormack, Mrs. Rheubottom and Mrs. Harris to review and approve for filing. EX 205-09. The complaint was approved by all clients. No objection was communicated.

Mrs. Harris executed a fee agreement containing provisions similar to the language contained in the agreements executed by Mrs. Rheubottom and Ms. Wormack. EX. 20.

Later, William Rheubottom, Callie Rheubottom's husband and Bert Harris, Mrs. Harris' husband, requested to join the litigation. EX. 18, 19. There were no conflicts or potential conflicts apparent to Mr. Marshall. Nobody objected to their joining in the litigation. Both Mr. Rheubottom and Mr. Harris signed fee agreements, which required them to pay all costs and expenses, called for no further fees "unless otherwise agreed" and allowed Mr. Marshall to terminate representation at his discretion. EX. 18 and 19.

In late April of 2002, a private mediation occurred between all of the parties to the litigation. Mr. Marshall was successful in negotiating a settlement of Mrs. Rheubottom's, Mrs. Harris' and Ms. Wormack's claims against Patricia Simpson for \$12,500.00 per client. Settlement documents were executed on or about May 17, 2002. EX 30.

On June 3, 2002, a settlement conference took place with Judge Michael Heavey in an effort to resolve plaintiffs' claims against the Chapter. Mrs. Womack, Mrs. Harris and Mr. Harris settled their claims. Mrs. Rheubottom and Mr. Rheubottom did not settle. EX 38.

Pursuant King County Superior Court Local Rules, Mr. Marshall sent a letter, EX 245, to Judges Shaffer, copied to all clients and attorneys, confirming Mrs. Wormack's, Mrs. Harris' and Mr. Harris' settlement and stating that Mr. and Mrs. Rheubottom had not settled. Mr. Marshall also

sent a letter to Judge Heavey informing him of the settlement, EX 244.

In response to the letters sent to Judges Heavey and Schafer, copied to Mrs. Wormack, on June 9, 2002, Mrs. Wormack sent a letter to Mr. Marshall acknowledging the case was settled and over, but she was unhappy with the results and wanted the settlement funds, being held in trust, sent to her. EX 254. But, at no point in this letter did she mention that she had not agreed to settle her case. EX 254.

On June 11, 2002, in an e-mail from Mr. Marshall's "frontdesk", Mrs. Wormack said "to put the Settlement Agreement in the mail to her – she will sign it and send it back by mail." EX 259. (*Emphasis added*).

On June 17, 2002, Mr. Marshall sent letters to his clients confirming that, "Ms. Harris and Ms. Wormack have now resolved their cases against the Chapter and the Chapter has now resolved its case against the two of you." EX 42. At Mrs. Wormack's direction, Mr. Marshall enclosed settlement documents for Mrs. Wormack's signature and to be forwarded to Mr. and Mrs. Harris for signature. EX 42.

On June 25, 2002, Mrs. Wormack, sent a letter to Mr. Marshall confirming what she and Mrs. Harris had told Mr. Marshall and Judge Heavey 22 days earlier, during the Judge Heavey mediation that, "WHAT WE DID SAY WAS "WE WILL NOT PAY YOU ANOTHER DIME TO CONTINUE A LAWSUIT THAT IS NOT SETTLED". EX 43.

It was this language, coupled with the client's conduct that reasonably led Mr. Marshall and Judge Michael Heavey to conclude that Mrs. Wormack and Mrs. Harris had settled their claims. At this time, Mr. Marshall learned for the first time that Mrs. Wormack was raising questions about settling her case.

On July 18, 2002, Mrs. Wormack spoke with Kelly Lee, Mr. Marshall's legal assistant, who noted that Mrs. Wormack was not going to proceed to trial "because Judge Heavey lied". EX 269.

On July 23, 2002, seven weeks after receiving a copy of Mr. Marshall's June 4 and 5, 2002 letters to Judges Heavey and Shaffer, Mrs. Harris wrote to Mr. Marshall confirming both Judge Heavey and Mr. Marshall believed the case was settled, "Both you and Judge Heavey heard something during the mediation meeting that I did not hear." EX 51:4.

During this time, attorney Thomson had filed a motion to enforce the settlement agreement against Mrs. Harris and Mrs. Wormack. The court made a decision not to consider or rule on the motion.

On January 17, 2003, as the trial neared, Mr. Marshall sent letters to Mrs. Wormack and Mrs. Harris inquiring if either was still interested in pursuing their third-party claims, EX 274, EX 67. Marshall subsequently had conversations with both women. Tr: 577-87.

Mrs. Harris responded by letter dated January 20, 2003, stating she was “still interested in this case to the same extent that I shared with you in previous conversations,” but that her “husband’s health will not allow me to make any effort to pay additional funds to you.” EX 68.

Neither paid nor continued their claim.

On March 2003, Mr. Marshall represented Mrs. Rheubottom and Mrs. Richard at the trial. The jury awarded \$3,500 to each. The HARRISES and Mrs. Wormack were voluntarily nonsuited, giving them additional time to re-file their case if they so desired. They did not re-file.

E. Arguments

1. Bar’s Allegations Against Mr. Marshall³

a. Settlement of Mrs. Wormack’s and Mrs. Harris Cases

In Count 11, the Bar alleged Mr. Marshall failed to abide by Mrs. Wormack’s and Mrs. Harris’ decisions not to settle their claims against the Grand Chapter.

On June 3, 2002, Judge Michael Heavey held a settlement conference with all parties. At the request of the Chapter and with a goal of settlement, Lorrain Harris and Essie Wormack handwrote and signed

³ Although Counts 5, 6, 7, 8 and 9 are not briefed, Marshall does not concede that the hearing officer or Disciplinary Board were correct in their findings of fact, conclusions of law or recommended sanctions, in the interest of focusing on the more serious claims, Marshall has elected not to address those counts in his brief.

two documents. The first, a "Letter of Apology" stating, "The undersigned hereby apologize for the acts that were perceived to be a violation of the Bylaws and Constitution of the Eastern Star. We hope that the process of healing will begin, now." EX 242:1. The second stated, "Recognizing that Sisterhood is most important in the Order of Eastern Star, and considering this legal fight has been in process since 1999[,] It is time now to lay this matter to rest and reconcile our differences." EX 242:2.

At the end of the mediation, those present believed Mrs. Wormack and Mrs. Harris had settled, but that Mr. and Mrs. Rheubottom and Mrs. Richard had not. But, it was after hours and Judge Heavey was late for another matter and could not put the settlement on the record. Tr. 61.

Mr. Marshall knew there was a settlement and immediately sent letters to Judge Heavey and Judge Catherine Shaffer, copied to all clients and opposing attorneys, confirming the settlement. EX 244, 245.

Terry Thomson, attorney for the Grand Chapter, recalled Judge Heavey, "standing by the door leading out to his chambers and saying that we had reached a settlement." Tr. 61. On June 10, 2002, Mr. Thomson sent a letter to Judge Shaffer stating that, "Now, Linda Richard and Callie Rheubottom represent the only remaining claims in this case . . . All other claims have been dismissed, or will be dismissed shortly." EX 38.

Mrs. Wormack acted as if her case was settled:

Mr. Marshall understood both Mrs. Wormack and Mrs. Harris to agree to settle their claims.

Judge Heavey understood Mrs. Wormack and Mrs. Harris had settled. EX 84.

Mr. Thomson believed a settlement occurred, especially after he later continued to threaten to enforce the settlement. EX 255, 270.

While at the settlement conference, both Mrs. Wormack and Mrs. Harris handwrote and signed, at the request of the Grand Chapter and for the purpose of settlement, two letters or notes, one entitled "Letter of Apology" and the other simply entitled with the date, "June 3, 2002 and saying, "It is time to lay this matter to rest and reconcile our differences". EX 242.

On June 9, 2002, six days after the mediation and after receiving copies of Mr. Marshall's letters to Judges Heavey and Shaffer, Mrs. Wormack sent a letter to Mr. Marshall, but did not mention she disagreed to the settlement. EX 254.

On June 11, 2002, in an e-mail from Mr. Marshall's "frontdesk", Mrs. Wormack said "put the Settlement Agreement in the mail to her – she will sign it and send it back by mail" because it cost her money to leave her house to go to a fax machine. EX 259.

On June 17, 2002, Mr. Marshall sent letters to all clients, including Ms. Harris and Mrs. Wormack "Ms. Harris and Mrs. Wormack have now resolved their cases against the Chapter and the Chapter has now resolved its case against the two of you." EX 42.

On June 19, 2002, Mr. Marshall sent a letter to Mr. Thomson, copied to all clients, including Ms. Harris and Mrs. Wormack, stating the Settlement Agreement was being circulated and he expected to receive executed documents within a few days. EX 266.

On June 25, 2002, 22 days after the mediation and many days after receiving multiple letters from Mr. Marshall stating she had settled, after requesting the settlement paperwork be sent to her, Mrs. Wormack, for the first time, claimed that she had not settled her case. EX 43.

On July 15, 2002, Mr. Marshall sent a letter to Mrs. Wormack asking her if she was going to "participate in the settlement" or "if she wished to proceed to trial". EX 268. On July 18, Mrs. Wormack spoke with Ms Lee, who noted in an e-mail to Mr. Marshall that Mrs. Wormack was not going to proceed to trial "because Judge Heavey lied". Tr. 269.

Mrs. Harris also acted as if her case was settled:

Originally, the settlement agreement was to first go to Mrs. Wormack and then to the Harrises for signatures. After Mr. And Mrs. Harris received copies of the Mr. Marshall's letters to Judges Heavey and

Shaffer, EX 244 and 245, and to Mr. Thomson, EX 19, on July 8, Mr. Marshall sent Mr. and Mrs. Harris the original Settlement Agreement for signature. EX 49. After a full week on July 15, Mr. Marshall sent another letter to Mr. And Mrs. Harris requesting they sign and return the Settlement Agreement. EX 50.

On July 23, 2002, seven weeks after Mr. And Mrs. Harris received copies of Mr. Marshall's letters to Judges Heavey and Shaffer, and more than two weeks after receiving the Settlement Agreement for execution, Mrs. Harris finally objected to the settlement. EX 51. In a five page letter, Mrs. Harris admitted that she has received and "reviewed" the "many letters", but buried deeply within this letter, she said for the first time, she did not agree there was a settlement. EX 51:4-5.

The case went to trial in March 2003, Mr. And Mrs. Rheubottom and Mrs. Richard participated and received small jury verdicts. Mr. And Mrs. Harris and Mrs. Wormack were voluntarily nonsuited, giving them additional time to re-file their case if they so desired. They elected not to re-file.

As to Mrs. Wormack and Mr. And Mrs. Harris, if they truly believed they had not settled their case, contrary to the beliefs of at least Judge Heavey, Mr. Thomson and Mr. Marshall, the normal response would be for at least one of the three to immediately contact Mr. Marshall

and object. But, no one took that action. Mr. Harris said nothing. Mrs. Harris waited over seven weeks to say anything and then made it almost an afterthought. And Mrs. Wormack, after 22 days and her third contact with Mr. Marshall and after requesting the settlement papers be sent to her, she finally claimed she had not settled her case.

There was an initial settlement, but at some time, Mrs. Wormack and Mrs. Harris began to have buyer's remorse. At some point in time, after June 3, 2002, both women changed their minds about a settlement. When this occurred is impossible to tell. But, we do know that Mr. Marshall was willing to prosecute their claims so long as the Court did not dismiss pursuant to Mr. Thomson's motion. EX 67 and 274. Tr. 577-87.

Additionally, in their response brief to the Disciplinary Board, Disciplinary Counsel again wholly misstated the evidence. They claim "[i]mmediately following the June 3, 2002 settlement conference with Judge Heavey, Mrs. Wormack told [Mr. Marshall] that she wanted to pursue her claims at trial . . .", citing Tr. 156 and 158. Nothing at Tr. 156 or 158 that says that. But, at Tr. 154-5, Mrs. Wormack states the opposite.

In Count 10, the Bar alleged Mr. Marshall made misrepresentations in his letters of June 17 and July 31, 2002.

Following Mr. Marshall's notification to the Court that the Rheubottoms had not settled their claims, Judge Heavey requested the

attorneys, the Rheubottoms, Mr. Thomson and his clients return to his chambers to clear up any confusion surrounding the settlement. Judge Heavey met with Mr. Marshall and the Rheubottoms. Mrs. Wormack and Mrs. Harris were not present. During this meeting with Judge Heavey, Mr. Rheubottom decided he wanted to settle his case. Mrs. Rheubottom insisted she did not want to settle her case. Judge Heavey then directed Mr. Marshall to have his clients sign the release documents and return them to Mr. Thomson.

On June 6, 2002, Judge Heavey sent an e-mail to Judge Shaffer:

I thought the matter was settled Monday night. Because the terms were simple and the lateness of the hour I did not write out a quick CR2A agreement. My mistake, although I am not sure now that now that they all would have signed it. I met with them all this morning. They are in good faith and I don't believe that there are any improprieties going on.

EX 84.⁴

Mr. Marshall's June 17, 2002 letter, stated, "[t]he court has directed Mrs. Wormack and Mrs. Harris sign the release and settlement agreement and the Chapter do the same in order to consummate this matter." EX 42. When asked why he made this statement, Mr. Marshall responded, "Because Judge Heavey had directed me to prepare the release agreements and to circulate them and have the parties sign it and return the agreement to him, return it for the stipulation of dismissal to be executed." Tr. 546-7.

⁴ Neither of the attorneys nor any of the parties was made aware of this e-mail until discovery in this Bar matter.

The Bar relied upon, the testimony of Mr. Thomson, who had no way of knowing what Judge Heavey told Mr. Marshall. Mrs. Wormack, had no way of knowing either. Mr. and Mrs. Harris did not testify.

In Mr. Marshall's July 31, 2002 letter, Mr. Marshall stated that, "[d]espite your reluctance to sign the Settlement Agreement, your claims have been dismissed and will not be heard at trial. If you wish to discuss this matter, please feel free to contact me." EX 53.

Rather than use the term "dismiss", Mr. Marshall could have used the term "settled". But, in any event, Judge Heavey had sent a minute order, in the form of an e-mail, to Judge Shaffer, the trial judge, noting the settlement. Tr. 565-67. Although both letters, EX 42 and 53, could have been more artfully drafted, they were sent by Mr. Marshall to obtain signatures on settlement agreements consummating a settlement Mrs. Harris and Mrs. Womack had previously agreed to enter into and which Judge Heavey requested Mr. Marshall to accomplish.

When Mr. Marshall understood that Mrs. Wormack's and Mrs. Harris decided they did not want to settle, he sent them letters to advise them to contact him regarding their right to proceed to trial. EX 67, 274.

The Bar has not proven Counts 10 or 11.

b. Mrs. Wormack and Mrs. Harris Fee Agreements⁵

In Count 1 and 3, the Bar alleged Mr. Marshall entered into a “flat fee” agreement with Mrs. Wormack and Mrs. Harris and either requested or received⁶ additional fees from the two, Count 1, and when Mr. Marshall stated in a Bar discovery deposition that the requests were for costs and not fees, his statements were misleading, Count 3. EX 150.

Pursuant to the fee agreements, Mr. Marshall was able to charge additional fees if the client agreed, “Marshall Wheeler Zaug will make no further charge for its services other than as set forth in this agreement or unless otherwise agreed.” (*Emphasis added*). EX 3:3. Mr. Marshall requested money for costs, but even if he requested money for fees, he was allowed to request fees pursuant to the terms of the fee agreements.

The scope of representation, set out in the fee agreements, stated, “Our function is to assess liability and damage issues and pursue negotiation or litigation to obtain the best possible result for you.” EX 3:3. This was only for the filing and prosecution of a lawsuit against the Grand Chapter and Mrs. Simpson. By the time this matter was going to

⁵ Counts 1 and 3 will be discussed together.

⁶ Although Mr. Marshall requested an additional \$15,000.00 from each woman to cover existing and future costs, neither paid Mr. Marshall any of that sum. Therefore, Mr. Marshall could not have received additional fees.

trial, the case was a consolidation with four additional lawsuits, not handled under the original fee agreement. EX 277.

Mr. Marshall's request was for additional costs not fees.

On January 17, 2003, Mr. Marshall sent letters to Mrs. Wormack and Mrs. Harris asking if they were still interested in pursuing their third-party claims. EX 274 and 67. Shortly thereafter, Mr. Marshall spoke with both, making arrangements for each to cover existing and projected costs. Tr. 577-87. Mr. Marshall testified he, "made it clear that my fees had already been paid but that the costs in the case with respect to the trial that these costs would have to be paid by the clients." Tr. 584.

Mrs. Harris was not present at the hearing and did not testify.

Mrs. Wormack did not testify that the additional \$15,000.00 Mr. Marshall requested was for fees, or even that she believed it was for fees.

Additionally, there was no binding fee agreement with Mrs. Wormack, who failed to execute the written fee agreement, Tr. 188-9, 190-1, EX 3:3-4, failed to pay the required \$7,500, only paying \$3,500 of the total sum and refused to pay any costs in violation of the terms of her fee agreement.

"Marshall Wheeler Zaug may terminate its employment hereunder in its discretion if it determines there are no reasonable grounds to pursue the matter or that it is not practical to do." (*Emphasis added*). EX 3:4.

Based upon that provision, Mr. Marshall told Mrs. Wormack “that [she] needed to get another attorney to represent [her].” Tr. 229.

The only direct evidence on whether the \$15,000.00 was for costs or for fees came from Mr. Marshall who said the \$15,000.00 was to cover costs and not fees. Tr. 584.

The hearing officer found Mr. Marshall’s testimony here not to be credible. EX 105:31(b) and 40(a). But, that only negates Mr. Marshall’s testimony. Even without his testimony, there is no testimony and no circumstantial evidence Mr. Marshall’s request was for fees.

Disciplinary Counsel, in their response brief to the Disciplinary Board argued Mr. Marshall could not contractually obtain cost advances from Mrs. Wormack or Mrs. Harris when the fee agreements clearly make that an option.

They then argued EX 43, 48, 57 and 59 make it clear that Mr. Marshall was requesting additional fees rather than costs and that in EX 48 Mr. Marshall conceded this, while these exhibits show only that he was requesting money and that he conceded nothing.

The Bar’s has failed to prove Count I by a clear preponderance.

In Count 3, the Bar alleged Mr. Marshall’s statements regarding the request for additional costs, made in an investigative deposition, were misleading.

For the reasons stated in the above section, the Bar did not meet its burden that Mr. Marshall's statements were misleading.

This was a very costly lawsuit. Terry Thomson, the opposing attorney, testified the cost of this litigation for his side was in excess of \$100,000.00. "It was a very costly lawsuit." Tr. 105, 106. But, Mrs. Wormack refused to pay any amount for costs and had no intention of abiding by the terms of her fee agreement, Tr. 193, and after her friend, Callie Rheubottom, paid \$4,000 of her attorneys' fees, she said, "I didn't borrow any money from Mrs. Rheubottom. I didn't ask her to intercede in my personal business, my confidential business between Mr. Marshall and I." Tr. 206.

The Bar failed to prove Counts 1 or 3 by a clear preponderance.

c. Representation of Multiple Clients

In Count 2, the Bar alleged Mr. Marshall agreed to represent Mrs. Harris over the objection of Mrs. Wormack, and later agreed to represent Mr. Harris without obtaining consent in writing from Mrs. Wormack, Mrs. Harris and Mr. Harris.⁷ EX 105:29.

⁷ It is assumed that the inclusion of Mr. Harris as someone from whom Mr. Harris was required to obtain a written consent is a scrivener's error.

Mr. Marshall was deprived of his right to due process of law⁸ because the hearing officer made findings of fact and conclusions of law, which were not based upon facts alleged.

[A]ttorney discipline actions are ‘adversarial proceedings of a quasi-criminal nature’ and the attorney subject to discipline is entitled to due process of the law.” *In re Disciplinary Proceeding Against Heard*, 136 Wn.2d 405, 442, 963 P.2d 818 (1998) (citing *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117, *modified on other grounds*, 392 U.S. 919, 88 S.Ct. 2257, 20 L.Ed.2d 1380 (1968)). Therefore, an attorney subject to a disciplinary proceedings is entitled to procedural due process, which includes fair notice of the charge. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682. *In re Disciplinary Proceeding Against Heard*, 136 Wn.2d 405, 442, 963 P.2d 818 (1998).

The Bar failed to allege: (1) any specific conflicts of interest; (2) that Mr. Marshall violated RPC 1.7(b) “[b]y agreeing to represent Mrs. Harris over the objection of Mrs. Wormack”; and (3) that Mr. Marshall took on representation of Mrs. Harris over the objection of Mrs. Wormack.

The hearing officer found several conflicts, none of which were alleged: how the costs of litigation would be allocated; how global settlement proposals would be dealt with; how the attorney time would be allocated; and how the different agendas of Mrs. Harris and Mrs. Wormack would be reconciled. Because the Bar failed to allege any

⁸ “An attorney has a cognizable due process right to be notified of the clear and specific charges and to be afforded an opportunity to anticipate, prepare, and present a defense.” *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 136-37, 94 P.3d 939 (2004).

specific conflicts, Mr. Marshall did not have adequate notice of the charges against him in order to prepare his defense and his right to due process has been violated.

As to division of costs, these were done on a pro rata basis, which is the fair way to do it. No one complained. No Washington appellate cases have been found where division of the costs subjected an attorney to disciplinary action.

There was no "global settlement". It was not even contemplated.

Allocation of hours among several clients, only one of whom, Mrs. Richard, was charged on an hourly basis, was done on a pro rata basis. See e.g., EX 61, 64.

The Bar failed to define "different agenda". Mrs. Wormack's objection appears to be to having Mrs. Harris in the same litigation, which Mrs. Harris was in anyway, as a defendant opposing the Grand Chapter. See Tr. 198. This was resolved.

Also, Count 2 assumes a conflict of interest when there is multiple representation. But, the hearing officer expressly found, "RPC 1.7(b) is not a *per se* rule that requires every representation of more than one client in a matter to require written waivers of conflict." EX 105:29. Unless

actual conflicts of interest existed, there is no requirement Mr. Marshall obtain consents and written waivers pursuant to RPC 1.7(b)⁹.

In *Discipline Marshall*, decided by the Washington State Supreme Court, Mr. Marshall was found to have violated the former RPC 1.7(b)(2), where a majority of the Court had the following to say:

Marshall and the dissent claim that there could be no conflict of interest here because the plaintiffs' interests were aligned. However, the hearing officer and Board found that while they shared broad goals, including elimination of racial discrimination in the longshore industry, their individual issues, needs, and claims were different. More importantly, we have recognized that former RPC 1.7(b) applies even absent a direct conflict. *In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 412, 98 P.3d 477 (2004). Marshall himself testified that there are *potential* conflicts whenever multiple representation occurs. There was a risk that Marshall would not be able to simultaneously abide by all of his clients' wishes when conflicts arose among the plaintiffs. The Association also notes that the "strength in numbers" strategy could work to the benefit of some but to the detriment of others. Even if Marshall reasonably believed that his representation of all of the *Jefferies* clients would not be adversely affected, Marshall had a duty to explain to each client "the implications of the common representation and the advantages and risks involved" and to get consent in writing from each. Former RPC 1.7(b)(2). The dissent ignores the plain language of the rule.

Discipline Marshall, 160 Wn.2d 317, 337-8, 157 P.3d 859 (2007).

Under the former RPC 1.7, which applied in *Discipline Marshall*, cited above, and which applies here, the Court may or may not take the same approach. But, it is of note that under the new RPC 1.7, effective

⁹ Interestingly, the Bar did not charge Mr. Marshall with a violation of RPC 1.7(a).

September 1, 2006,¹⁰ the opposite result is required. Under the new conflict of interest rules found in RPC 1.7, when dealing with issues of concurrent representation¹¹, RPC 1.7 (b) only becomes involved if there is a “concurrent conflict of interest”. RPC 1.7(b) (“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) a lawyer may represent a client if . . .”). (*Emphasis added*).¹² The Comments to RPC 1.7 are informative as to what creates a “concurrent conflict of interest” in order to invoke RPC 1.7:

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. . . . On the other hand,

¹⁰ Mr. Marshall wants to make clear that although he disagrees with the Washington State Supreme Court's application of RPC 1.7, this case does not represent a situation in which Mr. Marshall was warned in *Discipline Marshall*, 160 Wn.2d 317, and determined to ignore the Court's holdings. All of the events, which transpired in the present matter, transpired long prior to the Court's ruling in *Discipline Marshall*.

¹¹ There is good reason for joint representation of clients such as the fact that in many cases, because the requested award is relatively small per individual, an individual client would be without representation to pursue his or her case; multiple clients reduces the amount of attorneys' fees and litigation costs per person, and multiple parties creates an appearance of a strong united front to an adverse party.

¹² RPC 1.7(a) states as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

RPC 1.7, Cmt. 6.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

RPC 1.7, Cmt. 8

Obviously, this matter does not involve a direct conflict of interest or anything that created a significant risk of materially limiting Mr. Marshall's representation of any of these clients.

d. Mrs. Richard's Fee Agreement

In Count 4, the Bar alleged Mr. Marshall had agreed, in January 2003, to charge Mrs. Richard a "flat fee" of \$5,000.00 to complete her case, then, after the case was completed, billed her an additional \$21,787.50 for completing the trial.

Charging clients a non-refundable retainer is not *per se* a violation of the Bar's disciplinary rules. *Informal Opinion 1347*.¹³

Most importantly, Mrs. Richard entered into a written fee agreement with Mr. Marshall for an hourly fee. EX 34. She even crossed out the \$185 per hour fee and changed it to \$175 per hour. EX 34:2.

The Bar relies upon three things to support its allegation.

First, Mrs. Richard testified that at a meeting at Mr. Marshall's office, he agreed to accept \$5,000.00 as a "flat fee" to complete her case. But, at this meeting, there were five people present: Mr. and Mrs. Richard, Mr. and Mrs. Rheubottom and Mr. Marshall.

Although Mrs. Richards testified to the flat fee, Mr. Marshall testified under oath, there never was such an agreement. Tr. 589-91.

Although Mr. Richard was present, he could not recall Mr. Marshall ever saying that he was charging a "flat fee" or that there would be no other charges.¹⁴

¹³ Informal opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Informal opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official opinion of the Bar association. Washington State Bar Association, Informal Opinion 1347.

¹⁴ Mr. Busby asked, "Did you talk about whether there would be any additional charges to finish the case beyond that \$5,000.00 fee?" Mr. Richard answered "No." In order to make sure he had heard Mr. Richard correctly, Mr. Busby followed up by asking, "Did you ask Mr. Marshall whether that would be the rest that you would have to pay in order to finish the case." Again, Mr. Richard answered, "No." Tr. 334-35. That was the only time Mr. Richard talked to Mr. Marshall before the trial. Tr. 340.

Mr. Busby asked, "Did you talk about whether there would be any additional charges to finish the case beyond that \$5,000.00 fee?" Mr. Richard answered "No." In order to make sure he had heard Mr. Richard correctly, Mr. Busy followed up by asking, " Did you ask Mr. Marshall whether that would be the rest that you would have to pay in order to finish the case." Again, Mr. Richard answered, "No."
Tr. 334-35.

That was the only time Mr. Richard talked to Mr. Marshall before the trial. Tr. 340.

The Bar, failed to call either Mr. or Mrs. Rheubottom.

As to Mrs. Richard's testimony, it was obvious Mrs. Richard was confused during this trial. Exhibit 203 is an example of this. See Tr. 298 – 308. When Mrs. Richard initially sued the Grand Chapter, she was represented by Mr. Edward Lane, Tr. 298, who filed the initial lawsuit on her behalf. EX 203. Regarding her complaint, EX 203, filed by Mr. Lane; Mrs. Richard said:

6 Q. [Mr. Bulmer] And before you brought that action you were
7 not suspended?

8 A. [Mrs. Richard] Correct.

9 Q. And then you were suspended after that action?

10 A. Yes.

11 Q. After that?

12 A. Yes.

13 Q. Were you suspended or expelled?

14 A. You know, they was doing things I didn't know
15 about. My original lawsuit is I did not want to be a
16 member of the Order of the Eastern Star, period.

17 And per Mr. Marshall insisting that I
18 should say that I want to be a member of the Order of
19 the Eastern Star, which in my original lawsuit, if you

20 note, I did not want to be a member because I brought a
21 suit against them for illegal things that they were
22 doing and it was involving my name as the Grand
23 Secretary.
Tr. 299.

But, in fact, the original complaint, filed by Mr. Lane, verified under oath by Mrs. Richard, EX 203:5, contained the following, “On September 30, 2000 at the Occasional Grand Chapter, by a vote and duly adopted by the members present, upon recommendations of the Special Commission you were expel (sic) from Prince Hall Grand Chapter, Order of Eastern Star, Prince Hall Affiliate, Washington & Jurisdiction. . . .” EX 203:3. Additionally, by way of a prayer, Mrs. Richard specifically asks, “[t]hat the Plaintiff [Linda Richard] be reinstated as a member of the Prince Hall Grand Chapter, Order of Eastern Star, PHA”. EX 203:4.

Second, the Bar relies upon Exhibits 70, a letter sent by Mrs. Richard to Mr. Marshall with her check for \$5,000.00, and Exhibit 71, a receipt from Kelly Lee, Mr. Marshall’s legal assistant, at the time, to Mrs. Richard.

There is no evidence that Mr. Marshall ever saw either exhibit.

Exhibit 70 says “for Retainer Completing the PHGC Case”. The common meaning of “retainer” is discussed in *Formal Opinion 186* and is defined as “funds paid by a client to secure a lawyer's *availability* over a

given period of time”.¹⁵ *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d at 562.

As to Exhibit 71, the Bar relied upon certain writing at the bottom of this receipt. But, there are two problems: (1) The writing at the bottom of the page was added by Mrs. Richard sometime after January 28, 2003. Tr. 310-12; (2) No one can read the writing on the bottom of Exhibit 71, not even Mrs. Richard, who wrote it;¹⁶ and (3) Exhibit 71 does not say Non-refundable flat fee, it says “Non-refundable retainer”, the same term that was used in Exhibit 70.

Third, Mr. Marshall did not treat the \$5,000 “Non-refundable retainer” as a flat fee. When a check arrived in his office, as a flat fee, it would be deposited in an attorney’s general account. But, the check was deposited into Mr. Marshall’s trust account, EX 73, Tr. 591, where it was not withdrawn until May 30, 2003, four months after receipt. EX 73.

Additionally, in their response brief to the Disciplinary Board, Disciplinary Counsel wholly misstated evidence.

¹⁵ This Bar Formal Opinion 186 was withdrawn on December 9, 2005. The events in the present matter, for the most part, took place in 2003.

¹⁶ The Bar was willing to accept Mrs. Richard’s testimony that the words were “Mr. Marshall agreed to finish the case”. Tr. 291. But, what they really say is, “Mr. Marshall [unreadable], agreed to finish the case”. On cross-examination, Mrs. Richard was forced to concede that she could not make out the words. Tr. 309-10.

Disciplinary counsel claim Mr. Richard testified at Tr. 337 that Mr. Marshall told him “the \$5,000 would be ‘to finish the case’”. He did *not* testify to that at Tr. 337 or anywhere else.

They claim Mrs. Richard’s writing on the bottom of EX 65 “memorialized [Mrs. Richard’s] new agreement with [Mr. Marshall]”, but they failed to say that when asked about this, Mrs. Richard answered “No”, that it did not. Tr. 288-90.

They claim Mr. Marshall admitted at Tr. 593 he lied in his opening brief when he said he had not seen EX 70, a note sent to Mr. Marshall’s office that accompanied Ms Richard \$5,000 “nonrefundable retainer”. But, nowhere in Mr. Marshall’s testimony and specifically at Tr. 593, does Mr. Marshall admit that he saw Ms Richard’s note on EX 70.

In addition, in their response brief to the Disciplinary Board, Disciplinary Counsel argued “evidence” that was ruled inadmissible

First, Disciplinary Counsel claimed Mr. Marshall fabricated Exhibit 278, but they objected to its admission on the grounds of authentication, which objection was sustained. It is not in evidence.

Next, they claimed Mrs. Richard testified that the first time she saw the invoice, EX 278, was in October 2003. Tr. 313. But, they objected to this testimony, which objection was sustained. Tr. 313-4. It was not evidence. And, the testimony actually admitted, which the Bar neglected

to refer to, was that Mrs. Richard did not know when she first saw it. Tr. 314.

There was no flat fee agreement with Mrs. Richard. Of the five people present, only Mrs. Richard testified to it. No one else heard it. The Bar has failed to prove Count 4 by a clear preponderance.

2. Constitutional Issues

The Bar knowingly appointed a hearing officer, whose goal was to become a disciplinary counsel and who the Bar was aware had applied for that position on at least one prior occasion, while hearing a disciplinary case to its conclusion and who again applied for that position, while making decisions in Mr. Marshall's case.

When this hearing officer was forced to recuse herself, the Bar's Chief Hearing Officer appointed himself and ordered Mr. Marshall disbarred.

After the hearing, during the appeal to the Disciplinary Board, the introduction of the Bar's response brief lamented Mr. Marshall "should at long last be disbarred". Disciplinary Counsel then went on to misstate and distort evidence and argued matters not admitted into evidence.

The conduct of the Bar, in this case was ethically reprehensible. Under the Preamble

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

But, what occurred in the present case does not measure up to this lofty standard.

On November 12, 2005, the Bar filed its Formal Complaint against Mr. Marshall. On December 5, 2005, hearing officer Teena Killian was appointed to hear this matter. On January 4, 2006, Mr. Marshall filed his Answer. On January 11, 2006, the Hearing Order was filed scheduling May 22, 2006 as the starting date for the hearing. On May 2, 2006, the First Amended Formal Complaint was filed. On May 5, 2006, the Answer to the First Amended Formal Complaint was filed. On May 16, 2006, the hearing was set over to commence on July 24-28. On May 25, 2006, the Bar posted a new job opening for Disciplinary Counsel.

Between May 25 and June 15, 2006, Ms Killian, without informing Mr. Marshall, or his attorney, applied for a job as Disciplinary Counsel.

On June 8, Ms Killian signs an order revising hearing dates.

On June 22, 2006, the Bar informed Mr. Marshall's counsel that Ms Killian applied for the Disciplinary Counsel position. A joint letter was

sent requesting that Ms Killian recuse herself as a result of her conflict of interest. On July 6, 2006, Mr. Danielson, Bar's Chief Hearing Officer and hearing officer in the present matter signed Order Removing Ms Killian.

On August 10, 2006, Hearing Officer Danielson entered an Order allowing Mr. Marshall to see communications and correspondence between Ms Killian and the Bar concerning employment of Ms Killian, ordering redactions so the only information to be seen was the letterhead, the date, the sender, the recipient, and the Re line. Additionally, Mr. Danielson signed an order granting the Bar's motion to quash subpoena *deuces tecum* that Mr. Marshall had served on the records custodian of the Bar and Ms Killian; and denied any further discovery concerning the conduct of Ms. Killian and Disciplinary Counsel. EX 53.

The first hearing officer, Teena Killian, applied for a job as disciplinary counsel in January 2005, EX 453:1,¹⁷ while hearing to completion *In re Eric C. Hoort*, Public File No. 04-00037, without recusing herself. This application created a conflict of interest. Ms Killian should have been removed from the *Hoort* case and from the hearing officer appointment list for future cases.¹⁸ In addition, she should not have

¹⁷ See also EX 295-9.

¹⁸ Hearing officers should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

been appointed by Mr. Danielson to hear the present matter, without first informing Mr. Marshall's attorney of this conflict. But instead, on December 5, 2005, Ms Killian was appointed to preside over this matter. And, when on May 25, 2006, the Bar again posted an opening for a disciplinary counsel position, Ms Killian again immediately applied. On June 1, 2006, the Bar forwarded an order in this case for signature by Ms Killian. Within a matter of hours, Ms Chris Gray and Mr. Scott Busby became aware of Ms Killian's application, but neither took any action. On June 2, 2006, Ms Killian signed the order. Again nothing was done. In fact, nothing was even said to Mr. Marshall's attorney, Mr. Bulmer, until June 20, 2006. Later, Ms Killian was forced to recuse herself, EX 299, and was removed from the case as its hearing officer.

During her tenure as hearing officer in this matter, Ms Killian ruled on Mr. Marshall's motion for a continuance after the Bar filed its First Amended Formal Complaint on May 2, 2006, which contained three new counts, although trial, at that time, was set to commence on only twenty days later, May 22, 2006. She allowed a continuance of only slightly over

(iii) the hearing officer knows that, individually or as a fiduciary, the hearing officer . . . has an economic interest in the subject matter in controversy or in a party to the proceeding . . . or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification.
ELC 2.6(4)(A)(iii).

30 days to complete discovery on all three new counts and only 60 days to fully prepare for hearing. EX 295-7.

A lawyer having knowledge of a violation of the Rules of Professional Conduct *shall* inform the appropriate professional authority. RPC 8.3, ELC 2.6(3)(B). The later rule includes hearing officers. Although both disciplinary counsel and the chief hearing officer were aware, or should reasonably been aware, of Ms Killian's quest for employment as a Bar disciplinary counsel, beginning at least in January 2005, they allowed Ms Killian to be appointed as the hearing officer to hear Bradley Marshall's case. Then at least disciplinary counsel became aware of Ms Killian's second application for employment on June 1, 2006, but they did nothing and specifically they said nothing about Ms Killian's signing of the June 2, 2006. Only 20 days later, on June 20, 2006, they informed Mr. Bulmer of this transgression.

On August 10, 2006, after the appointment of two hearing officers; (one to which the Bar objected and the other to which Mr. Bulmer objected, thereby exhausting all preemptory dismissals), Mr. Danielson, Chief Hearing Officer, was responsible for an ethically sanitized hearing process. Despite objection from Mr. Bulmer, that he not appoint a hearing officer with knowledge of the Killian matter, for fear the hearing officer would be prejudice against Mr. Marshall, nevertheless appointed himself

as hearing officer. Mr. Danielson was responsible here for retaining Ms Killian on the Bar's hearing officer list, after the *Hoort* matter; who was statutorily responsible for Ms Killian's training, assignments, supervision, monitoring and evaluation. Mr. Danielson, due to his prior involvement with Ms Killian, had a conflict of interest and should have recused himself. Mr. Danielson serves in a capacity requiring him to interface with Disciplinary Counsel, Disciplinary Board members, Review Committee members, Bar personnel and to serve on Bar committees, and as an administrator, making it impossible for him to remain impartial and not act as an advocate for the Bar. His service as Hearing Officer in this case violated the appearance of fairness and impartiality.

Hearing officers should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

(iii) the hearing officer knows that, individually or as a fiduciary, the hearing officer . . . has an economic interest in the subject matter in controversy or in a party to the proceeding . . . or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification.

ELC 2.6(4)(A)(iii).

During the entire proceeding, Mr. Danielson identified with and advocated for the Bar, using Bar letterhead for some correspondence,¹⁹

¹⁹ See EX 417 and See January 2, 2007 Mr. Danielson's letter to Clerk of the Disciplinary Board.

issuing orders on Bar pleading paper,²⁰ and thanking witnesses on behalf of the Bar, not on behalf of all parties. Tr. 236. He attempted to hurry the hearing, which he admitted. Tr. 1025. He did not allow Mr. Marshall the ability to present his case in full; Mrs. Harris did not testify because of illness, nor did Mr. or Mrs. Rheubottom. Mr. Danielson refused to allow Mr. Marshall to depose Ms Killian and Bar personnel or to discover facts surrounding the Killian matter, quashing his subpoena of relevant records, issuing a protective order, precluding the parties from discussing the Killian matter with any third party witnesses. Mr. Danielson refused to set aside the order allowing the Bar's First Amended Complaint.

This case should be dismissed, sent back for a new trial, or Marshall should be allowed to assert "slack prosecution" as a mitigator. *State v. Flinn*, 119 Wn.2d 232, 247, 80 P.3d 171 (2003); *Personal Restraint of Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998); *Discipline of Tasker*, 141 Wn.2d 557, 568, 9 P.3d 822 (2000), and cases cited therein, instruct us on the importance of giving the respondent an opportunity to prove Bar misconduct and "slack prosecution", as a basis for dismissal, a new trial and/or as a mitigator.

²⁰ See EX 296, 297, Pleading Paper of Hearing Officer Killian. See EX 418 Letterhead of Hearing Officer Danielson. Also, see Hearing Officer Danielson's August 1, 2006 Order Appointing [James Danielson] Hearing Officer in the present matter and January 2, 2007 Hearing Officer Danielson's Order Granting Association's Motion to Quash Subpoenas Duces Tecum.

Mr. Danielson refused to allow Mr. Marshall to reopen his case in chief to present additional evidence on his behalf, including calling Mrs. Harris as a witness. During the course of the hearing, several documents were introduced by the Bar, purportedly from Mrs. Harris, which the hearing officer used to support his findings of fact, conclusions of law and recommendation to disbar, among these exhibits are at least EX 9, 12, 16, 51, 54, 68, and 214. Mr. Bulmer agreed during pretrial to the admissibility of these documents based on the understanding that Mrs. Harris would testify at the hearing. Mr. Bulmer only learned that Ms. Harris was ill at the conclusion of the Bar's case; he did not learn that she would be unavailable as a witness, thus taking away his right to examine her as to each document, until the end of the Bar's rebuttal case.

F. Sanction and Mental State

The sanction of disbarment should be used only in the most extreme cases. Here, it is disproportional and unnecessary.

This complaint should be dismissed. If the Court does not dismiss, the sanctions should be based upon a negligent state of mind, ABA Standards 4.33, 4.43, 4.63, 7.3²¹, and there be no restitution. To the extent

²¹ "Negligence" is the failure of a lawyer to heed a substantial risk that the circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." **ABA Standards – Definitions.**

that Mr. Marshall violated any disciplinary rules, which he denies, he did so with a negligent state of mind and to the extent any client was injured or potential²² injured, that injury was not serious or intentionally caused.

Mr. Marshall was allowed to charge Mrs. Wormack or Mrs. Harris additional fees under the fee agreements. But, his request was for costs.

Mr. Marshall is unaware of any actual concurrent conflict of interest among Mrs. Wormack, Mrs. Harris and Mr. Harris. He did not benefit other than obtaining a client or receiving fees for services.

Mr. Marshall made no effort to nor did he knowingly deceive a client or the Bar and he lacked motivation to do so.

Mr. Marshall did not enter into a flat fee agreement with Mrs. Richard.

Mr. Marshall believed and still believes Mrs. Wormack and Mrs. Harris settled their cases and later changed their minds.

Mr. Marshall asks that any sanctions imposed be pursuant to ABA Standard 4.32, 4.42, 4.62, 7.2 without imposition of aggravating factors.

²² The ABA Standards explicitly defines "potential injury" as:
the harm to a client, the public, the legal system or the profession 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.

ABA Standards, Definitions P. 13.

The Supreme Court, in *Haley I*, stated that presumptive sanctions for conflict of interest violations under former RPC 1.7 were:

Suspension is generally appropriate when a lawyer *knows of a conflict of interest* and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Reprimand is generally appropriate when a lawyer is *negligent in determining whether the representation of a client may be materially affected* by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

ABA STANDARDS stds. 4.32, 4.33.

In re Disciplinary Proceedings Against Haley, 156 Wn.2d 324, 340, 126 P.3d 1262 (2006). (Emphasis in original).

In *Haley I*, the Court found Haley's representation of two companies, in which he had fiduciary relationships, was prohibited by RPC 1.7(a) and his representation of one was materially limited, under RPC 1.7(b), by his personal financial interest in foreclosing on his security interest in one and transferring its assets to the other. Despite the Court's finding of these facts, and applying ABA Standard 4.31 (disbarment), they applied ABA Standard 4.32 (suspension). *In re Disciplinary Proceedings Against Haley*, 156 Wn.2d 324, 339-40, 126 P.3d 1262 (2006).

1. Aggravating and Mitigating Factors

Paragraph 164: "Respondent has refused to acknowledge the wrongful nature of his conduct. . . ." But, our Supreme Court has stated:

We are not persuaded that a lawyer continuing to assert on appeal that the alleged acts did not occur should have that assertion used against him or her.

In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 196 n.8, 117 P.3d 1134 (2005).

By Making the Act of Defending Himself an Aggravating Factor, the Bar and the Washington State Supreme Court Violated Marshall's Right to Free Speech. The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. Const., Amend I.

In line with this, the Washington State Constitution states, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WA St. Const., Art. I, §5.

In *Discipline Marshall*, the Washington State Supreme Court held:

Marshall also contends that refusal to acknowledge the wrongful nature of his conduct should not be considered because it punishes him for asserting his innocence. See *Kronenberg*, 155 Wn.2d at 196 n. 8. Yet we have recently applied this factor, [*In re Disciplinary Proceeding Against*] *Poole*, 156 Wn.2d [196] at 224, [125 P.2d 954 92006] and here the issue is not adequately briefed for us to eliminate this aggravating factor altogether. At least arguably, an attorney's unwillingness to acknowledge that certain misconduct amounted to a violation of the RPCs speaks to the likelihood of future harm to the public. In sum, all of the aggravating factors found by the hearing officer and the Board continue to apply.²³

Discipline Marshall, 160 Wn.2d at 347.

²³ *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005).

Here, the Court held that in determining an appropriate sanction, defending oneself was, by itself, an aggravating factor.

To consider defending oneself against quasi-criminal charges and possible disbarment to be an aggravating factor violates that individual's right to free speech and to due process.

Paragraph 160: "Respondent had a selfish motive." Gaining clients and charging for services is not a selfish motive? The yellow pages are full of this same selfish motive. The hearing officer is confusing the business part of practicing law with the term selfish motive.

Paragraph 177: "Respondent was intending to benefit himself by getting the clients' cases out of his office . . ." Per the hearing officer Mr. Marshall benefited both by obtaining and getting rid of these clients.

Paragraph 172 and 173: Mrs. Wormack and Mrs. Harris potentially suffered, "the loss of their legal claim". But, neither lost their claim, which were voluntarily nonsuited and could have re-filed if they wished to do so.

This case should be dismissed or sent back for a new trial. *See State v. Flinn*, 119 Wn.2d 232, 247, 80 P.3d 171 (2003) and cases cited therein (dismissal); *Personal Restraint of Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998) (new trial); *Discipline of Tasker*, 141 Wn.2d 557, 568, 9 P.3d 822 (2000) ("slack prosecution" - mitigator).

2. Proportionality²⁴

In *In re Disciplinary Proceeding Against Egger*, six-month suspension where Egger billed his client \$15,000 in fees already paid by another party and failed to get client's written consent to conflicts. The Court stated that, "[t]he language of standard 4.32 makes it clear that suspension is the appropriate sanction where an attorney acted with knowledge." *Egger*, 152 Wn.2d 393, 416-18, 420, 98 P.3d 477 (2004).²⁵

The sanction of disbarment is disproportionate and excessive.

A reprimand is generally appropriate "when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests . . . and causes injury or potential injury to a client." *ABA Standards* Std. 4.33, at 31. Gillingham either knew or should have known of the facial conflict of interest inherent in drafting a will for a client in which he was named a beneficiary. Given the mental state of knowledge, the facial and obvious nature of the conflict of interest, the potential for serious injury to the client, and what Gillingham conceded to be his "casual" attitude toward the Rules of Professional Conduct, we find suspension to be the appropriate sanction for Gillingham's violation of RPC 1.8(c).

²⁴ Under proportionality review, the Board analyzes whether the recommended sanction is proper when compared to similarly situated cases. *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 285, 66 P.3d 1069 (2003). Proportionate sanctions are those which are "roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability." *In re Disciplinary Proceeding Against Gillingham*, 126 Wn.2d 454, 469, 896 P.2d 656 (1995).

²⁵ In *In re Disciplinary Proceeding Against Brothers*, 149 Wn.2d 575, 580, 70 P.3d 940 (2003); In *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 560, 9 P.3d 822 (2000); In *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 99 P.3d 881 (2004); In *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 864-65, 872, 64 P.3d 1226 (2003); *In re Haskell*, 136 Wn.2d 300, 962 P.2d 813 (1998); *In re Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998); *In re Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999); *In re Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002); *In re McLean*, 148 Wn.2d 849, 64 P.3d 1226 (2003); *In re Cohen*, 149 Wn.2d 323, 67 P.3d 1086 (2003).

In re Disciplinary Proceeding Against Gillingham, 126 Wn.2d 454, 468, 896 P.2d 656 (1995).²⁶

G. Conclusion

Hearings officers identify with the Bar. This hearing officer said to Mrs. Wormack, “You are excused, ma'am, with my thanks and the thanks of the Association . . .” Tr. 236. They use Bar letterhead and Bar pleading paper. They are beholdng to the Bar and act like it.

If it is the intent of the Bar is to require attorneys to obtain written waivers in all cases where he or she represents multiple clients that is fine. But, the present RPC 1.7 does not seem to say that. Mr. Marshall will abide by such a rule and will take that approach in all future cases where there are multiple clients.

The hearing officer's made findings on key factual matters not found in allegations made by the Bar or supported by evidence that is clear and convincing. The Court should vacate those findings.

The hearing officer's recommendation to disbar Mr. Marshall is not sustainable on this record. Marshall asks this Court to dismiss the

²⁶ In *In re Disciplinary Proceeding Against Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004) (an attorney submitted declarations in support of court-awarded fees with altered invoices was given a six-month suspension); *In re Haskell*, 136 Wn.2d 300, 962 P.2d 813 (1998), an attorney who participated in the creation of fake invoices to clients and although the presumptive sanction was disbarment, based on a proportionality analysis Haskell received a two-year suspension. *In re Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998); *In re Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999), *In re Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002), all set out in the section dealing with Count 1.

charges against him in their entirety or send the matter back for a new trial.

RESPECTFULLY SUBMITTED this 3rd day of July 2008.

A handwritten signature in black ink, appearing to read 'Bradley R. Marshall', written over a horizontal line.

Bradley R. Marshall, Pro Per, Bar # 15830

SUPREME COURT OF THE STATE OF WASHINGTON
IN RE: BRADLEY R. MARSHALL
AN ATTORNEY AT LAW

Bar No. 15830
Supreme Court No. 200, 577-2

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 56 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 7/3/08 at Olympia, Washington.

Signature: _____

Print Name: Ingrid Y. Elsinga