

Supreme Court No. 200,586-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

MARY H. MCINTOSH,

Lawyer (Bar No. ~~12827~~).
12744

ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION

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Appendix A: Hearing, Findings of Fact; Conclusions Re: Rule Violations;
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Appendix B: Disciplinary Board Order

I. COUNTERSTATEMENT OF THE ISSUES

1. Ten Disciplinary Board members recommended that Respondent be suspended for six months for making misrepresentations to the court in an ex parte proceeding. The dissenting member would have suspended Respondent for one year. Should the Court adopt the unanimous Disciplinary Board recommendation for a suspension of at least six months?

2. After considering Respondent's character and reputation evidence in context with her testimony, the hearing officer declined to credit Respondent with the mitigating factor of good character and reputation. Did the Disciplinary Board err in adopting this mitigating factor?

II. COUNTERSTATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

In 2004, Tom DiNardo, an auctioneer in Skagit County, was removed from membership in the Washington Auctioneers Association by a vote of its Board of Directors. BF 46, ¶ 2.1. DiNardo hired lawyer Doug Owens, who brought an action against the Auctioneers Association and its directors seeking reinstatement for DiNardo and damages for defamation, unfair competition, and prima facie tort. BF 46, ¶ 2.2. The suit, DiNardo v. Washington Auctioneers Ass'n (Auctioneers) was filed in

November 2004 in Skagit County. BF 46, ¶ 2.4. Little or no discovery had taken place by the spring of 2005. Id.

McIntosh represented the Washington Auctioneers Association and Steve McMillan, one of its directors. See BF 46, 23. Previously, McIntosh had represented a party adverse to DiNardo in a small claims action and District Court appeal. Id. By 2005, the relationship between DiNardo and McMillan had become very hostile. BF 46, ¶ 2.7.

McMillan had been audited by the Washington State Department of Licensing. See BF 46, ¶ 2.5. DiNardo filed a request with the Department for records from this audit. Id. This request was not part of the Auctioneers lawsuit and DiNardo did not seek any advice or assistance from Owens in preparation of his request. BF 46, ¶ 2.5.

On April 18, 2005, McMillan received a call from a Department of Licensing auditor who told him that they were planning to release his audit records to DiNardo. BF 46, ¶ 2.8. McMillan called McIntosh and told her that he and his wife were about to leave the country. BF 46, ¶ 2.10. He asked her to stop the release of the records. BF 46, ¶ 2.8.

McIntosh contacted the Department of Licensing the next day and was told that unless an injunction was entered under RCW 42.17.330, the records would be delivered to DiNardo on April 22, 2005. BF 46, ¶ 2.9. This statute provided for an action in Superior Court to enjoin the

inspection of public records. RCW 42.17.330 (recodified as RCW 42.56.540 in July 2006).

McIntosh was about to leave on a vacation herself. BF 46, ¶ 2.10. Her last day in the office was April 21, 2005, and she was not planning to return until May 2, 2005. Id. McIntosh reviewed RCW 42.17.330 to see what could be done. BF 46, ¶ 2.11.

McIntosh determined that filing a second lawsuit to enjoin release of the records would be “burdensome.” BF 46, ¶ 2.27. The McMillans were, or soon would be, out of the country and unavailable to sign a complaint or provide the \$110 filing fee. BF 46, ¶ 2.12. Also, she had no good address for DiNardo to effect personal service. BF 46, ¶ 2.13.

McIntosh determined that, in order to bring an action against the Department of Licensing, she would have to delay her vacation by several days, hire an attorney to handle the case in her absence, or bring a motion for an order shortening time. BF 46, ¶ 2.22. Instead, she decided to seek a restraining order in the Auctioneers lawsuit, even though she knew that the audit records were not the subject of any discovery in that action. BF 46, ¶ 2.14-2.15.

On April 19, 2005, McIntosh called Doug Owens to ask him if he would agree to such an order. BF 46, ¶ 2.14. Owens said no unequivocally. BF 46, ¶ 2.21. Owens knew of the animosity between

DiNardo and the McMillans, and knew that DiNardo had an extreme dislike for McIntosh. BF 46, ¶ 2.18. He knew that he could not agree to the entry of a temporary restraining order. Id.

Owens told her that he knew nothing about DiNardo's request, that it had nothing to do with the Auctioneers lawsuit, and that he didn't know how to get in contact with DiNardo. BF 46, ¶¶ 2.16, 2.17. He also told her that he did not believe that the Skagit County Superior Court had jurisdiction to enter a restraining order against the Department of Licensing because the Department was not a party to the Auctioneers lawsuit. Id.

McIntosh explained that she was leaving on a trip to visit her grandchildren. BF 46, ¶ 2.19. Owens was sympathetic. Id. He explained that she needed to file a separate action against the Department of Licensing and get an injunction there. Id. McIntosh told Owens that she did not know how she would obtain signatures or the filing fee from her clients because they were out of the country. BF 46, ¶ 2.20. When the conversation concluded, McIntosh knew that Owens would not agree to a restraining order. BF 46, ¶ 2.23.

Nonetheless, McIntosh began preparing a motion for a restraining order in the Auctioneers lawsuit, implying in her declaration that Owens had agreed to the order:

I contacted Mr. Owens who was sympathetic to my vacation and thought that a hearing upon my return would be sufficient for his client's needs. He further indicated that he would not be able to contact his client between now and when I was leaving on my vacation, less than 24 hours notice.

BF 46, ¶ 2.24.

McIntosh also wrote that "There is no reason that the plaintiff needs these records to prove his case." BF 46, ¶ 2.25. This statement was "calculated to tie DiNardo's unrelated FOIA records request into the unrelated [Auctioneers] lawsuit." Id. McIntosh omitted the fact that Owens had told her she was legally incorrect in seeking the temporary restraining order against an unrelated, unnamed party. Id.

In the preamble to a separate pleading, the proposed Temporary Restraining Order, McIntosh wrote that Owens "was notified of the defendant's intention to obtain this order and expressed no objection so long as the hearing could take place after defendant's vacation." BF 46, ¶ 2.26. This was untrue. Id.

On the morning of April 21, 2005, prior to the ex parte calendar, McIntosh went to the courthouse looking for a judge to sign her order. BF 46, ¶ 2.29. She found Judge Rickert in the court administrator's office and handed him the motion and order, telling him that Owens had agreed to the entry of the order. Id. McIntosh did not tell Judge Rickert that the

records had nothing to do with the Auctioneers lawsuit or that Owens opposed an order being entered in that lawsuit. Id. Nor did she tell him that Owens believed that the Skagit County Superior Court had no jurisdiction to enter the injunctive relief she requested. Id.

Relying on McIntosh's statements, Judge Rickert signed the order. BF 46, ¶¶ 2.29, 4.1. At the disciplinary hearing in this matter, Judge Rickert testified that he was influenced by McIntosh's statement that Owens had agreed to its entry. BF 46, ¶ 2.30; TR 126-27. Judge Rickert was not informed, and thus did not understand, that the records had nothing to do with the Auctioneers lawsuit. BF 46, ¶ 2.30.

McIntosh left the next day for California. BF 46 ¶ 2.33. She instructed her staff to mail a copy of the order to Owens and to fax a copy of the order to the Department of Licensing. Id.

Upon learning of the entry of the ex parte order, Owens brought a motion to set it aside. BF 46, ¶ 2.31. Court Commissioner Kenneth Evans vacated the order nunc pro tunc. Id. McIntosh later told Owens that she had done nothing as bad as what other attorneys in the Skagit County Bar community have done. BF 46, ¶ 2.32.

At the time that this incident occurred, McIntosh was under investigation in a separate disciplinary action. BF 46, ¶ 4.8. In that case, McIntosh falsely attested in a notarial statement that a witness had

appeared before her to sign a document, when in fact the witness had not. BF 46, ¶ 4.8. McIntosh's conduct was found to have violated Rule 8.4(c) of the Rules of Professional Conduct (RPC) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice). Ex. 5, 10. McIntosh was admonished for this conduct by a review committee of the Disciplinary Board in July 2005. Id.

B. PROCEDURAL FACTS

On March 6, 2006, the Association filed a two count formal complaint alleging:

By presenting the motion and declaration in an ex parte proceeding without giving proper notice to the adverse party or his lawyer, Respondent violated RPC 3.5(b) (Count 1).

By presenting the motion and declaration in an ex parte proceeding without informing the tribunal of all the relevant facts known to her that should have been disclosed, Respondent violated RPC 3.3(f). (Count 2).

BF 2, at 4.

At the June 2007 hearing, the Association presented the testimony of Owens. BF 46, ¶ 1.4. McIntosh testified and presented several witnesses to testify as to her good reputation in the community. BF 46, ¶ 1.4; TR 76-83, 109-38.

On August 2, 2007, the hearing officer filed his findings of fact, conclusions of law, and disciplinary recommendations, finding that McIntosh violated RPC 3.3(f) and 3.5(b) and recommending that she be suspended for one year. BF 46. A copy is attached as Appendix A.

The Board affirmed the hearing officer's findings of fact and conclusions of law, but added the mitigating factor of good character and reputation and reduced the recommended sanction to six months. BF 61, at 2-3. A copy of the Board's order is attached as Appendix B. This appeal followed. BF 62.

III. SUMMARY OF ARGUMENT

The duty of candor in an ex parte proceeding is essential to protect the integrity of the legal system. McIntosh knowingly approached a sitting judge and falsely stated that she was there with opposing counsel's approval and that her motion was a part of an ongoing case. She chose this course of action so as not to delay her vacation. When confronted, she told opposing counsel that it was nothing worse than what other attorneys in her community had done. The hearing officer determined that McIntosh had violated RPC 3.3(f) and 3.5(b) and recommended a one year suspension. The Board reduced the recommended sanction to six months. The Association asks the Court to affirm the Board's recommendation.

The Board erred, however, in applying the mitigating factor of good reputation, a decision based on the erroneous premise that the testimony in the record was undisputed. The hearing officer rejected this mitigating factor after listening to McIntosh testify and finding that her stories were shifting and not credible. He also evaluated the character witnesses' testimony that they were unaware of her past misconduct and heard one witness say that this knowledge would have changed his opinion. The hearing officer was not required to credit the testimony of McIntosh's character witnesses and the Board erred in substituting its own judgment for the hearing officer's. Because this is an issue that has the potential to recur, the Association seeks review and reversal of the Board's decision on this issue.

IV. ARGUMENT

A. STANDARD OF REVIEW

McIntosh has not assigned error to any of the findings of fact. Unchallenged findings of fact are verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005). A hearing officer's findings of fact are given considerable weight, particularly when they involve the credibility and veracity of the witnesses. In re Disciplinary Proceeding Against Kuvvara, 149 Wn.2d 237, 246, 66 P.3d 1057 (2003). The Court reviews conclusions of law de novo,

upholding them if supported by the findings of fact. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004).

While the Court has plenary authority over lawyer discipline, Rule 2.1 of the Rules for Enforcement of Lawyer Conduct (ELC), it generally affirms the Disciplinary Board's sanction recommendation unless it can articulate a specific reason to reject it. Guarnero, 152 Wn.2d at 59. A unanimous recommendation is given a high degree of deference and will not be disturbed in the absence of a clear reason. In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 285, 66 P.3d 1069 (2003).

B. THE COURT SHOULD AFFIRM THE BOARD'S UNANIMOUS RECOMMENDATION OF A SUSPENSION OF AT LEAST SIX MONTHS.

The Court employs the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) as a guide to imposing sanctions. Whitney, 155 Wn.2d at 468. Under the ABA Standards, the Court first determines the presumptive sanction by examining the ethical duty violated, the lawyer's mental state, and the injury caused. In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 331, 144 P.3d 286 (2006). It then determines whether the presumptive sanction should be increased or reduced due to aggravating or mitigating factors. Id.

1. McIntosh Violated RPC 3.3(f) and RPC 3.5(b).

A lawyer shall not communicate ex parte with a judge unless authorized to do so by law or court order. RPC 3.5(b). “[I]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” RPC 3.3(f).

These rules are designed to protect the integrity of the legal system and the ability of courts to function as courts. An attorney’s duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. Such a high level of candor is necessary to prevent judges from making decisions that differ from those they would reach in an adversarial proceeding.

In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 595, 48 P.3d 311 (2002) (citation omitted).

Here, McIntosh drafted documents calculated to misrepresent that opposing counsel had agreed to the entry of a restraining order when he had not, and that the restraining order she requested was part of a lawsuit that it had nothing to do with. BF 46, ¶ 4.2. She then misrepresented to Judge Rickert that opposing counsel had agreed to the order’s entry. BF 46, ¶ 3.2. She did not give opposing counsel the opportunity to be present or be heard. BF 46, ¶ 3.3. The hearing officer determined that this conduct violated RPC 3.3(f) and 3.5(b), and the Disciplinary Board

affirmed that decision. McIntosh has not assigned error to these conclusions.

2. McIntosh Acted Knowingly.

Under the ABA Standards, knowledge exists “when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result.” ABA Standards at 6, 17. The hearing officer found, and the Board affirmed, that McIntosh acted knowingly when she initiated improper ex parte contact with Judge Rickert and failed to inform Judge Rickert of all relevant facts. He also found that she knowingly manipulated facts for her own purposes and convenience. BF 46, ¶¶ 3.2, 3.3, 4.3. McIntosh has not assigned error to these conclusions.

3. McIntosh’s Conduct Injured Owens and the Legal Profession as a Whole.

Under the ABA Standards, “injury” means harm to a client, the public, the legal system or the profession that results from a lawyer’s misconduct. ABA Standards at 7. Injury may be actual or potential. Id. “[A] disciplinary proceeding does not require a showing of actual harm. . . . The rationale is the need for protection of the public and the integrity of the profession.” In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 486, 998 P.2d 833 (2000) (quotation omitted). The hearing officer found, and the Board affirmed, that McIntosh’s conduct caused

injury to Owens, who did not charge for his time in setting aside the order, and to the integrity of the legal system. BF 46, ¶¶ 4.4, 4.5; BF 61.

The respondent knowingly manipulated the facts for her own purposes and convenience with the end result that the manipulation of those facts caused the court and Judge Rickert to be misled and to rely on misrepresentations.

BF 46 ¶ 4.3.

Respondent McIntosh also caused an injury to the integrity of the legal system by her actions. It cannot become an accepted practice to allow lawyers to ignore their duty of [*sic*] to be truthful and candid with tribunals. To allow the type of disingenuous activities engaged in by Ms. McIntosh in her approach to the practice of law and her candor with the bench damages the legal profession and causes all lawyers to be held in contempt by the public.

BF 46, ¶ 4.5.

McIntosh has not assigned error to these conclusions.

4. The Presumptive Sanction for McIntosh's Violations Is Suspension.

The hearing officer and Board found that suspension under ABA Standard 6.12 and 6.32 was the presumptive sanction in this case and that the presumptive minimum length of the sanction was six months.

This Court has repeatedly affirmed that six months is the presumptive minimum length of suspension. In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 623, 98 P.3d 444 (2004); In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 419, 98 P.3d

477 (2004); In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 762, 82 P.3d 224 (2004) (Cohen II).

ABA Standard 2.3 and its commentary support that a suspension should not be less than six months:

While the model Rules for Lawyer Disciplinary Enforcement (see MRDLE 25) currently provide for suspension of less than six months, short term suspensions with automatic reinstatement are not an effective means of protecting the public.

...

The amount of time for which a lawyer should be suspended, then, should generally be for a minimum of six months.

Commentary to ABA Standard 2.3.

Six months is therefore the starting point for determining the length of a disciplinary suspension. This minimum term should be applied “where there are both no aggravating factors and at least some mitigating factors, or when the mitigating factors clearly outweigh the aggravating factors.” In re Disciplinary Proceeding Against Cohen, 149 Wn.2d 323, 339, 67 P.3d. 1086 (2003) (Cohen I).

5. The Aggravating and Mitigating Factors Support a Suspension of at Least Six Months.

The hearing officer and Board found three aggravating factors: a prior disciplinary offense, refusal to acknowledge the wrongful nature of the misconduct, and substantial experience in the practice of law. ABA

Standards §§ 9.22(a), (g), (i). McIntosh's prior discipline was weighted very heavily by both the hearing officer and the Board because of its similarity to her current misconduct.

The hearing officer found that no mitigating factors applied. BF 46, ¶ 4.13. The Board reversed the hearing officer on this issue and replaced the hearing officer's finding with the following finding: "The Respondent proved the mitigating factor of good reputation ... by a clear preponderance of the evidence." BF 61, at 2. As set forth below, this was error.

But, even if the Court affirms the application of this mitigating factor, six months is an appropriate sanction. Evidence of character and reputation is not entitled to great weight when there are other, significant, aggravating factors. In Dynan, a case also involving misrepresentation to a tribunal, this Court held that the mitigating factor of character or good reputation was inconsequential when balanced against the aggravating factors of pattern of misconduct, refusal to acknowledge wrongful nature of the conduct, and substantial experience in the practice of law. 152 Wn.2d at 622. See also In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 348, 157 P.3d 859 (2007) (mitigating factor of character or reputation inconsequential because insufficient to alter sanction in light of long list of aggravating factors).

Considering the numerous aggravating factors the Association proved here, there is no clear reason to depart from the presumptive minimum six-month suspension.

6. The Disciplinary Board Erred in Applying the Mitigating Factor of Good Reputation.

The hearing officer specifically found that no mitigating factors applied. BF 46, ¶ 4.13. The Board struck this finding and replaced it with a finding that “Respondent proved the mitigating factor of good reputation ... by a clear preponderance of the evidence.” BF 61, at 2. This was error. Because this is an issue that is frequently disputed in lawyer disciplinary proceedings, the Association seeks review in the interests of justice and the efficient use of judicial resources.

At hearing, McIntosh presented five witnesses who testified as to her good reputation in the community. However, it was clear from the testimony that many of these witnesses were not aware of important facts when they formed their opinion. For example, Christopher Pollino testified that in years of dealing with McIntosh, he never had reason to question her ethics or professionalism. TR 111. But he also testified that he wasn't aware that McIntosh had received an admonition (for conduct

involving dishonesty, fraud, deceit, and misrepresentation) until McIntosh's lawyer sent him a copy of it before the hearing. TR 112. Judge Needy testified that he was unsure whether members of the legal community knew of McIntosh's prior admonition. TR 119. He himself did not know of it until McIntosh's lawyer mailed it to him. Id. Commissioner Evans knew some of the facts underlying the prior admonition, but he did not know which rules were violated. TR 80-81. And Judge Rickert testified that his opinion of McIntosh's reputation for truth and veracity in the legal community was good, but this was based in part on his belief that McIntosh had never made a misrepresentation in his courtroom. TR 122. He was unaware of McIntosh's prior admonition or that it was based on a misrepresentation made on a case in which he was presiding. He stated that this knowledge would have changed his opinion. TR 125.

Moreover, contradicting the evidence of McIntosh's good reputation was her own testimony, which the hearing officer found to be "dissembling," inconsistent, and not credible. BF 46, ¶¶ 2.39, 2.40, 3.8, 4.9. After considering all of this evidence, the hearing officer declined to apply the mitigating factor of good character or reputation.

McIntosh's reputation evidence was, if not directly disputed, seriously undermined by her own testimony and by the fact that most of

the witnesses lacked knowledge of her prior misconduct. The hearing officer was entitled to disregard the testimony in its entirety, even if that testimony was not directly contradicted. See, e.g., Plancich v. Williamson, 57 Wn.2d 367, 370, 357 P.2d 693 (1960).

The Board erred in reversing the hearing officer's finding that no mitigating factors applied. A respondent has the burden of proving a mitigating factor. In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007). A hearing officer is in a better position than a reviewing court to assess witness testimony and is not bound by testimony if he or she is not persuaded by it. See In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77-78, 960 P.2d 416 (1998). The Board should not have substituted its evaluation of the testimony for that of the hearing officer.

C. THE REMAINING NOBLE FACTORS SUPPORT THE BOARD'S RECOMMENDATION.

This Court adopts the sanction recommended by the Board unless the Noble factors of proportionality and unanimity require otherwise. Kuvara, 149 Wn.2d at 259.

1. The Board's Recommendation for a Suspension of at Least Six Months Was Unanimous.

Ten members of the Board recommended a six-month suspension. BF 61, at 2. The dissenting member would have recommended a one-year

suspension. BF 61, at 2. While the Board was not in unanimous agreement on the specific length of the suspension, there was complete agreement that a suspension of at least six months was warranted. This should be given great deference and not disturbed in the absence of a clear reason. In re Disciplinary Proceeding Against Trejo, No. 200,477-6, 2008 WL 2390338, at *8 (Wash. June 12, 2008).

2. The Recommended Sanction Was Proportionate to the Misconduct.

When undertaking proportionality review, the Court considers whether the recommended sanction is proportionate to the misconduct. In re Disciplinary Proceeding Against Lopez, 153 Wn.2d 570, 595, 106 P.3d 221 (2005). The lawyer facing discipline bears the burden of bringing cases to the Court's attention that demonstrate the disproportionality of the sanction imposed. Cohen II, 150 Wn.2d at 763. McIntosh's cited cases do not provide a clear reason to depart from the Board's unanimous recommendation.

First, McIntosh argues that her sanction is disproportionate to the one imposed in Carmick for similar conduct. There, the Board unanimously recommended a sixty-day suspension for a lawyer who violated RPC 3.3(f) and 3.5(b). This Court affirmed. Considering the longstanding principle of deference to a unanimous Disciplinary Board,

Carmick does not compel the court to reverse the unanimous recommendation in this case.

Moreover, although both McIntosh and Carmick violated RPC 3.3(f) and 3.5(b), these cases are not so similar as to make McIntosh's sanction disproportionate. First, although Carmick had prior misconduct, it was not given great weight as an aggravating factor. See Carmick, 146 Wn.2d at 605. Carmick's prior offense had occurred two years earlier and involved unrelated misconduct (a violation of RPC 1.6). Id. Here, in contrast, McIntosh committed misconduct while on notice that disciplinary counsel was recommending an admonition for false swearing in a legal document. The hearing officer found that McIntosh's prior conduct was similar enough to give this factor great weight. BF 46, ¶ 4.11. The Board agreed. BF 61, at 2. This Court should affirm and conclude that the weight of this factor suffices to justify a sanction higher than that imposed in Carmick.

In addition, McIntosh has refused to acknowledge the wrongful nature of her conduct. This aggravating factor was not present in Carmick, 146 Wn.2d at 605. The pertinent, unchallenged finding is as follows:

In fact, the respondent has changed her story and has tried to justify her actions, or quibble over the meaning of terms. The dissembling by the respondent when coupled with the obvious lack of remorse for her actions and the refusal to acknowledge wrongdoing are an aggravating factor.

BF 46, ¶ 4.9. The hearing officer found this factor to be significant. BF 46, ¶ 4.12. The Board agreed that the record justified applying this factor, but did not give this factor great weight. BF 61, at 3.

However weighted, McIntosh's lack of remorse justifies a severe sanction to further the purposes of deterrence and protection of the public. In Dann, this Court noted that when a lawyer "has not acknowledged that the preponderance of his actions were in any way dishonest or deceitful ... his continued insistence that he has acted properly leaves us quite uncertain that he would not repeat his ethical misconduct." 136 Wn.2d at 81 (citation omitted). McIntosh's quibbles and justifications during the hearing, as well as her rationalization to Owens that her behavior was not worse than what other attorneys in her community had done, suggests that a weighty sanction is necessary to prevent further misconduct.

Finally, the Disciplinary Board already considered McIntosh's conduct in proportion to Carmick's, and seemingly reduced McIntosh's sanction by six months based on Carmick and Dynan.² BF 61, at 3. As the Board found, the recommended sanction is not disproportionate when considering these two cases.

² The Board, although applying the mitigating factor of good reputation, did not give it great weight. This factor therefore did not by itself justify a reduction of the sanction by six months.

McIntosh cites two notices from past issues of the Washington State Bar News involving lawyers Barbara Varon and Gerald Burke. But Bar News notices do not provide the factual support and record necessary to permit a meaningful comparison for a proportionality analysis, particularly as they do not mention the lawyer's previous misconduct. See Lopez, 153 Wn.2d at 596; Cohen II, 150 Wn.2d at 763.

In any event, both cases are inapposite. Barbara Varon provided documents to an ex parte commissioner that showed that the adverse party was represented by counsel, but she neglected to orally inform the commissioner of that fact. (60 Wash. St. Bar News, Nov. 2006, at 55). Gerald Burke presented an order to a commissioner without telling him that another commissioner had made a conflicting procedural ruling. (62 Wash. St. Bar News, April 2008, at 59). While both cases involved an omission of fact in connection with an ex parte proceeding, neither involved the type of affirmative dishonesty engaged in by McIntosh.

McIntosh argues, without citation to authority, that in comparing these cases, it is crucial to examine what was at stake in each case and what motivated the lawyer. Respondent's Brief (RB) at 19. She argues that Varon, Carmick, and Burke were seeking affirmative relief for their clients. According to McIntosh, her own misconduct was for the purpose of preserving the status quo. RB at 17-18. However, even assuming that

this distinction is relevant to the severity of the disciplinary sanction, there were other, honest, ways for McIntosh to achieve this result. She admitted that she could have hired another lawyer to bring the temporary restraining order against the agency or delayed her vacation to get it done. She did neither. The hearing officer's unchallenged finding is that "Mary McIntosh was apparently more interested in being able to get away on vacation than in discharging her duty to act with candor to the court and avoid improper contact with the court." BF 46, ¶ 4.1. The motivation is similar to that in Kuvara, where a lawyer was disbarred for notarizing a forged signature and submitting a false document as a "short cut," rather than for greed or monetary gain. 149 Wn.2d at 244.

These cases do not provide a clear reason to depart from the Board's unanimous sanction recommendation of a suspension of at least six months.

3. The Impact of a Lengthy Suspension Is No Longer an Appropriate Consideration.

Finally, citing In re Disciplinary Proceeding Against Noble, 100 2d 88, 667 P.2d 608 (1983), McIntosh argues that the impact of a suspension would be onerous to her as a solo practitioner. That Noble factor was rejected years ago. Kuvara, 149 Wn.2d at 258. Respondent's reliance on this factor is therefore misplaced. Even so, McIntosh has not offered any

facts to show why the suspension would affect her more harshly than other lawyers. Inevitably, a sanction causes hardship. The suffering that a lawyer incurs as a result of his or her own conduct cannot be the measure of an appropriate disciplinary sanction, as it is sometimes necessary to deter others and show the legal system's intolerance of misconduct. In re Disciplinary Proceeding Against Kennedy, 97 Wn.2d 719, 723, 649 P.2d 110 (1982).

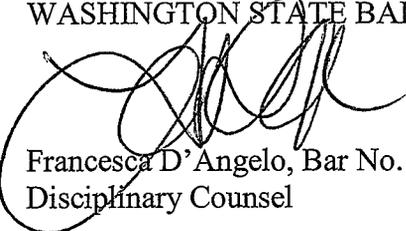
V. CONCLUSION

The purposes of lawyer discipline are to protect the public and the integrity of the legal system, deter further unethical conduct, and, where appropriate, rehabilitate the lawyer. Here, the specter of a pending admonition was insufficient to deter McIntosh from committing additional misconduct. To this day, she continues to minimize the conduct that resulted in the prior discipline. A lenient sanction would not deter this lawyer nor protect the public or the integrity of the legal system.

The Court should affirm the Board's unanimous recommendation of a suspension of at least six months.

RESPECTFULLY SUBMITTED this 24 day of June, 2008.

WASHINGTON STATE BAR ASSOCIATION



Francesca D'Angelo, Bar No. 22979
Disciplinary Counsel

APPENDIX A

FILED

AUG 02 2007

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In Re

MARY H. MCINTOSH

Lawyer (Bar No. 12744).

PUBLIC NO. 06#00010

HEARING, FINDINGS OF FACT;
CONCLUSIONS RE: RULE
VIOLATIONS; AND DISCIPLINARY
RECOMMENDATIONS

I. HEARING

1.1 Date: On June 18, 2007 this matter came on for hearing before Donald W. Carter, the undersigned hearing officer. The matter was concluded by submission of written closing arguments on July 16, 2007.

1.2 Present: The respondent, Mary H. McIntosh, Esq. appeared personally and through her counsel, John William Murphy, Esq.; The Honorable George McIntosh, Judge, retired, the father of the respondent also appeared and had served as a paralegal on the respondent's behalf; the Washington State Bar Association was represented through Disciplinary Counsel, Francesca D'Angelo, Esq.

HEARING, FINDINGS OF FACT; CONCLUSIONS RE:
RULE VIOLATIONS; AND DISCIPLINARY
RECOMMENDATIONS - 1

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1 1.3 Purpose: This hearing was held to consider the Petition for Disciplinary
2 Sanctions for the respondent's alleged violations of RPC 3.5(b) and 3.3(f), which violations
3 were alleged to have occurred in April, 2005.

4 1.4 Evidence/Witnesses: The Bar Association presented the direct testimony of
5 Doug Owens, Esq. with regard to the incidents. The respondent testified personally and called
6 Kenneth Evans, Esq.; Christopher J. Pollino, Esq.; Honorable David Nee, Judge; Honorable
7 Michael Rickert, Judge; Honorable Susan Cook, Judge; and Brian Payton, Court
8 Commissioner. In addition to the testimony, the exhibits to this proceeding were admitted by
9 stipulation, without objection by either party. The deposition of Mary H. McIntosh was
10 published on the record during the hearing.
11
12

13 1.5 The Standard of Proof: All findings set forth below were established at the
14 hearing by a clear preponderance of the evidence.

15 Following the hearing and final arguments, the Hearing Officer made the following:
16

17 II. FINDINGS OF FACT

18 2.1 In 2004, Tom DiNardo, an auctioneer in Skagit County, was removed from the
19 membership rolls of the Auctioneers Association by a vote of the Board of Directors, without
20 hearing.
21

22 2.2 In response to the above-referenced actions, Tom DiNardo retained attorney
23 Doug Owens to bring an action against the Washington Auctioneers Association (WAA) and
24 its directors individually. On behalf of his client, attorney Owens filed the action against the
25 Association and its directors seeking a mandated reinstatement in the WAA for DiNardo, as
26 well as damages for defamation, unfair competition (under the Consumer Protection Act), and
27
28
29

HEARING, FINDINGS OF FACT; CONCLUSIONS RE:
RULE VIOLATIONS; AND DISCIPLINARY
RECOMMENDATIONS - 2

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1 "prima facie tort".

2 2.3 Mary H. McIntosh, Esq. had previously advised one of the Board members,
3 Steven McMillan, with regard to bringing a civil action against DiNardo. Ms. McIntosh
4 advised McMillan to not bring an action against DiNardo. Ms. McIntosh had also previously
5 been involved in a small claim action and District Court appeal by DiNardo asserted against the
6 Skagit Symphony on whose Board respondent McIntosh served.
7

8 2.4 DiNardo's action, entitled DiNardo v. WAA, was filed in Skagit County in
9 November 2004. The case was in its infancy in the spring of 2005, and little or no discovery
10 had taken place.
11

12 2.5 Without consulting with his counsel, DiNardo filed a Freedom of Information
13 Act (FOIA) request with the Department of Licensing (WDL) for records regarding McMillan
14 and the recent audit of his auction business. DiNardo neither called Owens before filing the
15 FOIA request, nor sought any advice or assistance from Owens in the preparation of that
16 document.
17

18 2.6 Mary McIntosh had come to know DiNardo in approximately 2002 when the
19 dispute between DiNardo and the symphony board arose.

20 2.7 By 2005, the relationship between DiNardo and McMillan had become very
21 hostile. DiNardo also bore a great deal of animus toward respondent Mary McIntosh.
22 Although denied by Ms. McIntosh, from her testimony it was apparent that she bore an equal
23 amount of dislike for DiNardo.
24

25 2.8 On or about Monday, April 18, 2005, McMillan received a telephone call from
26 the WDL indicating that unless enjoined from doing so, the WDL would be releasing the audit
27

1 records received from McMillan to DiNardo pursuant to his FOIA request. McMillan
2 contacted his counsel, Mary McIntosh, and requested that she prevent the WDL from releasing
3 the audit records.

4 2.9 On or about April 19, 2005, Ms. McIntosh contacted the WDL and spoke with
5 an investigator, who informed her that unless an injunction was entered pursuant to RCW
6 42.17.330 (now RCW 42.56.540), the records would be delivered to requestor DiNardo on
7 Friday, April 22, 2005.

8
9 2.10 During his conversation with Mary McIntosh, Mr. McMillan had indicated that
10 he and his wife were leaving for China and would be unavailable. Respondent McIntosh was
11 also scheduled to leave her office on April 21, 2005 and be gone until May 2, 2005 to visit her
12 children and grandchildren in California.

13
14 2.11 After finishing her conversation with the investigator from the WDL, respondent
15 McIntosh immediately reviewed RCW 42.17.330 regarding "Court Protection of Public
16 Records."¹

17
18 2.12 By April 19, 2005, Ms. McIntosh was aware that her client's, the McMillans,
19 were, or would soon be, out of the county and unavailable for signatures on a complaint and
20 pleadings in support of a Temporary Restraining Order (TRO) to block the release of the audit
21

22
23 ¹ RCW 42.17.330 was recodified under RCW 42.56.540, which reads:

24 The examination of any specific public record may be enjoined if, upon motion and
25 affidavit by an agency or its representative or a person who is named in the record or to
26 whom the record specifically pertains, the superior court for the county in which the
27 movant resides or in which the record is maintained, finds that such examination would
28 clearly not be in the public interest and would substantially and irreparably damage any
29 person, or would substantially and irreparably damage vital governmental functions. An
 agency had the option of notifying persons named in the record or to whom a record
 specifically pertains, that release of a record has been requested. However, this option
 does not exist where the agency is required by law to provide such notice.

[1992 c 139 § 7; 1975 1st ex.s c 294 § 19; 1973 c 1 § 33 (Initiative Measure No. 276,
approved November 7, 1972). Formerly RCW 42.17.300.]

HEARING, FINDINGS OF FACT; CONCLUSIONS RE:
RULE VIOLATIONS; AND DISCIPLINARY
RECOMMENDATIONS - 4

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1 documents by the WDL. Also, the McMillans were not available to provide the \$110.00 filing
2 fee necessary to commence a separate action under RCW 42.17.330 against the WDL and
3 DiNardo in order to enjoin the release of the McMillan's records.

4 2.13 On April 19, 2005, Mary McIntosh also knew from searching records on the
5 internet that DiNardo had sold his home near Anacortes, Washington at Skyline Marina. She
6 was also aware from a discussion with the WDL and a review of his website that the only
7 available address of record for him was a Post Office box in Lynden, Washington, making
8 personal service on DiNardo of a new summons, complaint, motion for TRO, supporting
9 declarations and order to show cause why the TRO should not be granted difficult, if not
10 impossible.
11

12
13 2.14 On Tuesday, April 19, 2005, after admittedly reviewing RCW 42.17.330, Ms.
14 McIntosh contacted DiNardo's attorney, Doug Owen. Ms. McIntosh decided to seek the
15 injunction of the WDL in already filed action, DiNardo v. Washington Auctioneers Association
16 (WAA), although the injunctive relief would be against a non-party to that lawsuit and the
17 materials sought to be prevented from being turned over were not being sought through
18 discovery in that action.
19

20 2.15 Ms. McIntosh was aware the McMillan's audit records in the WDL's possession
21 were not the subject of any discovery request by defendant Owens in the DiNardo v. WAA
22 lawsuit. On April 19, 2005, Mary McIntosh knew that Doug Owens had made a request to the
23 DLI for the McMillan records.
24

25 2.16 Doug Owens knew nothing of DiNardo's request to the WDL. During his phone
26 conference with Ms. McIntosh, Doug Owens disclosed that he did not know the whereabouts of
27

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29
HEARING, FINDINGS OF FACT; CONCLUSIONS RE:
RULE VIOLATIONS; AND DISCIPLINARY
RECOMMENDATIONS - 5

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1 DiNardo and did not know how to get in contact with his client. Ms. McIntosh disclosed that
2 she knew DiNardo had sold his house in the Skyline area.

3 2.17 Doug Owens informed Mary McIntosh during their brief phone call that
4 DiNardo's request under the Freedom of Information Act for McMillan's audit records at the
5 WDL had nothing to do with the lawsuit in which they were involved as counsel for their
6 respective clients. Mr. Owens further stated that the Skagit County Court would not have
7 jurisdiction to enter a restraining order (TRO) against the Department of Licensing in DiNardo
8 v. WAA as it was not made a party to the causes of action which were before the court. He
9 advised Ms. McIntosh that she had to start a different lawsuit to enjoin the WDL.
10

11
12 2.18 Doug Owens was very knowledgeable of the animosity between his client and
13 the McMillans, as well as the extreme dislike his client had for respondent McIntosh. Doug
14 Owens knew that he could not agree to the entry of a temporary restraining order.

15
16 2.19 During their brief telephone conference, Ms. McIntosh told Doug Owens that
17 she was leaving for a trip to visit her grandchildren. Although Mr. Owens was sympathetic to
18 respondent McIntosh's vacation plans, he told her to file a separate lawsuit because the court
19 did not have jurisdiction over the WDL in order to enjoin the release of the McMillan audit
20 records.

21
22 2.20 Mary McIntosh also told Doug Owens that she did not know how she would
23 obtain the \$110 filing fee to file the new cause of action, nor did she know how she would
24 obtain her clients' signatures in the new lawsuit because they were out of town.

25
26 2.21 Doug Owens was unequivocal when he told Ms. McIntosh that he could not and
27 would not agree to an order enjoining the production of the audit records in the lawsuit entitled
28

1 DiNardo v. WAA, because the court did not have jurisdiction and a cause of action was
2 required for the injunctive relief Ms. McIntosh wanted to receive.

3 2.22 Respondent McIntosh stated that she "did not know what he was talking about"
4 when Owens mentioned the separate lawsuit in her testimony. Despite this, in her earlier
5 deposition testimony, she acknowledged that she did not want to bring a separate lawsuit
6 because:
7

- 8 • She felt the bringing of the separate action would be "burdensome";
- 9 • She would have to serve DiNardo and did not know where he was;
- 10 • She would probably have to delay her vacation by several days and did not
11 wish to have this matter cause that delay;
- 12 • She would have to hire an attorney to handle the case in her absence, which
13 she did not want to have to do;
- 14 • She may have to bring a motion shortening time; and,
- 15 • "She would have to take a stab at the agency itself."
- 16
- 17

18 2.23 At the termination of their conversation on April 19, 2005, respondent McIntosh
19 knew that Doug Owens would not agree with the entry of an order temporarily enjoining the
20 Department of Licensing from releasing the audit records.
21

22 2.24 Respondent McIntosh nevertheless prepared a Motion/Declaration for an ex
23 parte temporary restraining order in DiNardo v. WAA despite being told by Mr. Owens that he
24 could not and would not agree to the entry of an order. In her declaration supporting her
25 motion for a TRO, Ms. McIntosh implied that Owens had agreed to the order, by stating, "I
26 contacted Mr. Owens who was sympathetic to my vacation and thought that a hearing upon my
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29

1 return would be sufficient for his client's needs. He further indicated that he would not be able
2 to contact his client between now and when I was leaving on my vacation, less than 24 hours
3 notice." Based upon the testimony of the parties, the only true part of the statement was that
4 Mr. Owens was sympathetic to the respondent's vacation plans. He did not consent to any ex
5 parte contact by Ms. McIntosh, nor did he agree that an order could be entered.
6

7 2.25 In her declaration in support of her motion, Ms. McIntosh further stated, "There
8 is no reason that the plaintiff needs these records to prove his case." This is also a misleading
9 statement, and was obviously calculated to tie DiNardo's unrelated FOIA records request into
10 the unrelated lawsuit in which Ms. McIntosh now sought the TRO. A key fact not set forth in
11 Ms. McIntosh's declaration was that her opposing counsel, Mr. Owens, had told her she was
12 legally incorrect in seeking the temporary restraining order against an unrelated, un-named
13 party in the DiNardo v. WAA lawsuit.
14

15 2.26 Ms. McIntosh, in the preamble to the Temporary Restraining Order, also stated
16 that Doug Owens "was notified of the defendant's intention to obtain this order and expressed
17 no objection so long as the hearing could take place after defendant's vacation." This statement
18 was a misrepresentation regarding not only the notification, but also regarding Doug Owens'
19 position that the proceeding itself was not the proper arena in which the order should be
20 requested because the request was separate from the issues in DiNardo v. WAA.
21
22

23 2.27 The respondent McIntosh testified that she felt that filing a second lawsuit to
24 enjoin the release of the records would be "burdensome."

25 2.28 Before entering the order, respondent McIntosh did not fax a copy to Doug
26 Owens to obtain his consent or agreement to the entry of the order. She also did not provide a
27
28

29 HEARING, FINDINGS OF FACT; CONCLUSIONS RE:
RULE VIOLATIONS; AND DISCIPLINARY
RECOMMENDATIONS - 8

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1 copy of the order and related pleadings to Doug Owens to determine whether or not he agreed
2 with the contents of her pleadings which quoted him.

3 2.29 On Thursday, April 21, 2005, respondent McIntosh went to the courthouse at
4 approximately 8:45 a.m. looking for a judge to sign the temporary restraining order. This was
5 before the regular ex parte calendar. Respondent McIntosh flagged down Judge Rickert in the
6 court administrator's office and handed him the motion and order, telling him that Doug Owens
7 had agreed to the entry of the order. She did not tell Judge Rickert that attorney Owens not
8 only oppose the temporary restraining order being entered in DiNardo v. WAA, but also
9 objected to an injunction being sought in that action as it was unrelated to the FOIA request and
10 therefore the relief McMillan ultimately sought. During her ex parte contact with Judge
11 Rickert, she also neglected to inform the judge that it was her opposing counsel's opinion that
12 the injunctive relief she was seeking could not be entered by the Superior Court of Skagit
13 County for those very reasons. Without being fully advised of all the facts germane to the
14 matter in front of him, Judge Rickert signed the order temporarily enjoining the WDL from
15 releasing the records to Mr. DiNardo.
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19 2.30 At the disciplinary hearing, Judge Rickert testified that he was influenced into
20 signing the order by Ms. McIntosh's statement that attorney Owens had agreed to the entry of
21 the order. He further testified he was influenced by the statement in the declaration: "There is
22 no reason that the plaintiff needs these records to prove this case." Judge Rickert was not
23 informed, and thus did not understand, that the records had nothing to do with DiNardo v.
24 WAA.
25

26 2.31 Upon learning of the entry of Respondent's ex parte order, Doug Owens moved
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28
29

1 to set it aside. Eventually, an order vacating Ms. McIntosh's order *nunc pro tunc* was entered
2 by Court Commissioner Kenneth Evans after a hearing on the merits of the respective motions.

3 2.32 During a conversation after April 22, 2005, Ms. McIntosh informed Mr. Owens
4 that she had done nothing in this matter which was as bad as what other attorneys in the Skagit
5 County Bar community have done.

6
7 2.33 After entry of the order on Thursday, April 21, 2005, respondent McIntosh
8 returned to her office. She then left for the airport to catch a flight the next day to California to
9 visit her grandchildren. Her staff was left with instructions to mail a copy of the order to Doug
10 Owens and to fax a copy of the order to the Department of Licensing.

11
12 2.34 Around this time, Doug Owens was out of the office for extended periods of
13 time due to the death of his father-in-law.

14 2.35 At the time this incident occurred in April 2005, the respondent was under
15 investigation in a separate disciplinary action.

16
17 2.36 The respondent testified that she did not need an agreed order, or, alternatively
18 that, an agreed order was not necessary because her seeking of the injunction constituted "an
19 emergency order".

20 2.37 Prior to and after April 19-21, 2005, Doug Owens and Mary McIntosh have had
21 a cordial relationship.

22 2.38 Doug Owens' testimony was consistent and credible and made logical sense.

23 2.39 Ms. McIntosh's testimony was neither consistent nor credible. Her testimony ran
24 the gamut from stating that Doug Owens agreed to the entry of the order, to his not agreeing to
25 the order, to the fact that he did not need to agree to the order and that the order was "an
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1 emergency order" not requiring notice or agreement. Despite these multiple conflicting
2 positions, the pleadings presented by Ms. McIntosh to the court in support of the temporary
3 injunction strongly and misleadingly imply that Doug Owens had given his agreement, and in
4 fact at the hearing, she admitted she told Judge Rickert that Mr. Owens had given his consent
5 for the order's entry.
6

7 2.40 Despite her multiple claims that Doug Owens consented to the temporary
8 injunction order being entered in the DiNardo v. WAA lawsuit, her subsequent actions are
9 inconsistent with those claims. She did not prepare an order for Owens' signature. She did not
10 fax a copy of the proposed order to Owens for his review. She sent no letter confirming his
11 agreement. Instead, she prepared a motion and declaration worded in a manner which was
12 intended to lead the reader into believing Mr. Owens consented to the entry of the order and
13 agreed with the procedure chosen by Ms. McIntosh. When that TRO was presented to the
14 court, while not actually stating that Doug Owens agreed to the order, the only reasonable
15 inference was that he was in agreement with her request for the TRO and the proceeding for the
16 permanent injunction. No notice of the presentation of the order was given to Mr. Owens and
17 no opportunity was given to him to oppose its entry. Instead, Ms. McIntosh presented the
18 pleadings ex parte to Judge Rickert outside of the courtroom set for ex parte hearings.
19
20
21

22 2.41 Respondent McIntosh sought the injunction under CR 65(b) and testified that
23 she did not need to get Mr. Owens' consent to get the order entered, nor did she need his
24 agreement. She testified she was only required to notify Mr. Owens if she was going to have
25 an order entered, which she alleges she did in the phone call. She acknowledged Owens did
26 not consent and did not agree with her on the procedural issues.
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1 v. WAA, because a separate action should be brought naming the WDL as a party; the materials
2 sought to be prevented from delivery to DiNardo were not related to the case in which the TRO
3 was sought; and Doug Owens was not given actual notice that Ms. McIntosh would be seeking
4 the TRO in DiNardo v. WAA. The actions by Mary McIntosh constitute a knowing lack of
5 candor and a violation of RPC 3.3(f). In failing to disclose these facts, which went to the
6 essence of her request for relief, she deprived Judge Rickert of the ability to make an informed
7 decision as to whether or not there were facts which were adverse to Ms. McIntosh's position
8 and whether or not the temporary restraining order and order to show cause should have been
9 issued.
10

11
12 3.3 Without notice to Mr. Owens, Ms. McIntosh caught Judge Rickert shortly before
13 court was to convene in the Court Administrator's office and requested he sign her proffered
14 order. This was done at a time she knew that Mr. Owens (1) was not able to reach his client;
15 (2) had advised Ms. McIntosh that he would not consent to an order being entered in DiNardo v
16 WAA because his client's FOIA request had nothing to do with the pending lawsuit; and (3)
17 had told Ms. McIntosh that the proper way to pursue the matter was to file a new action directly
18 against the WDL seeking injunctive relief. Instead, in a contested matter, Ms. McIntosh went
19 to a sitting judge and obtained an order under misleading if not false pretences without
20 allowing opposing counsel the opportunity to be either present or heard. A lawyer is prohibited
21 from communicating ex parte with a judge (or member of a tribunal) except as permitted by
22 law. Ms. McIntosh knowingly initiated improper ex parte contact with Judge Rickert. By her
23 actions Ms. McIntosh violated RPC 3.5(b).
24
25

26 3.4 RPC 3.3(f) and RPC 3.5(b) are designed to protect the legal system and the
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HEARING, FINDINGS OF FACT; CONCLUSIONS RE:
RULE VIOLATIONS; AND DISCIPLINARY
RECOMMENDATIONS - 13

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1 ability of the courts to function.

2 3.5 An attorney's duty of candor is at its highest when opposing counsel is not
3 present to disclose contrary facts or expose deficiencies in a legal argument. Ms. McIntosh
4 willfully failed to present the facts concerning Mr. Owens' opposition. She also failed to
5 disclose that RCW 42.17.330 contemplated a separate action for injunctive relief. Her duty to
6 be candid and honest in dealing with Judge Rickert was also breached when she artfully crafted
7 her declaration to imply that the material sought to be enjoined from delivery to DiNardo were
8 documents and/or things sought via discovery in the DiNardo v. WAA lawsuit. A level of
9 candor is necessary to prevent judges from making decisions that differ from those they would
10 reach in an adversarial position. Had Judge Rickert been informed accurately of Mr. Owens
11 position that the court lacked both in rem jurisdiction over the subject matter (i.e., the materials
12 were not sought in the instant lawsuit and were not part of the discovery proceedings) and in
13 personam jurisdiction over WDL, he also would have undoubtedly (and properly) denied Ms.
14 McIntosh's motion for temporary relief.
15
16
17

18 3.6 In her contact with Judge Rickert, respondent McIntosh knowingly made
19 misrepresentations and omitted relevant facts in order to obtain her order in an expeditious
20 manner so she could go on vacation, rather than have to delay her vacation and/or hire another
21 lawyer in order to proceed properly with a second lawsuit.
22

23 3.7 Mary McIntosh's allegation in her declaration that immediate and irreparable
24 injury would occur if the TRO was not issued was a further misrepresentation that the
25 McMillan records about to be released by the Department of Licensing were part of the
26 discovery in the DiNardo v. WAA lawsuit. The continuing and substantial misrepresentations
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1 made by Ms. McIntosh are violations of RPC 3.3(f).

2 3.8 In disciplinary proceedings it is axiomatic that "The finder of the fact is the sole
3 and exclusive judge of the evidence, the weight to be given thereto, and the credibility of
4 witnesses" applies. Mary McIntosh's testimony and explanation of events was found to be
5 neither consistent nor credible, while Mr. Owens' testimony was both consistent and credible.
6

7 3.9 The ethical violations alleged in Counts 1 and 2 of the Washington State Bar
8 Association's Petition have been proven by a clear preponderance of the evidence.

9 The hearing officer having made the foregoing conclusion, and having found violations
10 of RPC 3.3(f) and RPC 3.5(b), now considers the following:

11
12 **IV. PRESUMPTIVE SANCTION/AGGRAVATING CIRCUMSTANCES**

13 4.1 In an attempt to carefully craft her declaration in support of her motion for
14 temporary injunction and the preamble of her order, respondent made knowing
15 misrepresentations as to both the consent of Doug Owens to the entry of the temporary
16 restraining order and also the relation of the material whose delivery was to be enjoined to the
17 lawsuit itself. Mary McIntosh was apparently more interested in being able to get away on
18 vacation than in discharging her duty to act with candor to the court and avoid improper contact
19 with the court. Based upon all of the facts proven by the Bar Association, the respondent
20 knowingly made misrepresentations to the court – misrepresentations upon which Judge
21 Rickert relied in signing the TRO.
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23
24 4.2 The respondent was aware from her contact with Mr. Owens that he would not,
25 and could not, agree to the entry of an order enjoining the delivery of the McMillan audit
26 materials to DiNardo. She was aware Mr. Owens did not feel that the pending litigation was
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1 the proper forum for the injunction motion to be brought. She was aware that the FOIA request
2 had nothing to do with DiNardo v.WAA. Instead of discharging her duty of making full
3 disclosure to the court of the adverse facts and issues surrounding her motion for the TRO, she
4 chose instead to omit or misrepresent facts in the artfully worded declaration which misled or
5 would tend to mislead the judge in determining whether or not the TRO should be issued.

7 4.3 The respondent knowingly manipulated the facts for her own purposes and
8 convenience with the end result that the manipulation of those facts caused the court and Judge
9 Rickert to be misled and to rely upon misrepresentations.

11 4.4 The respondent's actions caused a monetary injury to Doug Owen who did not
12 charge for his time in setting aside the order.

13 4.5 Respondent McIntosh also caused an injury to the integrity of the legal system
14 by her actions. It cannot become an accepted practice to allow lawyers to ignore their duty of
15 to be truthful and candid with tribunals. To allow the type of disingenuous activities engaged in
16 by Ms. McIntosh in her approach to the practice of law and her candor with the bench damages
17 the legal profession and causes all lawyers to be held in contempt by the public.

19 4.6 ABA Standard 6.12 and 6.32 apply to the case at bar.²

21 4.7 The presumptive sanction for both of Ms. McIntosh's violations is suspension,
22 and barring aggravating factors, six (6) months is the generally accepted minimum suspension.
23 However, minimum term suspension is appropriate in cases where there are no aggravating
24 factors and at least some mitigating factors or where the mitigating factors clearly outweigh the
25 aggravating factors.

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27
28 ² "6.12 and 6.32 as set forth in the brief from the Washington State Bar Association

1 4.8 Defendant/Respondent has had a prior disciplinary offense, which is an
2 aggravating factor. On July 14, 2005 the respondent received an admonition for notarizing a
3 signature and falsely representing the signatory has appeared before her. The ongoing
4 investigation in that disciplinary matter was occurring while the respondent was committing the
5 acts complained of in this disciplinary action. As with the instant action, the prior disciplinary
6 defense also was focused on misrepresentations made by the respondent.

8 4.9 The respondent has refused to acknowledge the wrongful nature of her
9 misconduct. In fact, the respondent has changed her story and has tried to justify her actions, or
10 quibble over the meaning of terms. The dissembling by the respondent when coupled with the
11 obvious lack of remorse for her actions and the refusal to acknowledge wrongdoing are an
12 aggravating factor.

14 4.10 Respondent has had substantial experience in the practice of law. She interned
15 after her first year at Davies Pearson in Tacoma, Washington through her passing of the Bar.
16 Since admission she has continuously practiced law.

18 4.11 The prior misconduct is a factor which should be borne in mind in setting the
19 sanction and should be given great weight as an aggravating factor because it is similar to the
20 type of conduct at current issue. That is, it involved the false swearing in a legal document.
21 This is similar to the behavior described here where falsehoods are knowingly asserted in a
22 declaration and in court pleadings.

24 4.12 Another significant issue is the refusal to acknowledge the wrongful nature of
25 her conduct.

27 4.13 No mitigating factors were found.

After the determination of the foregoing the following is made:

V. RECOMMENDATIONS

5.1 Based upon the violations of RPC 3.3(f) and 3.5(b), suspension for one year (12 months) is an appropriate sanction for the respondent.

5.2 Restitution: Pursuant to ELC 13.7, an order of restitution for \$400.00 to Doug Owens should be made for the efforts he expended in representing Mr. DiNardo without compensation. That expenditure was solely due to the unethical actions of the respondent. Further, the reinstatement should be conditioned upon her payment of restitution to Mr. Owens.

DATED this 1 day of August, 2007.


DONALD W. CARTER, WSBA #5569
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the HO's Findings of Fact, Conclusion of Law to be delivered to the Office of Disciplinary Counsel and to be mailed to John W. Murphy, Respondent/Respondent's Counsel at 1025 3rd St Mount Vernon WA by Certified/first class mail, postage prepaid on the 2 day of August 2007.

Becky Couler
Clerk/Counsel to the Disciplinary Board

APPENDIX B

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DISCIPLINARY BOARD

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DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

MARY H. McINTOSH,
Lawyer (WSBA No. 12744).

Proceeding No. 06#00010

**DISCIPLINARY BOARD ORDER
AMENDING HEARING OFFICER'S
SANCTION RECOMMENDATION**

This matter came before the Disciplinary Board at its January 25, 2008 meeting on automatic review of Hearing Officer Donald W. Carter's decision recommending a one-year suspension following a hearing.

Having reviewed the documents designated by the parties, the briefs and the applicable case law and rules, and having heard oral argument,

IT IS ORDERED THAT the Hearing Officer's Finding of Fact and Conclusions of Law are adopted. The Board finds the mitigating factor of good reputation and decreases the sanction recommendation to a 6-month suspension. The vote on this

ae1

1 matter was 10-1.¹

2 The record contains character evidence from five witnesses and an offer of proof
3 from several more. Skagit County Lawyers Chris Pollino (TR 112) and Ken Evans (TR
4 76-77), Commissioner G. Brian Paxton (TR 128-29) and Skagit County Superior Court
5 Judges Hon. David Needy (TR 115-116) and Hon. Susan Cook (TR 138) all testified to
6 Ms. McIntosh's good reputation. The Hearing Officer's only reference to this testimony
7 is his finding 4.13 "No mitigating factors were found." The testimony in the record
8 regarding good reputation was undisputed. The Board strikes the Hearing Officer's
9 paragraph 4.13 and replaces it with the following:

10 4.13 The Respondent proved the mitigating factor of good reputation (*ABA*
11 *Standard 9.32(g)*) by a clear preponderance of the evidence.

12 The Board agrees with the Hearing Officer that the presumptive sanction in this
13 case is a suspension. The Board also agrees with the Hearing Officer that the starting
14 point for the sanction discussion is a six-month suspension. The Hearing Officer found
15 the following aggravating factors: prior discipline, refusal to acknowledge the wrongful
16 nature of the misconduct, and substantial experience in the practice of law. The
17 Hearing Officer gave great weight to the prior misconduct, because the misconduct
18 also involved a misrepresentation. The Board agrees with this analysis.

19 The Hearing Officer also gave great weight to refusal to acknowledge the
20 wrongful nature of the conduct. The Board believes the record justifies applying this

21 _____
22 ¹ Those voting in the majority were Anderson, Carlson, Cena, Coppinger-Carter, Fine, Madden, Meehan,
23 Meyers, Romas and Ureña. Mr. Andrews voted in the minority and would have approved the Hearing
24 Officer's sanction recommendation. Mr. Andrews agrees with the majority that the record proves the
mitigating factor of good character, but would give it slight weight considering the totality of the
circumstances.

1 factor, but not giving it great weight.

2 Substantial experience in the practice of law applies, but again, does not justify
3 great weight. The Board would also not give great weight to the mitigating factor of
4 good reputation. After considering and balancing the aggravating and mitigating
5 factors, a six month suspension is the appropriate sanction.

6 A proportionality analysis also supports this sanction recommendation. In *In re*
7 *Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004), the Court imposed a six month
8 suspension on Mr. Dynan for filing false billing declarations in three court cases.
9 Although the Court found that the presumptive sanction was disbarment, and that the
10 aggravating factors slightly outweighed the mitigating factors, the final sanction was a
11 six month suspension based on proportionality. *Dynan* at 620-625. In *In re Carmick*,
12 146 Wn.2d 582, 48 P.2d 311 (2002) the Court imposed a 60-day suspension for
13 misrepresenting to the Court whether all parties were aware of an ex parte order and
14 negotiating directly with a represented party. In *Carmick*, the presumptive sanction
15 was suspension and the Court found three aggravating factors, including prior
16 discipline, and one mitigating factor. *Carmick* at 604-606.

17 The Board recommends that that Court suspend Ms. McIntosh for six months
18 and order \$400.00 in restitution to Doug Owens.

19 Dated this 20th day of February, 2008

20 

21 William Carlson, Vice Chair
22 Disciplinary Board