

No. 200,681-7

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SUPREME COURT
STATE OF WASHINGTON

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In The
Supreme Court of the State of Washington
DONALD R. CARPENTER
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In re PAUL H. KING,
Attorney,

On Appeal from the Washington State Bar Association

BRIEF OF ATTORNEY

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ORIGINAL

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I. INTRODUCTION

This case involves a series of procedural errors that violated the Rules for Enforcement of Lawyer Conduct and Mr. King's right to due process of law. A key issue here is that the hearing examiner, David Schoeggl, WSBA # 13638, lacks the appearance of fairness to qualify for such a judicial function. Yet he refused to recuse himself after motions were brought requesting that he recuse. This was after a number of procedural safeguards and requirements were ignored, violated, or not met. Some of the rules violations can only be cured by vacation or reversal of the findings below.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING

Assignment of Error A:

The hearing examiner, David Schoeggl, WSBA # 13638, was disqualified for lack of appearance of fairness.

Issues Pertaining to Assignment of Error A:

- 1) Mr. Schoeggl is a named party to an appellate proceeding and has a stake in the case.
- 2) Mr. Schoeggl, as hearing examiner, is governed by the Code of Judicial Conduct and has the duty to recuse as violation of Canon Three

has occurred.

- 3) Mr. Schoeggl is required to report lawyer misconduct under ELC 2.6(3)(B).
- 4) Mr. Schoeggl has ignored a notice of unavailability filed for Mr. King and acted on motions during time of unavailability.
- 5) Mr. Schoeggl granted a motion to exclude himself as a potential witness.
- 6) Mr. Schoeggl granted a motion to exclude Scott Busby as a witness knowing that he was the sole witness for Mr. King against enhancement of penalties.
- 7) Mr. Schoeggl proceeding with a hearing knowing that a motion for protective order was pending.

Assignment of Error B

Mr. King's right to due process and his procedural rights under the Rules for Enforcement of Lawyer Conduct were violated, denied, and not complied with to prejudice his right to a fair proceeding and to deny jurisdiction to the Bar Association to hear the complaint.

Issues Pertaining to Assignment of Error B:

- 1) During the investigative phase, Mr. King and Mr. Scannell were

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denied the right to cross examine and to be present during the deposition of witness Mark Maurin by lack of notice. The deposition was taken on October 25, 2005.

- 2) Review Committee acted without nonlawyer member present.
- 3) Discipline Board Chair, Gail McMonagle, WSBA # 22280, denied attorney's motion to vacate findings of Review Committee by herself and without the concurrence of any other Disciplinary Board member, contrary to the Rules.
- 4) Discipline Board Chair McMonagle denied this attorney's motion to vacate findings of Review Committee before the attorney had an opportunity to file a reply brief.
- 5) Discipline Board Chair McMonagle denied attorney's request for reconsideration of Order Denying Motion to Vacate Findings of Review Committee by herself and without the concurrence of any other Disciplinary Board member, contrary to the Rules.
- 6) Hearing schedule was not set in accordance with ELC 10.12(b).
- 7) The formal complaint was not accompanied by adequate summons.
- 8) Jurisdiction was not obtained as service of formal complaint was not completed.

9) Appeal, Motion and Declaration for Review of Audio Tapes for Accuracy under ELC 11.4 has not been ruled on.

III. STATEMENT OF THE CASE

A. Fair Statement of the Facts

This is a case that originated with a grievance filed against Mr. King by Kurt Rahrig, WSBA File Number 05-00854. During the pre-charging investigation of this matter, disciplinary counsel for the Bar Association, Scott Busby, WSBA # 17522, subpoenaed Mark Maurin for an investigatory deposition and conducted it on October 25, 2005. No notice was given to Mr. King.

Mr. King moved for a protective order suppressing the fruits of this deposition and the Association responded by asserting that it conducted the deposition without notice to Mr. King because none was necessary.

A petition under the Writs Act, chapter 7.16 RCW was filed by Mr. King and John Scannell naming Mr. Busby, Gail McMonagle, and David Schoeggl as defendants, *Scannell v. Busby*, King County Superior Court No. 06-2-33100-1 SEA. The case was filed on October 16, 2006 and presented to Mr. Busby on November 1, 2006. The appeal was timely

filed, Court of Appeals No. 60623-9-I. A decision has recently been made in that appeal, Mr. Scannell intends to file petition for review by this Court.

The Finding and Order of Review Committee IV was filed on January 9, 2007, Sub No. 1, creating WSBA File Number 05-00118. At the hearing of the review committee held on January 5, 2007, one of the three committee members, the nonlawyer member Hollingsworth, was not present. Yet the other two members issued the Finding and Order of Review Committee. This was challenged by Mr. King with his Motion to Vacate Finding and Order, Absence of Review Committee Member, Sub No. 2. Disciplinary Board Chair, Gail McMonagle denied this with her Disciplinary Board Chair Order Denying Respondent's Motion to Vacate Findings of Review Committee, Sub No. 6. Mr. King filed his Motion for Reconsideration of Disciplinary Board Chair Order Denying Respondent's Motion to Vacate Findings of Review Committee, Sub No. 7. Again, Ms. McMonagle signed the Disciplinary Board Chair Order Denying Respondent's Request for Reconsideration of Order Denying Motion to Vacate Findings of Review Committee, Sub No. 11. Mr. King filed his Appeal to the Full Disciplinary Board and Motion to Vacate the

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Disciplinary Chair Orders Denying Respondent's Motions, Sub No. 12. Without this appeal being decided by the full disciplinary board, the Formal Complaint, Sub No. 17 was filed.

The Formal Complaint and the Notice to Answer and Notice of Default Procedure and the Formal Complaint, Sub No. 18, were mailed to Mr. King's address in the Philippines, and its summons allowed only 20 days for a response. Civil Rule 4(d)(4) requires 90 days from the date of mailing when service is performed by mail.

Even though he is a named party in a then pending appeal, Mr. Schoeggl was appointed hearing officer in this matter.

The Hearing Schedule, Sub No. 44, was not entered by agreement of the parties or by motion as required by ELC 10.12(b).

Mr. King filed a Notice of Unavailability, Sub No. 87. During the time period of his unavailability, Mr. Schoeggl acted on WSBA motions, entering the Order Granting Association's Motion to Permitting Telephonic of Out of State Witnesses, Sub No. 110, and the Order Requesting Status Report, Sub No. 111.

The hearing examiner granted a motion to exclude himself and Mr. Busby as witnesses. Order on Motion for Continuance, Motion to Strike

Witnesses, Sub No. 122.

Mr. King filed his Motion for Stay Pending Resolution of the Outstanding Appellate Decisions and Memorandum of Law in Support of Removing Hearing Examiner for Violation of Appearance of Fairness Doctrine and for Violating Canons of Judicial conduct, Sub Nos. 146 and 147. On the same day, Mr. Schoeggl entered the Order Denying Motion for Stay, Sub No. 148, asserting he does not suffer a conflict of interest and is not biased. A few days later Mr. Schoeggl entered the Order re Pending Motions, Sub No. 167, refusing to recuse himself from the case.

After the Transcripts of the Hearings, Sub No. 236 were filed, Mr. King filed his Appeal and Motion and Declaration for Review of Audio Tapes for Accuracy Under ELC 11.4, Sub No. 241. This Appeal and Motion has never been ruled upon and therefore, the Transcripts have not been completed and reconciled.

B. Procedural History:

On October 25, 2005, witness Mark Maurin was deposed by disciplinary counsel Scott Busby, without notice to Mr. King. WSBA's Exhibit 154, Motion for Protective Order, Jurisdiction, Deposition or of Mark Maurin and WSBA's Exhibit 157, Association's Answer to Motion

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for Protective Order, pages 2-3.

On October 16, 2006, Mr. King and John R. Scannell, WSBA # 31035 filed a Writs Act petition naming Scott Busby, Gail McMonagle, and David Schoeggl as respondents, *Scannell v. Busby*, King County Superior Court No. 06-2-33100-1 SEA. This case was timely appealed on September 21, 2007, Court of Appeals No. 60623-9-I. WSBA's Exhibit 199, Docket. WSBA's Exhibit 200, Amended Petition for Writ of Prohibition, Mandamus, and Injunction. WSBA's Exhibits 201 and 202, pleadings in the Writs case. WSBA's Exhibit 203, Order Denying Petition. WSBA's Exhibit 204, Notice of Appeal. WSBA's Exhibit 205, Docket for Court of Appeals No. 60623-9-I.

On January 5, 2007, the review committee held a hearing with its non-lawyer member, Hollingsworth, absent. Motion to Vacate Finding and Order, Absence of Review Committee Member, Sub No. 2.

On January 9, 2007 the Finding and Order of Review Committee IV, Sub No. 1, issued by the two remaining members of the review committee, was filed.

On February 5, 2007, Gail McMonagle, WSBA # 22280, signed the Disciplinary Board Chair Order Denying Respondent's Motion to

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Vacate Findings of Review Committee, Sub No. 6, and on February 7, 2007 this Order was filed.

On February 14, 2007, the Disciplinary Board Chair Order Denying Respondent's Request for Reconsideration of Order Denying Motion to Vacate Findings of Review Committee, Sub No. 11, was filed.

On February 23, 2007, Mr. King filed his Appeal to the Full Disciplinary Board and Motion to Vacate the Disciplinary Board Chair Orders Denying Respondent's Motions, Sub No. 12.

On May 8, 2007, the Formal Complaint, Sub No. 17, and the Notice to Answer and Notice of Default Procedure and the Formal Complaint, Sub No. 18 was filed.

On May 21, 2007, David Martin Schoeggl, WSBA # 13638, was appointed hearing officer, Order Appointing Hearing Officer, Sub No. 20.

On July 10, 2007, the Order re Hearing Date, Prehearing Deadlines, and Other Matters, Sub No. 44, was filed.

On July 25 and 28, 2007, Mr. King filed his Motion and Order for Resetting Case Schedule, Sub Nos. 54 and 55.

On August 1, 2007, Mr. King filed his Answer to Formal Complaint, Sub No. 64.

Also on August 1, 2007, Mr. King filed his Motion to Strike First Hearing Schedule and to Require Compliance with ELC 10.12(b), Sub 65.

Also on August 1, 2007, Mr. King filed his Motion to Dismiss Formal Complaint, Inadequate Summons, Sub No. 66.

On September 17, 2007, the Order on Motion for Default, Motion to Dismiss, and Motion to Vacate Scheduling Order, Sub No. 72 was filed denying these motions.

On December 7, 2007, Mr. King filed a Notice of Unavailability, Sub No. 87. Mr. King notified Mr. Busby and Mr. Schoeggl that he was going to be unavailable from December 3, 2007 through February 1, 2008.

On January 18, 2008, Mr. Schoeggl entered the Order Granting Association's Motion to Permitting Telephonic of Out of State Witnesses, Sub No. 110, and the Order Requesting Status Report, Sub No. 111.

On January 14, 2008, the Motion to Strike Judicial Officer from Respondent's Witness List, Sub No. 106, was filed requesting that hearing officer David Schoeggl be stricken.

Also on January 14, 2008, the Motion for Order Permitting Disciplinary Counsel to Continue to Act as Advocate, Sub No. 105, requesting that Scott Busby be allowed to continue even though he was

named as a witness by Mr. King.

On February 4, 2008, Mr. Schoeggl entered the Order on Motion for Continuance, Motion to Strike Witnesses, Sub No. 122, which struck witnesses listed by Mr. King, including himself, Schoeggl, and Mr. Busby.

On March 12, 2008, Mr. King filed his Motion for Stay Pending Resolution of the Outstanding Appellate Decisions and Memorandum of Law in Support of Removing Hearing Examiner for Violation of Appearance of Fairness Doctrine and for Violating Canons of Judicial conduct, Sub Nos. 146 and 147.

Also on March 12, 2008, Mr. Schoeggl entered the Order Denying Motion for Stay, Sub No. 148, asserting he does not suffer a conflict of interest and is not biased.

On March 18, 2008, Mr. Schoeggl entered the Order re Pending Motions, Sub No. 167, refusing to recuse himself from the case.

On August 19, 2008, the Transcripts of the Hearings, Sub No. 236 were filed.

On July 22, 2008, Mr. King filed his Appeal and Motion and Declaration for Review of Audio Tapes for Accuracy Under ELC 11.4, Sub No. 241. This Appeal and Motion has never been ruled upon and

therefore, the Transcripts have not been completed and reconciled.

On February 2, 2009 Disciplinary Board Order Adopting Hearing Officer's Decision, Sub No. 263, was filed.

On February 17, 2009, attorney King filed the Notice of Appeal Sub No. 264.

IV. ARGUMENT

A. The Following Factors Indicate the Hearing Examiner Has a Conflict of Interest and Lacks Appearance of Fairness

1) **The Hearing Examiner David Schoegg is a Named Party to an Appellate Proceeding and has a Stake in the Case:** The hearing examiner Schoegg is a named party in a case that was filed in 2006 and has a stake in the outcome. He is represented by Robert Welden, WSBA counsel and also acting in concert with the Disciplinary Function of the WSBA. *Scannell v. Busby*, King County Superior Court No. 06-2-33100-1 SEA. This case was timely appealed on September 21, 2007, Court of Appeals No. 60623-9-I. WSBA's Exhibit 199, Docket. WSBA's Exhibit 200, Amended Petition for Writ of Prohibition, Mandamus, and Injunction. WSBA's Exhibits 201 and 202, pleadings in the Writs case. WSBA's Exhibit 203, Order Denying Petition. WSBA's

Exhibit 204, Notice of Appeal. WSBA's Exhibit 205, Docket for Court of Appeals No. 60623-9-I.

2) The Hearing Examiner David Schoeggl is Governed by the Code of Judicial Conduct Relating to this Matter and has the Duty to Recuse as Violation of Cannon Three has Occurred: The hearing examiner shall follow the Cannons of Judicial Conduct as stated under ELC 2.6 and is governed by those rules. Mr. Schoeggl has violated the Cannons of Judicial Conduct under opinion under 93-14 and 89-13. He is presently hearing a case in which he represented from the same firm as the Mr. Scott Busby. See opinion cited below.

3) The Hearing Examiner David Schoeggl is a Party to a Case on Appeal in Which He May be a Material Witness: David Schoeggl is necessary party to a lawsuit to determine whether the actions of Mr. Busby and Ms. McMonagle meet the criteria of the reasonable practice of law in the State of Washington. At some point in time he may be a material witness in a trial. *Scannell v. Busby, supra.*

4) The Hearing Examiner David Schoeggl is Required to Report Lawyer Misconduct ELC 2.6 (3) (B): The Hearing examiner is required to report Disciplinary issues involving attorneys. In the present

case we have an ex-parte deposition and it has not been reported. WSBA's Exhibit 154, Motion for Protective Order, Jurisdiction, Deposition or of Mark Maurin and WSBA's Exhibit 157, Association's Answer to Motion for Protective Order, pages 2-3.

5) The Hearing Examiner David Schoeggl has Ignored a Notice of Unavailability Filed for the Respondent-Attorney and Acted on Motions: On December 7, 2007, Mr. King filed a Notice of Unavailability, Sub No. 87. Mr. King notified Mr. Busby and Mr. Schoeggl that he was going to be unavailable from December 3, 2007 through February 1, 2008. During the time period of his unavailability, Mr. Schoeggl acted on WSBA motions that Mr. Busby had brought. On January 18, 2008, he entered the Order Granting Association's Motion to Permitting Telephonic of Out of State Witnesses, Sub No. 110, and the Order Requesting Status Report, Sub No. 111.

6) The Hearing Examiner David Schoeggl Granted a Motion to Exclude Himself as a Potential Witness: The hearing examiner granted a motion to exclude himself knowing that his stake in the outcome may have affect on his judgment. Order on Motion for Continuance, Motion to Strike Witnesses, Sub No. 122.

7) **The Hearing Examiner David Schoeggl Granted a Motion to Exclude as Witness Mr. Busby Knowing that He was the Sole Witness for the Attorney in Defense Against Enhancement of Penalties:** The hearing examiner granted a motion to exclude Mr. Busby as a witness knowing that the sole witness in the Respondent's case on enhanced penalties would be Mr. Busby. The Respondent has no way to rebut the findings because the inability to call the sole witness on higher penalties in his defense. Order on Motion for Continuance, Motion to Strike Witnesses, Sub No. 122.

8) **The Hearing Examiner David Schoeggl Proceeded with a Hearing Knowing that a Motion for Protective Order was Pending:** The hearing examiner had no jurisdiction to hear this complaint because there is a pending motion to limit or terminate a deposition that has not been ruled upon. Under CR 30(d) enforcement on the subpoena cannot be had until the motion has been ruled upon. Under ELC 10.4(b) this is supposed to have been the Chief hearing examiner. Alternatively, under ELC 5.5 and CR 30, this would be the Disciplinary Committee as a whole. Neither has ruled yet. WSBA's Exhibit 154, Motion for Protective Order, Jurisdiction, Deposition or of Mark Maurin and WSBA's Exhibit 157,

Association's Answer to Motion for Protective Order, pages 2-3.

B. Authorities in Support that Hearing Examiner David Schoegg is Disqualified for Lack of Appearance of Fairness

Mr. King filed his Motion for Stay Pending Resolution of the Outstanding Appellate Decisions and Memorandum of Law in Support of Removing Hearing Examiner for Violation of Appearance of Fairness Doctrine and for Violating Canons of Judicial conduct, Sub Nos. 146 and 147. On the same day, Mr. Schoegg entered the Order Denying Motion for Stay, Sub No. 148, asserting he does not suffer a conflict of interest and is not biased. A few days later Mr. Schoegg entered the Order re Pending Motions, Sub No. 167, refusing to recuse himself from the case.

A trial judge presented with this issue must project his thinking to an overview of the entire proceeding and determine, prospectively, how it would appear to a reasonably prudent disinterested person. He is not to decide the issue solely on his personal feelings or knowledge. Please see *Fleming v. Tacoma*, (1972) 81 Wash. 2d 292, 502 P. 2d 327; *State v. Stiltner*, (1971) 80 Wash. 2d 47, 491 P. 2d 1043; *State v. Madry*, (1972) 8 Wash. App. 61, 504 P.2d 1156; and *Ward v. Monroeville, Ohio*, (1972) 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80.

The matter must be considered fair but also, be appearing to be fair. *Brister v. Council of City of Tacoma*, (1980) 27 Wash. App. 474, 619 P. 2d 982, review denied, 95 Wash. 2d 1006 (1981). In determining if a proceeding appears to be fair, the critical concern is how it would appear to a reasonably prudent and disinterested person. See *Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. Human Rights Comm'n*, (1976) 87 Wash. 2d 802, 557 P. 2d 307.

The purpose of the appearance of fairness doctrine is to prevent biased or potentially interested quasi-judicial decision makers from deliberating in an administrative proceeding. *Nationscapital Mortgage Corp. v. Dept of Fin. Insts.*, (2006) 133 Wash. App. 723, 759, 137 P. 3d 78. *In re Discipline of Haskell*, (1998) 136 Wash. 2d 300, 313-314, 962 P. 2d. 813 found:

we do agree with his contention that Haskell was entitled to a hearing before a hearing officer who was not only fair, but appeared to be fair. *Brister v. Council of City of Tacoma*, 27 Wn. App. 474, 619 P.2d 982 (1980), review denied, 95 Wn.2d 1006 (1981). In determining if a proceeding appears to be fair, the critical concern is how it would appear to a reasonably prudent and disinterested person. See *Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976).

Thus the Appearance of Fairness doctrine applies to disciplinary proceedings before the WSBA.

A litigant that has information forming the basis of an appearance of fairness claim at the time of the hearing must raise it prior to the hearing. Failure to do so waives the right to assert an appearance of fairness claim in a later proceeding. *Bellevue v. King County Boundary Review Bd.*, (1978) 90 Wash. 2d. 856, 863, 586 P. 2d. 470.

In re Discipline of Blauvelt, (1990) 115 Wash. 2d 735, 745, 801 P.2d 235, found

as soon as Judge Blauvelt received notice of the charges, he refrained from attending

political conventions. In other words the remedy is to stop the action pending resolution.

With ex parte contacts, the prosecutorial function can become intertwined with the investigative and adjudicative functions, leading to a reversal of any result under the appearance of fairness doctrine: See *Washington Medical Disciplinary Board v. Johnston*, (1981) 29 Wash. App. 613, 630 P.2d 1354, where it was held that a combination of investigative functions and adjudicative functions, indicated that if the

prosecution role became intertwined, then a constitutional violation would result. In contending that the Disciplinary Board violated due process, Johnston argued that the Board impermissibly acted as investigator, prosecutor, and judge against him. This combination of functions, according to Johnston, deprived him of a fair and impartial hearing. See generally 3 K. Davis, *Administrative Law* § 18 (2d ed. 1980).

In response the Disciplinary Board relied heavily, as did the Superior Court, on *Withrow v. Larkin*, (1975) 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456, which upheld a Wisconsin statute concerning discipline of doctors even though the agency played both an investigative and adjudicative function.

While conceding that combining the investigative and adjudicative function does not necessarily lead to a due process violation, the Washington Court in *Johnston* stated that a different result would occur if there was a commingling of the prosecutorial function citing *Huber Pontiac, Inc. v. Allphin*, (S.D. Ill. 1977) 431 F. Supp. 1168, vacated on other grounds sub nom. *Huber Pontiac, Inc. v. Whitler*, (7th Cir. 1978) 585 F.2d 817. More importantly, the *Johnston* Court ruled at 29 Wash. App. 625-628 that a violation of the appearance of fairness doctrine

occurs:

We note initially that the appearance of fairness doctrine applies to proceedings such as those conducted by the Disciplinary Board. *Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n*, 87 Wash. 2d 802, 557 P.2d 307 (1976); *Stockwell v. State Chiropractic Disciplinary Bd.*, 28 Wash. App. 295, 622 P.2d 910 (1981). The purpose of this doctrine was clearly enunciated many years ago:

The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle.

It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgement of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People v. Suffolk Common Pleas*, 18 Wend. 550:

"Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."

State ex rel. Barnard v. Board of Educ., 19 Wash. 8, 17, 52 P. 317 (1898). Thus, even a mere suspicion of irregularity or an appearance of bias or prejudice must be avoided. *Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n*, *supra* at 809.

Applying the doctrine to this case, we are compelled to hold that a disinterested person would be reasonably justified in thinking that partiality may have existed. See *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976). There is no real dispute that Board members were actively involved in investigating the charges against Johnston. At the first hearing regarding the suspension of Johnston's license, the chairman of the Board stated "that the Board is quite thoroughly conversant with all the factors that have led up to this hearing." Board members, as noted above, had reviewed investigative reports prepared by the staff of the Board and the letters of complaint from Drs. Mack and Sandstrom. The formal charges against Johnston were issued over the name of the secretary of the Board, who also sat as a Board member in the adjudication of the charges. One member went so far as to discuss the case privately with a key witness, Mack, prior to these proceedings. These same Board members ultimately determined whether Johnston's license should be revoked. Although this combination of the investigative and adjudicative functions, as discussed above, does not amount to violation of due process, nevertheless, it allows the Board to act as accuser and judge in the same proceedings. As the Supreme Court stated in *State ex rel. Beam v. Fulwiler*, 76 Wash. 2d 313, 315-16, 456 P.2d 322 (1969):

Despite the integrity of the respective members of the commission, and their undoubted desire to be objective in their appellate disposition of the matter, it is highly unlikely, under the unusual circumstances prevailing, that the respondent or anyone in a like situation could approach or leave a hearing presided over by a tribunal so composed with any feeling that fairness and impartiality inhered in the procedure. See also *Loveland v. Leslie*, 21 Wash. App. 84, 583 P.2d 664 (1978).

In addition to this combination of functions, an aspect of the

Board's proceedings which, we do not deem dispositive, yet worthy of comment, raises the specter of unfairness. Throughout these proceedings the one assistant attorney general assigned to the Board acted in a dual capacity as legal adviser to the Board and prosecutor. Although this dual capacity is specifically authorized by RCW 18.72.040, we believe performance of the two roles by the same individual is inherently inconsistent and thus creates the possibility of disproportionate influence with the Board.

The Board's response to this issue is that the appearance of fairness doctrine is not violated if due process is not violated. We do not believe, however, that the broad language contained in the cases supports this argument. See Vache, *Appearance of Fairness: Doctrine or Delusion*, 13 Willamette L.J. 479, 487 (1977). Further, traditional due process analysis focuses on the possibility of actual bias or prejudice. See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975); *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243 (1927); *FTC v. Cement Inst.*, 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793 (1948). The appearance of fairness doctrine, however, clearly focuses on the possibility of the appearance of bias or prejudice. See *Narrowsview Preservation Ass'n v. Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974); *Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n*, *supra*.

In conclusion, we feel compelled by our holding to discuss future proceedings. By our decision we do not hold that all Disciplinary Board proceedings, as currently conducted, are invalid. We note that as presently enacted the statute governing the Disciplinary Board provides for the appointment of pro tem members for the purpose of participating in disciplinary proceedings. RCW 18.72.135. As we read the current statute, the problems inherent when the Board members who investigate charges are the same members who ultimately act as decision makers can be avoided by the convening of separate panels to investigate and adjudicate specific charges. Such a procedure is an alternative method of eliminating the inconsistent nature of the assistant attorney general's dual capacity, as he or she would be acting as adviser to one panel and prosecutor to a separate panel.

We also wish to emphasize that by our decision we are not questioning the ability of doctors to act in a quasijudicial capacity. Our review of the record, which consists almost entirely of highly technical medical testimony, confirms the wisdom of the legislature's decision to place responsibility for the discipline of doctors on members of the medical profession. Clearly, fellow physicians have the requisite expertise and experience to understand best the appropriate standards to which all doctors must adhere. Nor do we mean to impugn the integrity of the Board members involved in this case. As we noted above, see footnote 9, supra, our focus must be directed toward the appearance of impropriety; our remarks should not be construed as implying that actual impropriety occurred.

Here, as argued earlier, there is an appearance of ex parte contacts between the hearing examiner Sc and the prosecutor Busby, who have had joint representation with him in a previous court hearing concerning the very issues that are before the hearing examiner now. This co-mingling of prosecutorial and adjudicative functions is even worse than in *Johnston* and should now be allowed to stand. Disqualification of the charges would be the only remedy of a violation of this magnitude.

In re Disciplinary Proceeding Against Michels, (2003) 150 Wash. 2d 159, 170, 75 P. 3d 950 found:

A judge pro tempore is subject to the same standards as a regular judge. *In re Disciplinary Proceeding Against Niemi*, 117 Wn.2d 817, 820 P.2d 41 (1991). The Code of Judicial Conduct requires judges to disqualify themselves in any proceeding in which their impartiality may reasonably be questioned. Canon 3(D)(1)(b)

requires the same must be done if the judge previously served as a lawyer. Judicial integrity is sacrificed if the canon is violated and the appearance of fairness is ignored.

C. Judicial Conduct Ethics Opinions

The Hearing Examiner is acting under the Code of Judicial Conduct. The State of Washington Ethics Advisory Committee has issued the following Ethics Opinions under General Rule 10:

Opinion 93-14:

Question

When an appellate judge has retained an attorney, should that judge recuse himself/herself when another member of that law firm appears in court even though on a totally unrelated matter? Does it matter if the law firm is a large one, located in a large metropolitan area? Would the same advice be given for cases presently under consideration but not yet decided?

Does it make a difference if the property in question is the separate property of the judge's spouse and there are other parties on the same side?

Answer

CJC Canon 3(C) provides that judicial officers should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.

When an appellate court judge has retained an attorney, the appellate court judge is required to disclose that relationship when a member of that law firm appears in court on a totally unrelated matter and should recuse if there is any objection. This is also true for cases which are presently under consideration but not yet decided.

The size and location of the law firm, the fact that the property in question is the separate property of the spouse and the number of parties on the same side does not make any difference.

Mr. Schoeggl has engaged Mr. Welden, Bar counsel as his personal attorney. Mr. Busby practices with Mr. Welden in the same firm. This is an automatic disqualification.

In addition since Mr. Busby has the same attorney for virtually the same issues the chances of ex parte contact and also is a direct violation of CJC 3(C).

Opinion 89-13:

Question

May a court commissioner hear any matters in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved? May a court commissioner hear any matters in which the attorney for the opposing counsel in the lawsuit against the commissioner is involved? May a court commissioner hear any matters in which the attorney is associated with either the commissioner's attorney or associated with opposing counsel?

Answer

CJC Canon 3(C) requires judges to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. Therefore, a court commissioner may not hear any matters which are not agreed (whether the same be actively contested or any posture of default) in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved or the opposing counsel in the lawsuit is involved. This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination. The type of lawsuit is not relevant to the issue of disqualification. The court commissioner may hear matters in which the attorney is associated with either the commissioner's attorney or opposing

counsel if 1) the commissioner discloses on the record the relationship to the commissioner's attorney or opposing counsel, 2) that attorney is not associated in any way with the commissioner's lawsuit and the commissioner's attorney or opposing counsel have not been involved in the matter before the commissioner, and 3) offers to recuse. The commissioner may enter all agreed orders brought by the commissioner's attorney, opposing counsel, or any of their associates.

In this case the Hearing Examiner is directly involved together with Mr. Welden as their counsel.

Opinion 85-10:

Question

Is it proper for a municipal court judge to serve on the board of directors of a nonprofit organization which conducts safety training classes that a municipal court judge could require defendants to attend as a condition of their sentence?

Answer

It is not proper under CJC Canon 2(B) for a municipal court judge to serve on the board of directors of a nonprofit organization which conducts safety training classes that a municipal court judge could require defendants to attend as a condition of their sentence since it may create the appearance of partiality.

Opinion 91-10:

Question

Is it a violation of the Code of Judicial Conduct for an attorney who sits as a pro tem court commissioner on the Family Law Motions Calendar to continue working as a pro tem commissioner while also working part-time on contract as an attorney advising Court Appointed Special Advocates (CASA) who volunteer to provide advocacy services for children in custody and visitation disputes?...

Answer

It is a violation of the Code of Judicial Conduct for an attorney who sits as a pro tem court commissioner on the Family Law Motions Calendar to contract as an attorney to advise Court Appointed Special Advocates (CASA) as those dual functions would create a conflict of interest and an appearance of impropriety under CJC Canon 2(A). Accordingly, it is not necessary to answer the last two questions.

Opinion 00-01:

Question

May a judicial officer hear criminal and/or traffic cases for a city, within his/her district, when the mayor of that city is his/her brother?

The city has a city manager and the mayor is not involved in the day-to-day operation of the city.

Answer

CJC Canon 2(B) provides in part that judges should not allow family relationships to influence their judicial conduct or judgment. Canon 3(D)(1) provides that judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.

Even though a city manager form of government governs the city, the familial relationship between the judge and the mayor creates an appearance of partiality which could cause the judicial officer's impartiality to be questioned and therefore, the judicial officer may not hear any criminal and/or traffic cases involving the city.

Opinion 84-03:

Question

Is it proper for a judge to sit when the spouse of a judge of the same judicial district appears in his or her attorney capacity in front of that judge?

Answer

It is the opinion of the Committee that the mere fact that a fellow judge's spouse appears in front of a judge does not require disqualification of the judge.

Comment

CJC Canon 2 requires that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities. It specifically requires that a judge should not allow social or other relationships to influence the judge's judicial conduct or judgment. In addition, CJC Canon 3C(1)(d) requires that a judge should disqualify himself or herself where the judge's impartiality might

reasonably be questioned. CJC Canon 3 speaks specifically to the problem of a judge's spouse appearing in front of the judge in any capacity, and requires disqualification in such circumstances.

D. Denial of Due Process During the Investigative Phase, Lack of Notice of Deposition of Mark Maurin

Mr. King was denied due process during the investigation phase. He was denied the right to cross examine and to challenge the deposition of Mark Maurin which was conducted on October 25, 2005 by the lack of notice of this deposition.¹ For challenging and asking for their rights Mr. King has been sanctioned for higher penalties, leading to a public hearing. A motion in limine is not the proper remedy, the remedy is start over in the investigative phase.

Where the indictment process leads to a public trial Justice Douglas, concurring in *Joint Anti-Fascist Refugee Comm. v. McGrath*, (1951) 341 U.S. 123, 177-180, 95 L. Ed. 817, 71 S. Ct. 624 found:

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men. The powers being used are the powers of government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him. . . . When the Government becomes the moving party

¹ WSBA's Exhibit 154, Motion for Protective Order, Jurisdiction, Deposition or of Mark Maurin and WSBA's Exhibit 157, Association's Answer to Motion for Protective Order, pages 2-3.

and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path. Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. . . . The rudiments of justice, as we know it, call for notice and hearing -- an opportunity to appear and to rebut the charge. It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law. . . .

The Loyalty Board convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is "a paragon of veracity, a knave, or the village idiot." His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal. Without knowing who her accusers are she has no way of defending. . . .

Dorothy Bailey was not, to be sure, faced with a criminal charge and hence not technically entitled under the Sixth Amendment to be confronted with the witnesses against her. But she was on trial for her reputation, her job, her professional standing. A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice. (Footnotes and citations omitted.)

In re Disciplinary Proceeding Against Sanders, (2006), 159

Wash.2d 517, 524-525, 145 P. 3d 1208 found:

Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution. Under Canon 3(D)(1), "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." In *Sherman v. State*¹², the court found that where a trial judge "may have inadvertently obtained information critical to a central issue on remand, . . . a reasonable person might question his impartiality." The court set the test for determining impartiality:

[I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the facts."

This court in *In re Disciplinary Proceeding Against Sanders*¹⁵ noted that the interest of the State in maintaining and enforcing high standards of judicial conduct under the auspices of Canon 1 is a compelling one. In *Sanders*, this court balanced that interest against Justice Sanders' First Amendment rights and found that an independent basis for finding a violation of Canon 1 under those circumstances was not possible. Justice Sanders argues that the language in Canon 1 is hortatory and therefore cannot stand as an independent basis for a violation of the Code of Judicial Conduct. In the instant case, Canon 1 sets the conceptual framework under which Canon 2(A) operates. Canon 2(A) provides the more specific restraint, to wit: "Judges should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Under the circumstances of this case, Canon 1 taken in conjunction with Canon 2(A) provides a

sufficiently specific basis to find a violation of the Code of Judicial Conduct. Here, it was clear that there was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court and that this contact would be viewed as improper. We concur with the Commission's finding that it was clearly reasonable to question the impartiality of the justice under the circumstances of this case.

Sherman v. State is *Sherman v. State*, (1995) 128 Wash. 2d. 264, 905 P. 2d. 355 and *In re Disciplinary Proceeding Against Sanders* refers to an earlier *Sanders* Disciplinary Proceeding, (1998) 135 Wash. 2d. 175, 187-188, 955 P. 2d. 369.

E. Findings and Order of Review Committee Should be Vacated, Absence of Nonlawyer Committee Member

The Finding and Order of Review Committee IV was filed on January 9, 2007, Sub No. 1. At the hearing of the review committee held on January 5, 2007, one of the three committee members, the nonlawyer member Hollingsworth, was not present. Yet the other two members issued the Finding and Order of Review Committee. This was challenged by Mr. King with his Motion to Vacate Finding and Order, Absence of Review Committee Member, Sub No. 2. Disciplinary Board Chair, Gail McMonagle denied this with her Disciplinary Board Chair Order Denying Respondent's Motion to Vacate Findings of Review Committee, Sub No.

6. Mr. King filed his Motion for Reconsideration of Disciplinary Board Chair Order Denying Respondent's Motion to Vacate Findings of Review Committee, Sub No. 7. Again, Ms. McMonagle signed the Disciplinary Board Chair Order Denying Respondent's Request for Reconsideration of Order Denying Motion to Vacate Findings of Review Committee, Sub No. 11. Mr. King filed his Appeal to the Full Disciplinary Board and Motion to Vacate the Disciplinary Chair Orders Denying Respondent's Motions, Sub No. 12. Without this appeal being decided by the full disciplinary board, the Formal Complaint, Sub No. 17 was filed.

ELC 2.4(b) reads:

(b) Membership. The Chair appoints three or more review committees of three members each from among the Board members. Each review committee consists of two lawyers and one nonlawyer. The Chair may reassign members among the several committees on an interim or permanent basis. The Chair does not serve on a review committee.

ELC 2.4(b) is derived from Rules for Lawyer Discipline (RLD) 2.4(a) with no substantive change. Washington Practice Volume 2 Rules Practice, 6th Ed. Tegland, p. 527. The RLD was adopted on January 21, 1983. There were no review committees as defined in RLD 2.4 and ELC 2.4 in the Discipline Rules for Attorneys (DLA) that preceded the RLD.

The function appears to be performed by local administration committees under DRA 2.1, then consisting of at least three active members of the Association, meaning no nonlawyers.

Thus a change was deliberately enacted in 1983 to specify that a review committee that reviews paperwork with respect to a grievance, the initial investigation of a grievance, and any response by the attorney for either dismissal of the grievance or further action to include at least one nonlawyer and two lawyers. Thus it is significant that in this case, the nonlawyer member of the review committee was not present.

ELC 2.4(b) and its predecessors clearly state that at least three persons are required to form a review committee and does not provide for any number less than that to provide a quorum capable of acting on behalf of the entire committee.

By contrast, ELC 2.3(b)(4) specifically provides that the Disciplinary Board can function with a quorum of at least a majority of its total membership and that the Board can act with a majority vote of present members as long as at least seven members vote.

The absence of language in ELC 2.4 allowing two members of a review committee to form a quorum in the absence of the third member

clearly means that no two members can act on behalf of the committee without the third member present. The purpose of the requirement that a review committee consist of at least one nonlawyer is defeated when the two lawyer members present act in the absence of the nonlawyer member.

Thus, by Rule, the Finding and Order of Review Committee IV entered on January 5, 2007 is void because the review committee was without power to act without its third member, the nonlawyer, present.

1) Purpose of the Rules of Lawyer Discipline

The 1983 Directory of Membership Services and Resources published by the Washington State Bar Association is the first such publication subsequent to the adoption of the Rules of Lawyer Discipline in January 1983. A page of this publication with a description of the Grievance Procedure reads in relevant part:

If the matter proceeds to the formal disciplinary process, the primary emphasis is on protecting the client and eliminating the need for further disciplinary action – not on “punishing” an attorney.

Rita Bender, WSBA # 6573 wrote an article titled *An Overview of the Proposed Revision of Disciplinary Rules*, published on pages 11-13, 15 of the April 1982 edition of the Washington State Bar News, Volume

36 No. 4. It appears at this time, the design of the Review Committee has not been finalized. The requirement that a Review Committee consists of at least two lawyers and one non-lawyer is not mentioned therein. Ms. Bender writes on Page 15:

The enlarged Disciplinary Board will be empowered to meet by means of committees consisting of three Board members, which will have authority to review reports of investigations of alleged acts of misconduct and to order a hearing where appropriate.

Unless Ms. Bender simply omitted the final design of the Review Committee in her article, the determination that such committees each consist of at least two attorneys and one non-attorney was made between April 1982 and January 21, 1983.

As to her perception of the purpose of the proposed Rules for Lawyer Discipline, Ms. Bender writes the following last paragraph of her article on page 15 of the April 1982 Bar News:

Overall, the changes in the rules are meant to produce a less cumbersome process, one which moves disciplinary matters more speedily to a conclusion, and one which provides more clarity in the sanctions which can appropriately be imposed. The proposed rules acknowledge the function and expertise of a professional staff in the office of Bar Counsel, and places far more responsibility upon that staff, and less upon volunteer Bar members. The expectation appears to be that public confidence in the Bar to provide for responsible self-discipline can be restored if discipline is prompt and public. While some of the tactics which

were previously available to respondents have been eliminated, disciplinary practice under the proposed rules may prove to be fairer for respondents and their attorneys as well as for the Bar and the public, **since both the procedures and the sanctions are far more precise than they have been until now.**

Emphasis added.

2) In Light of the Purpose of the Rules of Lawyer Discipline, Such Rules as are Brought Into the Rules for Enforcement of Lawyer Conduct Must be Enforced as Written

However, if we ignore the requirement of RLD 2.4(a) and ELC 2.4(b) that each Review Committee consists of at least two lawyers and one non-lawyer by allowing any two such persons hold their hearing and make a decision without the third member present, that would reduce the precision of the procedure. The missing person, whether lawyer or non-lawyer, might have a perspective that is different than the other two members' perception, and if present, be able to persuade one or both to change their initial position.

For the same reason, in criminal cases and non-domestic civil cases, where a decision against a defendant requires a finding of wrongdoing on the part of said defendant, the full number of jurors required for such proceeding must be present or the proceeding is declared a mistrial, or trial continued to another day before a new jury pool unless

all parties consent to the reduced number of jurors.

Similarly, a federal grand jury can only indict or find no true bill in a case where at least 16 members are present, 18 U.S.C. §3321 and Federal Rule of Criminal Procedure (FRCrP) 6(a)(1), and of such 16 or more, 12 must vote to indict or to avoid dismissal under FRCrP 6(b)(2) which provides that a motion to dismiss an indictment on the grounds that a grand juror was not qualified may not be granted if the record shows that at least 12 qualified grand jurors concurred in the indictment.

Simply put, if a rule provides for a minimum number of persons to serve on a committee or jury determining if wrongdoing was committed or if there is sufficient evidence wrongdoing was committed to proceed to full hearing or trial on such wrongdoing, and where there is no rule providing a lesser number of such persons to provide a quorum allowing such lesser number to act on behalf of the committee or jury, then such lesser number of persons lack the power to act.

ELC 5.6(c) and (d) reads:

(c) Report in Other Cases. Disciplinary counsel must report to a review committee the results of investigations except those dismissed or diverted.

(d) Authority on Review. In reviewing grievances under this rule, a review committee may:

- (1) affirm the dismissal;
- (2) issue an advisory letter under rule 5.7;
- (3) issue an admonition under rule 13.5;
- (4) order a hearing on the alleged misconduct; or
- (5) order further investigation as may appear appropriate.

Thus a Finding and Order that leads to further proceedings in the disciplinary process beyond dismissal or diversion of a grievance requires the action of a Review Committee.

F. Disciplinary Board Chair McMonagle Acted Outside Rules When She Denied Respondent's Motion to Vacate Findings of Review Committee and His Request for Reconsideration of Her Order by Herself

On February 5, 2007, Gail McMonagle, WSBA # 22280 signed the Disciplinary Board Chair Order Denying Respondent's Motion to Vacate Findings of Review Committee, Sub No. 6, and on February 7, 2007 this Order was filed. No other member of the Disciplinary Board signed this Order.

ELC 2.3(b)(4) reads:

- (4) Quorum. A majority of the Board members constitutes a quorum. If there is a quorum, the concurrence of a majority of those present and voting constitutes action of the Board, so long as at least seven members vote.

A motion to vacate a Review Committee's action must be determined at a

meeting of the Disciplinary Board with at least seven concurring in any decision. While the Chair has the power to convene a special Board meeting, ELC 2.3(g), she is not authorized to act absent such a meeting with a quorum present and at least seven members, which could include herself as a member, concurring in the result.

The Disciplinary Board Chair Order Denying Respondent's Request for Reconsideration of Order Denying Motion to Vacate Findings of Review Committee, Sub No. 11, was filed on February 14, 2007. No other member of the Disciplinary Board signed this Order. Thus she repeated the error she made when she signed and entered Sub No. 6, as described herein above, and as argued herein above, ELC 2.3(b)(4) was not followed and its requirement for a quorum of the Board was not met.

G. Disciplinary Board Chair McMonagle Denied Due Process When She Denied Respondent's Motion to Vacate Findings of Review Committee Before Attorney Could File Reply Brief

At the hearing of the review committee held on January 5, 2007, one of the three committee members, the nonlawyer member Hollingsworth, was not present. Yet the other two members issued the Finding and Order of Review Committee, Sub No. 1. On February 5, 2007, Gail McMonagle, WSBA # 22280 signed the Disciplinary Board

Chair Order Denying Respondent's Motion to Vacate Findings of Review Committee, Sub No. 6, and on February 7, 2007 this Order was filed. A legal assistant for Mr. King and for John Scannell, Roger W. Knight, had communicated with Julie Shankland and Becky Crowley during the week of February 5-8, 2007 that respondent wanted to file a Reply to Association's Answer to Respondent's Motion to Vacate Finding and Order. Please see Declaration of Roger W. Knight in Support of Motion for Reconsideration of Disciplinary Board Chair Order Denying Respondent's Motion to Vacate Findings of Review Committee (Knight Declaration), Sub No. 8. The Reply was completed and is filed herein with its attached Exhibits.

The Association's Answer to Respondent's Motion to Vacate Finding and Order, Sub No. 4, was filed on January 22, 2007. On February 6, 2007, Julie Shankland responded to Roger Knight's e-mail inquiries with the following statement:

I am responding to your e mail to Becky Crowley yesterday afternoon. You informed Ms. Crowley that Mr. King wanted to file a reply to his motion to vacate the review committee order. The time periods governing motions in the ELC have passed and we sent Mr. King's motion to the Disciplinary Board Chair for a decision. If we receive materials from Mr. King prior to receiving the order, we will forward them—after providing disciplinary

counsel a reasonable opportunity to respond.

Exhibit attached to Knight Declaration. This is the first time the Respondent and his assistants knew that “time periods governing motions in the ELC have passed”. Yet this message seemed to indicate that if a reply was filed, the Disciplinary Board Chair might hold off on making a decision pending submission of all documents.

However, the Disciplinary Board Chair had already signed the Order on February 5 and it was filed on February 7, depriving Respondent an opportunity to reply to the Association’s Answer. There is no Rule and was no scheduling order providing any deadline or opportunity to file such a reply brief, and given the prejudicial consequences of denying Mr. King his opportunity to respond, then procedural due process as required by Article I Section 3 of the Washington Constitution and the Fourteenth Amendment was denied.

H. Hearing Schedule Not Set in Accordance With ELC 10.12(b)

The Hearing Schedule, Sub No. 44, was not set in accordance with ELC 10.12(b) which reads:

(b) Scheduling of Hearing. If possible, the parties should arrange a date, time, and place for the hearing by agreement among themselves and the hearing officer or panel members. Alternatively, at any time after the respondent has filed an answer to the formal complaint, or after the time to file the answer has expired, either party may move for an order setting a date, time, and place for the hearing. Rule 10.8 applies to this motion. The motion must state:

- the requested date or dates for the hearing;
- other dates that are available to the requesting party;
- the expected duration of the hearing;
- discovery and anything else that must be completed before the hearing; and
- the requested time and place for the hearing.

A response to the motion must contain the same information.

These procedures were not followed.

It is a fundamental part of the right to due process of law that a party in any proceeding have an meaningful opportunity to be heard in a forum and that the applicable rules of procedure be followed.

Mr. King objected to this with his Motion and Order for Resetting Case Schedule, Sub Nos. 54 and 55, and his Motion to Strike First Hearing Schedule and to Require Compliance with ELC 10.12(b), Sub No.

65.

I. Formal Complaint Not Accompanied by Adequate Summons

The Notice to Answer and Notice of Default Procedure and the Formal Complaint, Sub No. 18, was mailed to Paul King at his addresses at Caburuan, Santo Thomas, La Union Province, Republic of the Philippines and c/o Ruby Ghenta, Donan Tombia Aspiras Street, Consolasion, Agoon, La Union 2504, Republic of the Philippines. The Summons within the Notice to Answer and Notice of Default Procedure allowed 20 days.

CR 4(d)(4) reads:

Alternative to Service by Publication. In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint **within 90 days from the date of mailing**. Service under this subsection has the same jurisdictional effect as service by publication.

Emphasis added.

The reasons for allowing 90 days for service by mail, particularly to a respondent or defendant who is out of the State of Washington and out of the United States, is that such a respondent will need the extra time to prepare for a defense of the charge or claim. This is just as true for lawyer disciplinary proceedings as it is for a defendant in a civil case covered by Washington's Civil Rules.

Mr. King objected to this with his Motion to Dismiss Formal Complaint, Inadequate Summons, Sub No. 66.

J. Jurisdiction Was Not Obtained as Service of Formal Complaint Not Completed

The Formal Complaint, Sub No. 17 was filed on May 8, 2007. The matter was discussed in the hearing by Randy Beitel that the complaint had to be personally served in accordance with ELC 10.3(a)(2), which reads:

(2) Service. After the formal complaint is filed, it must be personally served on the respondent lawyer, with a notice to answer.

No such service occurred. Mr. King appeared and answered but reserved his right to contest jurisdiction. No affidavit of service appears in the file.

No jurisdiction was thus ever obtained.

Mr. King objected to this with his Motion to Dismiss Formal Complaint, Inadequate Summons, Sub No. 66.

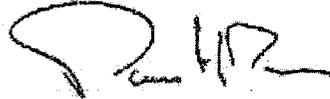
K. Appeal, Motion and Declaration for Review of Audio Tapes for Accuracy Under ELC 11.4 Has not Been Ruled On

The Appeal and Motion and Declaration for Review of Audio Tapes for Accuracy Under ELC 11.4, Sub No. 241, has not been ruled upon at the time of this Brief. Thus the Transcripts of the Hearings, Sub No. 236, have not been completed and reconciled.

V. CONCLUSION

For the reasons stated herein, the Disciplinary Board Order Adopting Hearing Officer's Decision, Sub 263, should be vacated or reversed.

Respectfully submitted this 22nd day of April, 2009,



PAUL H. KING, WSBA #7370
Attorney for Paul H. King

OFFICE RECEPTIONIST, CLERK

To: Roger Knight
Subject: RE: Brief of Appellant No. 200,681-7

Rec. 4-23-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Roger Knight [mailto:rogerwknight@hotmail.com]
Sent: Wednesday, April 22, 2009 6:59 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: rogerwknight@hotmail.com
Subject: Brief of Appellant No. 200,681-7

Please find attached in pdf format the title page, index and tables, argument body, and signature page for the Brief of Appellant in In re Paul H. King, No. 200,681-7. I will serve a hard copy printout of this Brief tomorrow upon the WSBA.

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From: OFFICE RECEPTIONIST, CLERK
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To: scottb@wsba.org
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Subject: FW: Brief of Appellant No. 200,681-7
Attachments: supreme_court_brief_title.pdf; supreme_court_brief_table.pdf;
supreme_court_brief_argument_without_signature_page.pdf;
supreme_court_signature_page.pdf

Attached is the brief that was filed with this court today.

From: Roger Knight [mailto:rogerwknight@hotmail.com]
Sent: Wednesday, April 22, 2009 6:59 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: rogerwknight@hotmail.com
Subject: Brief of Appellant No. 200,681-7

Please find attached in pdf format the title page, index and tables, argument body, and signature page for the Brief of Appellant in In re Paul H. King, No. 200,681-7. I will serve a hard copy printout of this Brief tomorrow upon the WSBA.

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