

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

IN RE DISCIPLINARY PROCEEDING AGAINST

J. DAVID SMITH,

Lawyer (Bar No. 8993).

---

ANSWERING BRIEF OF THE  
WASHINGTON STATE BAR ASSOCIATION

---

*SG*  
CLERK  
2010 APR 23 AM 7:25  
RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
BY R. MALDEN BARBARA  
Scott G. Busby  
Bar No. 17522  
Disciplinary Counsel

WASHINGTON STATE BAR ASSOCIATION  
1325 4<sup>th</sup> Avenue, Suite 600  
Seattle, Washington 98101-2539  
(206) 733-5998

## TABLE OF CONTENTS

I.	COUNTERSTATEMENT OF THE ISSUES.....	1
II.	COUNTERSTATEMENT OF THE CASE.....	2
	A. SUBSTANTIVE FACTS.....	2
	B. PROCEDURAL FACTS .....	4
III.	ARGUMENT .....	7
	A. STANDARD OF REVIEW .....	7
	B. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(b), RPC 8.4(c), AND FORMER RLD 1.1(a).....	8
	C. THE APPLICATION OF ELC 10.14(c) DOES NOT VIOLATE RESPONDENT'S RIGHT TO DUE PROCESS OF LAW.....	10
	D. RESPONDENT WAS NOT DENIED THE OPPORTUNITY TO PRESENT EVIDENCE AT THE DISCIPLINARY HEARING.....	12
	E. DISBARMENT IS THE APPROPRIATE SANCTION .....	14
	1. Presumptive Sanction.....	14
	2. Aggravating and Mitigating Factors .....	16
	3. Unanimity .....	19
	4. The Appropriate Sanction .....	20
IV.	CONCLUSION.....	20

## TABLE OF AUTHORITIES

### Cases

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	4
<u>In re Disbarment of Barnett</u> , 35 Wn.2d 191, 211 P.2d 714 (1949).....	16
<u>In re Disciplinary Proceeding Against Cohen (Cohen II)</u> , 150 Wn.2d 744, 82 P.3d 224 (2004).....	14
<u>In re Disciplinary Proceeding Against Cohen</u> , 149 Wn.2d 323, 67 P.3d 1086 (2003).....	17
<u>In re Disciplinary Proceeding Against Curran</u> , 115 Wn.2d 747, 801 P.2d 962 (1990).....	16
<u>In re Disciplinary Proceeding Against Day</u> , 162 Wn.2d 527, 173 P.3d 915 (2007).....	16, 19, 20
<u>In re Disciplinary Proceeding Against Egger</u> , 86 Wn.2d 596, 547 P.2d 864 (1976).....	16
<u>In re Disciplinary Proceeding Against Guarnero</u> , 152 Wn.2d 51, 93 P.3d 166 (2004).....	8, 20
<u>In re Disciplinary Proceeding Against Heard</u> , 136 Wn.2d 405, 963 P.2d 818 (1998).....	9
<u>In re Disciplinary Proceeding Against Hopkins</u> , 54 Wash. 569, 103 P. 805 (1909).....	9
<u>In re Disciplinary Proceeding Against Johnson</u> , 74 Wn.2d 21, 442 P.2d 948 (1968).....	16
<u>In re Disciplinary Proceeding Against McGrath</u> , 98 Wn.2d 337, 655 P.2d 232 (1982).....	16
<u>In re Disciplinary Proceeding Against Perez-Peña</u> , 161 Wn.2d 820, 168 P.3d 408 (2007).....	13
<u>In re Disciplinary Proceeding Against Plumb</u> , 126 Wn.2d 334, 892 P.2d 739 (1995).....	13
<u>In re Disciplinary Proceeding Against Stroh</u> , 97 Wn.2d 289, 644 P.2d 1161 (1982).....	16
<u>In re Disciplinary Proceeding Against Vanderveen</u> , 166 Wn.2d 594, 211 P.3d 1008 (2009).....	7, 8, 13, 14, 15, 17, 19, 20

<u>Kercheval v. United States</u> , 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927).....	12
<u>Louisiana State Bar Ass'n v. Wilkinson</u> , 562 So. 2d 902 (La. 1990) .....	11
<u>Maryland State Bar Ass'n v. Rosenberg</u> , 273 Md. 351, 329 A.2d 106 (1974).....	11
<u>State v. Brayman</u> , 110 Wn.2d 183, 751 P.2d 294 (1988) .....	12
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996) .....	12
<u>State v. Riker</u> , 123 Wn.2d 351, 869 P.2d 43 (1994).....	14

**Statutes**

15 U.S.C. § 78ff(a).....	2
15 U.S.C. § 78j(b).....	2
18 U.S.C. § 1343.....	2, 3
18 U.S.C. § 2.....	2
18 U.S.C. § 371.....	1, 2, 3, 9

**United States Code of Federal Regulations (C.F.R.)**

17 C.F.R. § 240.10b-5.....	2, 3
----------------------------	------

**ABA Standards for Imposing Lawyer Sanctions (ABA Standards)**

ABA <u>Standards</u> std. 5.11.....	1, 15
ABA <u>Standards</u> std. 5.11(a).....	15
ABA <u>Standards</u> std. 5.11(b).....	15
ABA <u>Standards</u> std. 9.22.....	16
ABA <u>Standards</u> std. 9.32.....	16

**Rules for Enforcement of Lawyer Conduct (ELC)**

ELC 1.1 .....	8
ELC 10.10(b) .....	6, 8
ELC 10.10(d) .....	9
ELC 10.14(c).....	1, 5, 8, 9, 10, 12, 13
ELC 11.2(b)(1).....	7

**Former Rules for Lawyer Discipline (RLD)**

RLD 1.1(a) ..... 1, 5, 7, 8, 9, 15  
RLD 4.9..... 10

**Former Discipline Rules for Attorneys (DRA)**

DRA 1.1(a).....10

**Rules of Professional Conduct (RPC)**

RPC 1.2(d) ..... 5, 7  
RPC 4.1 ..... 7  
RPC 4.1(a)..... 5, 7  
RPC 4.1(b) ..... 5, 7  
RPC 8.4(b) ..... 1, 5, 7, 8, 9, 15  
RPC 8.4(c)..... 1, 5, 7, 8, 9, 15  
RPC 8.4(i) ..... 1, 5, 7

**Washington Superior Court Civil Rules (CR)**

CR 12 ..... 8

**Other Authorities**

James C. Plaster, Student Commentary, When Lawyers Go Bad: The Evidence Considered in the Disciplinary Proceedings of Convicted Attorneys, 25 J. Legal Prof. 219, 220-21 (2001)..... 10

**I. COUNTERSTATEMENT OF THE ISSUES**

1. In his answer to the Formal Complaint, Respondent admitted that he was convicted of conspiracy to commit securities fraud and wire fraud, a felony in violation of 18 U.S.C. § 371. Does Respondent's felony conviction for conspiring to commit securities fraud and wire fraud establish that he violated RPC 8.4(b), RPC 8.4(c), and former RLD 1.1(a) (currently RPC 8.4(i))?

2. Under ELC 10.14(c), as well as similar provisions adopted in at least 44 other United States jurisdictions, the court record of a respondent lawyer's criminal conviction is conclusive evidence of his guilt in a disciplinary proceeding. In this proceeding, was Respondent entitled to relitigate the criminal charge of which he was convicted?

3. Consistent with ELC 10.14(c) and this Court's case law, Respondent was allowed to offer evidence not inconsistent with the conviction to determine the appropriate sanction. Respondent chose to offer no evidence at all and made no offer of proof, except for the representation that he would repudiate his plea agreement if he could. Was Respondent denied the opportunity to offer evidence at the disciplinary hearing?

4. Under ABA Standards std. 5.11 and this Court's case law, the presumptive sanction is disbarment. The Disciplinary Board unanimously

adopted the hearing officer's recommendation of disbarment. Should this Court affirm?

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. SUBSTANTIVE FACTS**

On February 12, 2004, Respondent was charged in a Superseding Indictment filed in the United States District Court for the Western District of Washington with:

- one count of conspiracy, in violation of 18 U.S.C. § 371;
- nine counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff(a), 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2; and
- ten counts of wire fraud, in violation of 18 U.S.C. §§ 2 and 1343.<sup>1</sup>

EX 103; BF 90 at 3, ¶ 4.2. As charged in Count 1 of the Superseding Indictment, the objects of the conspiracy were:

To unlawfully, knowingly, and willfully, directly and indirectly, by the use of means and instrumentalities of interstate commerce, and of the mails, use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, by (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary to make the statements made, in light of the circumstances in which they were made, not misleading; and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon other persons, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a),

---

<sup>1</sup> The statutes and regulations are at Appendix A.

and Title 17, Code of Federal Regulations, Section 240.10b-5.

and:

To knowingly and willfully transmit and cause to be transmitted by wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, in furtherance of a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1343.

EX 103 at 4-5, ¶¶ 9-10. As charged in Count 1 of the Superseding Indictment, conspiracy is a felony punishable by imprisonment for up to five years. 18 U.S.C. § 371; EX 102 at 2, ¶ 3; BF 101<sup>2</sup> at 8.

On April 28, 2004, Respondent entered a plea of guilty to conspiracy as charged in Count 1 of the Superseding Indictment. EX 102; BF 90 at 3-4, ¶ 4.4; BF 101 at 24. Respondent admitted under oath that he was guilty of the charged offense, and he admitted under oath that the facts set forth in the Statement of Facts in his Plea Agreement were true and correct. EX 102 at 4-10, ¶ 8; BF 90 at 4-9, ¶ 4.5; BF 101 at 4, 11-12, 17-23. According to the Statement of Facts in his Plea Agreement, Respondent knowingly conspired with others to commit the crimes of securities fraud and wire fraud; and he did so deliberately, with the intent to defraud. EX 102 at 4, ¶ 8; BF 90 at 9, ¶ 4.5; BF 101 at 17-23.

---

<sup>2</sup> BF 101 is a stipulated transcript of EX 105, an audio recording of the April 28, 2004 plea hearing.

On June 1, 2005, Respondent again entered a plea of guilty to conspiracy as charged in Count 1 of the Superseding Indictment. EX 104, 106-107; BF 90 at 4-10, ¶¶ 4.5-4.6. The second guilty plea and the Superseding Plea Agreement were occasioned by some “sentencing uncertainties” resulting from the United States Supreme Court’s decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).<sup>3</sup> EX 106 at 2-6. Respondent admitted again that he was guilty of the charged offense, and he admitted the same facts he had admitted in his earlier Plea Agreement. EX 104 at 4-10, ¶ 8; EX 106 at 3, 7, 15-16; EX 107 at 12; BF 90 at 4-9, ¶ 4.5.

On June 17, 2005, Respondent was sentenced to an 18-month term of imprisonment followed by three years of supervised release. EX 108 at 23; EX 111. At his sentencing hearing, Respondent told the court: “I failed so greatly in this that, obviously, I’m going to lose my [law] license, and I don’t intend to ask for it back.” EX 108 at 21.

#### **B. PROCEDURAL FACTS**

The Formal Complaint was filed on June 4, 2004. BF 1. The Formal Complaint alleged that Respondent entered a plea of guilty to conspiracy as charged in Count 1 of the Superseding Indictment. BF 1 at 1, ¶ 2. In paragraph 5 the Formal Complaint alleged, “In the plea

---

<sup>3</sup> Blakely was decided on June 24, 2004.

agreement, Respondent admitted the facts as set forth in paragraphs 6 through 80 of the Formal Complaint.” BF 1 at 2, ¶ 5. In paragraphs 6 through 80, the Formal Complaint alleged the facts that Respondent had admitted under oath in his Plea Agreement. BF 1 at 2-10, ¶¶ 6-80; BF 101 at 4, 11-12, 17-23; EX 102 at 4-10, ¶ 8. Finally, the Formal Complaint alleged that by operation of ELC 10.14(c), the record of Respondent’s conviction established that Respondent had violated RPC 1.2(d), RPC 4.1(a) and 4.1(b), RPC 8.4(b), RPC 8.4(c), and former RLD 1.1(a) (currently RPC 8.4(i)).<sup>4</sup> BF 1 at 2, ¶ 4, 10, ¶81.

On June 29, 2004, Respondent filed an “Answer” in which he declined to answer the allegations in the Formal Complaint until after he was sentenced. BF 12. The matter was stayed between September 17, 2004, and March 24, 2008, due to Respondent’s prison sentence and his subsequent supervised release in New York. BF 13-14, 17, 19, 26, 28.

On March 24, 2008, Respondent filed an answer to the allegations in the Formal Complaint. BF 29. Respondent admitted that he had entered a plea of guilty to conspiracy as charged in Count 1 of the Superseding Indictment. BF 29 at 2, ¶ 2. Respondent admitted paragraph 5 of the Formal Complaint “to the extent of the statements made therein,” but he added that “when the whole truth is considered,” his recitation of

---

<sup>4</sup> The rules as they existed at the time of the relevant conduct are at Appendix B.

the circumstances of the plea agreement would result in “a general denial of paragraph 5.” BF 29 at 3, ¶ 5.

On April 3, 2008, the Association moved for an order finding misconduct based on the pleadings under ELC 10.10(b). BF 35, 49, 51. On April 24, 2008, the hearing officer entered an order finding that Respondent had committed the misconduct alleged in the Formal Complaint. BF 56, 58. Consistent with ELC 10.10(b), the matter was set for a hearing to determine the sanction. BF 56.

The hearing took place on December 10, 2008. BF 90; TR 1. The hearing officer ruled that Respondent could not dispute the essential facts of his criminal conviction, but that both parties could offer evidence not inconsistent with the conviction to determine the appropriate sanction. TR 23, 37-38; BF 90 at 2, ¶ 1.3. Respondent chose to offer no evidence at all, and he made no offer of proof, except for the generalized representation, through counsel, that he would “repudiate that plea agreement” if he could. TR 33, 39.

On January 14, 2009, the hearing officer entered his Findings, Conclusions, and Recommendation.<sup>5</sup> BF 90. The hearing officer concluded, on the basis of the facts Respondent admitted in his answer to

---

<sup>5</sup> The hearing officer’s Findings, Conclusions, and Recommendation are at Appendix C.

the Formal Complaint, that Respondent had violated RPC 1.2(d), RPC 4.1(a) and 4.1(b), RPC 8.4(b), RPC 8.4(c), and former RLD 1.1(a) (currently RPC 8.4(i)). BF 90 at 10-13, ¶¶ 5.1-5.5. The hearing officer recommended that Respondent be disbarred. BF 90 at 18.

The Disciplinary Board reviewed the hearing officer's decision under ELC 11.2(b)(1). The Board issued a decision on September 29, 2009, and an amended decision on October 21, 2009.<sup>6</sup> BF 106, 120. The Board concluded that the criminal conduct Respondent admitted in his answer to the Formal Complaint established violations of RPC 8.4(b), RPC 8.4(c), and former RLD 1.1(a), but not violations of RPC 1.2(d) or RPC 4.1.<sup>7</sup> BF 120 at 1-3. The Board unanimously affirmed the hearing officer's recommendation of disbarment. BF 120 at 1 n.1.

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW**

This Court bears the ultimate responsibility for lawyer discipline in Washington. In re Disciplinary Proceeding Against Vanderveen, 166 Wn.2d 594, 604, 211 P.3d 1008 (2009). The Court gives great weight to

---

<sup>6</sup> The Amended Disciplinary Board Order, BF 120, contains some clarifying corrections to the Disciplinary Board Order, BF 106. Those clarifying corrections were requested jointly by the parties. BF 110, 112. The Amended Disciplinary Board Order is at Appendix D.

<sup>7</sup> Consequently, the alleged violations of RPC 1.2(d) and RPC 4.1 are not at issue in this appeal.

the hearing officer's findings of fact and will uphold findings of fact that are supported by substantial evidence. Id. Conclusions of law are reviewed de novo and will be upheld if they are supported by the findings of fact. Id. at 604. The Disciplinary Board's unanimous sanction recommendation should be affirmed unless the Court can articulate clear and specific reasons for rejecting it. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.3d 166 (2004).

**B. THE EVIDENCE AND THE FINDINGS OF FACT SUPPORT THE CONCLUSION THAT RESPONDENT VIOLATED RPC 8.4(b), RPC 8.4(c), AND FORMER RLD 1.1(a)**

The ELC are the rules governing the procedures by which a lawyer may be subjected to disciplinary action for violation of the RPC. ELC 1.1; Vanderveen, 166 Wn.2d at 607. ELC 10.14(c) provides:

**Proceeding Based on Criminal Conviction.** If a formal complaint charges a respondent lawyer with an act of misconduct for which the respondent has been convicted in a criminal proceeding, the court record of the conviction is conclusive evidence at the disciplinary hearing of the respondent's guilt of the crime and violation of the statute on which the conviction was based.

ELC 10.10(b) provides:

**Disciplinary Counsel Motion.** Disciplinary counsel may move for an order finding misconduct based on the pleadings. In ruling on this motion, the hearing officer or panel may find that all or some of the misconduct as alleged in the formal complaint is established, but will determine the sanction after a hearing.

CR 12 applies to motions under ELC 10.10(b), and no factual materials

outside the answer and complaint may be presented with the motion. ELC 10.10(d).

In his answer to the Formal Complaint, Respondent admitted that he was convicted of conspiracy, in violation of 18 U.S.C. § 371, as charged in Count 1 of the Superseding Indictment. BF 1 at 1, ¶ 2; BF 29 at 2, ¶ 2. He also admitted that according to the plea agreement, the conspiracy was “to commit the offenses of securities fraud and wire fraud.” BF 1 at 2, ¶ 5, 10, ¶ 80; BF 29 at 3, ¶ 5. Respondent thereby admitted that according to “the court record of the conviction,” ELC 10.14(c), he is guilty of conspiring to commit securities fraud and wire fraud. Under ELC 10.14(c), the court record of the conviction is conclusive evidence of Respondent’s guilt in this proceeding. Because Respondent’s admissions establish that he was convicted of conspiring to commit securities fraud and wire fraud, they also establish that he violated RPC 8.4(b) (criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and former RLD 1.1(a) (act involving moral turpitude).<sup>8</sup>

---

<sup>8</sup> An act involves moral turpitude if the inherent nature of the act violates “the commonly accepted standard of good morals, honesty, and justice.” In re Disciplinary Proceeding Against Heard, 136 Wn.2d 405, 418, 963 P.2d 818 (1998) (quoting In re Disciplinary Proceeding Against Hopkins, 54 Wash. 569, 572, 103 P. 805 (1909)).

**C. THE APPLICATION OF ELC 10.14(c) DOES NOT VIOLATE RESPONDENT'S RIGHT TO DUE PROCESS OF LAW**

It is well settled throughout the United States that once a lawyer has been convicted of a crime, the issue of the convicted lawyer's guilt will not be addressed in a disciplinary proceeding. James C. Plaster, Student Commentary, When Lawyers Go Bad: The Evidence Considered in the Disciplinary Proceedings of Convicted Attorneys, 25 J. Legal Prof. 219, 220-21 (2001). This principle has been part of Washington's lawyer discipline system for at least the last 35 years. ELC 10.14(c), adopted in 2002, was preceded by former RLD 4.9, which provided:

When a formal complaint charges a lawyer with an act of misconduct for which the lawyer has been convicted in a criminal proceeding, the court record setting forth the conviction shall be conclusive evidence at the ensuing disciplinary hearing of the guilt of the respondent lawyer of the crime for which he or she was convicted and of his or her violation of the statute upon which the conviction was based.

Former RLD 4.9, adopted in 1983, was preceded by former DRA 1.1(a), which provided that upon a criminal conviction,

the judgment and sentence shall be conclusive evidence at the ensuing disciplinary hearing of the guilt of the respondent attorney of the crime described in the indictment or information, and of his or her violation of the statute upon which it is based.

Former DRA 1.1(a) was adopted in 1975. The American Bar Association has adopted a similar provision in Rule 19(e) of its Model Rules for

Lawyer Disciplinary Enforcement:

**Conviction as Conclusive Evidence.** For purposes of a hearing on formal charges filed as a result of a finding of guilt, a certified copy of a judgment of conviction constitutes conclusive evidence that the lawyer committed the crime, and the sole issue in any such hearing shall be the nature and extent of the discipline to be imposed.

At least 44 other United States jurisdictions have similar provisions, which are collected in Appendix E.

The constitutionality of these provisions has not been seriously questioned. Maryland State Bar Ass'n v. Rosenberg, 273 Md. 351, 355, 329 A.2d 106 (1974).

The requirements of due process having been satisfied at the criminal trial, and the attorney's guilt having been established beyond a reasonable doubt at that proceeding, a new or other inquiry into the guilt of the attorney for disciplinary purposes is not mandated by either the State or federal constitutions.

Id. Because a criminal conviction, whether based on a jury verdict or a guilty plea, amounts to a finding of guilt beyond a reasonable doubt, the standard of proof that applies to lawyer discipline proceedings has already been satisfied. Louisiana State Bar Ass'n v. Wilkinson, 562 So. 2d 902, 903 (La. 1990). Due process does not require a second opportunity for the lawyer to refute the criminal charges against him. Id. And there is no legal support for Respondent's suggestion, Respondent's Opening Brief at 19, that a conviction based on a guilty plea is somehow less conclusive

than a conviction after trial. See, e.g., Kercheval v. United States, 274 U.S. 220, 223, 47 S. Ct. 582, 71 L. Ed. 1009 (1927) (“A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive.”)

Despite the absence of any contrary authority, Respondent asserts that ELC 10.14(c) and, by implication, all the similar provisions adopted in other jurisdictions are unconstitutional. Relying on State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996), and State v. Brayman, 110 Wn.2d 183, 751 P.2d 294 (1988), Respondent opines that the “due process difficulty” is that ELC 10.14(c) “seeks to establish a conclusive presumption.” Respondent’s Opening Brief at 25-26. But Respondent’s reliance on these cases is misplaced, because a conclusive or mandatory presumption creates “due process problems” only when applied to one who has not already been convicted of the charged crime. See Deal, 128 Wn.2d at 699-701. Moreover, Respondent’s guilt of the crime of conspiracy is not a mere “presumption” established by ELC 10.14(c); it is an adjudicated fact. No authority that Respondent has cited grants him the right to be presumed innocent of a crime of which he was found guilty.

**D. RESPONDENT WAS NOT DENIED THE OPPORTUNITY TO PRESENT EVIDENCE AT THE DISCIPLINARY HEARING**

When a disciplinary hearing is based on a prior criminal conviction whose existence is conclusively established by the finding of guilt, both

parties may offer evidence not inconsistent with the conviction to determine the appropriate sanction. Vanderveen, 166 Wn.2d at 608; In re Disciplinary Proceeding Against Perez-Peña, 161 Wn.2d 820, 831, 168 P.3d 408 (2007); In re Disciplinary Proceeding Against Plumb, 126 Wn.2d 334, 339, 892 P.2d 739 (1995). But ELC 10.14(c) and this Court's case law prohibit the respondent from disputing the essential facts regarding a prior criminal conviction in a disciplinary proceeding. Vanderveen, 166 Wn.2d at 608, 611.

Respondent challenges the sanction recommendation on the grounds that he was "denied the meaningful opportunity to put on his evidence about the underlying facts." Respondent's Opening Brief at 28. The record, however, shows otherwise. Consistent with ELC 10.14(c) and this Court's case law, the hearing officer ruled that Respondent could not dispute the essential facts of his criminal conviction in the disciplinary proceeding. TR 23, 37-38. But the hearing officer also ruled, consistent with this Court's case law, that both parties could offer evidence not inconsistent with the conviction to determine the appropriate sanction. TR 23, 37-38; BF 90 at 2, ¶ 1.3. Despite that invitation, Respondent chose to offer no evidence at all. TR 39. And although he expressed his displeasure with the hearing officer's rulings, Respondent made no offer of proof, except for the generalized representation that he would

“repudiate that plea agreement” if he could. TR 33. The hearing officer’s rulings were correct, and even if there were some issue concerning the correctness of those rulings, Respondent has failed to preserve it for appellate review. See, e.g., State v. Riker, 123 Wn.2d 351, 369-70, 869 P.2d 43 (1994).

#### **E. DISBARMENT IS THE APPROPRIATE SANCTION**

The ABA Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) govern sanctions in lawyer discipline cases. In re Disciplinary Proceeding Against Cohen (Cohen II), 150 Wn.2d 744, 758, 82 P.3d 224 (2004). On review, the Court considers whether the hearing officer determined the correct presumptive sanction, considering the ethical duty violated, the lawyer’s mental state, and the actual or potential injury caused by the lawyer’s misconduct. See id. Next, the Court considers whether the hearing officer properly weighed the aggravating or mitigating factors. See id. If raised, the Court also considers the degree of unanimity among the members of the Disciplinary Board. Vanderveen, 166 Wn.2d at 609, 615-16.

##### **1. Presumptive Sanction**

Although Respondent asserts that disbarment is “not appropriate,” he does not dispute that disbarment is the presumptive sanction. Respondent’s Opening Brief at 28. ABA Standards std. 5.1 applies to

violations of RPC 8.4(b) and 8.4(c). See, e.g., Vanderveen, 166 Wn.2d at 612. Std. 5.11 provides:

- 5.11 Disbarment is generally appropriate when:
- (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
  - (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Respondent was convicted of conspiracy to commit securities fraud and wire fraud. According to the charge to which Respondent pleaded guilty, the object or purpose of the conspiracy was to obtain money through dishonesty, fraud, deceit, and misrepresentation, in violation of federal securities fraud and wire fraud statutes. EX 103 at 4-5, ¶¶ 9-10. Therefore, Respondent's conduct falls squarely within ABA Standards stds. 5.11(a) and 5.11(b). The presumptive sanction for Respondent's violations of RPC 8.4(b) and 8.4(c) is disbarment.

Because the ABA Model Rules of Professional Conduct do not address acts of moral turpitude, the ABA Standards do not provide a presumptive sanction for violations of former RLD 1.1(a) involving acts

of moral turpitude. In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 547, 173 P.3d 915 (2007); In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 770-71, 801 P.2d 962 (1990). But under this Court's case law, the presumptive sanction for any act that constitutes a felony of moral turpitude is disbarment. See, e.g., Day, 162 Wn.2d at 547; In re Disciplinary Proceeding Against McGrath, 98 Wn.2d 337, 345, 655 P.2d 232 (1982); In re Disciplinary Proceeding Against Stroh, 97 Wn.2d 289, 300, 644 P.2d 1161 (1982); In re Disciplinary Proceeding Against Egger, 86 Wn.2d 596, 598, 547 P.2d 864 (1976); In re Disciplinary Proceeding Against Johnson, 74 Wn.2d 21, 24-25, 442 P.2d 948 (1968); In re Disbarment of Barnett, 35 Wn.2d 191, 211 P.2d 714 (1949).

## **2. Aggravating and Mitigating Factors**

The hearing officer and the Board found four of the aggravating factors identified in ABA Standards std. 9.22: dishonest or selfish motive, a pattern of misconduct, refusal to acknowledge wrongful nature of conduct, and substantial experience in the practice of law. BF 90 at 17; BF 120 at 1. The hearing officer and the Board found one of the mitigating factors identified in ABA Standards std. 9.32: absence of a prior disciplinary record. BF 90 at 18; BF 120 at 1.

Before addressing Respondent's arguments concerning the

aggravating factors, we note that the presence or absence of the three aggravating factors that Respondent challenges would have no effect on the sanction in this case. Ordinarily, the presumptive sanction should be imposed unless there are aggravating or mitigating factors sufficiently “compelling” to justify a departure therefrom. In re Disciplinary Proceeding Against Cohen, 149 Wn.2d 323, 337, 339, 67 P.3d 1086 (2003). In this case, even if there were only one aggravating factor, or none at all, the single mitigating factor would not be sufficiently compelling to justify a departure from the presumptive sanction of disbarment. See Vanderveen, 166 Wn.2d at 615.

First, Respondent contends that the record does not support a finding of dishonest or selfish motive. Respondent’s Opening Brief at 28-29. According to the court record of Respondent’s conviction, the object of the conspiracy to which he pleaded guilty was, among other things, “to obtain money and property by means of false and fraudulent pretenses, representations, and promises.” EX 103 at 5, ¶ 10. There is no indication that Respondent’s efforts were not intended to benefit himself. Cf. Vanderveen, 166 Wn.2d at 611. Furthermore, the facts that Respondent admitted in his plea agreement are replete with evidence of his dishonest and selfish motives. See, e.g., EX 102 at 9-10, ¶ 8.m.

Next, Respondent contends that a pattern of misconduct was not

shown because “the entire process was a single conspiracy.” Respondent’s Opening Brief at 29. But according to the court record of Respondent’s conviction and the facts he admitted in his plea agreement, “the entire process” involved an elaborate pattern of multiple false and fraudulent documents and other fraudulent misrepresentations. EX 102 at 4-10, ¶ 8.

Next, Respondent challenges the finding concerning his refusal to acknowledge the wrongful nature of his conduct. Respondent’s Opening Brief at 29. That finding was based on the conveniently contrary positions that Respondent has taken concerning the nature of his conduct. When it was expedient to do so, Respondent did acknowledge that his conduct was wrongful. He admitted under oath that he had committed the wrongful acts set forth in the Statement of Facts in his Plea Agreement. EX 102 at 4-10, ¶ 8; EX 104 at 4-10, ¶ 8; EX 106 at 3, 7, 15-16; EX 107 at 12; BF 101 at 4, 11-12, 17-23. He told the sentencing judge that he and his lawyer had worked out that Statement of Facts in collaboration with the government’s lawyer. EX 106 at 15-16. To obtain a more lenient sentence, Respondent apologized profusely for his wrongful conduct, telling the sentencing judge, “I failed so greatly in this that, obviously, I’m going to lose my [law] license, and I don’t intend to ask for it back.” EX 108 at 18-22.

But when acknowledging the wrongful nature of his conduct no longer appeared to serve his interests, the Statement of Facts that Respondent had worked out with the government's lawyer became an "adhesion contract." Compare EX 106 at 15-16 with BF 29 at 3, ¶ 5. When his goal was to maintain the law license that he said he didn't intend to ask for, Respondent sought to repudiate all the admissions he had made under penalty of perjury at a time when contrition seemed expedient. TR 33. Under these circumstances, the hearing officer and the Board were justified in finding that Respondent's refusal to acknowledge the wrongful nature of his conduct was an aggravating factor.

Finally, Respondent contends that due to his criminal sentence he is "entitled" to a mitigating factor that was not found by the hearing officer or the Board: imposition of other penalties or sanctions. Respondent's Opening Brief at 29-30. This Court recently held that a criminal sentence is not a mitigating factor in determining the appropriate sanction. Vanderveen, 166 Wn.2d at 614-15; see also Day, 162 Wn.2d at 547-49. Respondent may consider this Court's holding in Vanderveen "absurd," Respondent's Opening Brief at 29, but he provides no reason for the Court to depart from it.

### **3. Unanimity**

Where the Board's recommendation is unanimous, it is entitled to

great deference, and should be affirmed unless this Court can articulate a specific reason for rejecting it. Day, 162 Wn.2d at 538, 542; Guarnero, 152 Wn.2d at 59; see also Vanderveen, 166 Wn.2d at 616. The Board's decision in this case was unanimous, and therefore entitled to great deference.

#### **4. The Appropriate Sanction**

Given the seriousness of Respondent's felony conviction and its adverse reflection on the integrity of the legal profession, the absence of any compelling mitigating factors, and the deference to which the Board's unanimous recommendation is entitled, disbarment is the appropriate sanction. See Vanderveen, 166 Wn.2d at 618.

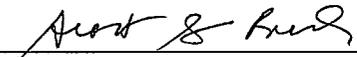
#### **IV. CONCLUSION**

Respondent was convicted in a United States District Court of conspiring to obtain money by committing securities fraud and wire fraud. Respondent's conviction conclusively establishes his guilt of the crime, and due process does not require a second opportunity for him to refute the criminal charges against him. At the disciplinary hearing, Respondent had an opportunity to offer evidence not inconsistent with the conviction, but he chose not to do so. The presumptive sanction is disbarment, and both the hearing officer and a unanimous Disciplinary Board recommended disbarment. The Association respectfully requests that

Respondent J. David Smith be disbarred.

RESPECTFULLY SUBMITTED this 22<sup>d</sup> day of April, 2010.

WASHINGTON STATE BAR ASSOCIATION

  
\_\_\_\_\_  
Scott G. Busby, Bar No. 17522  
Disciplinary Counsel

# APPENDIX A

## **15 U.S.C. § 78j. Manipulative and deceptive devices**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

## **15 U.S.C. § 78ff. Penalties**

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than

\$5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than \$2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

## **18 U.S.C. § 2. Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

### **18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

### **18 U.S.C. § 1343. Fraud by wire, radio, or television**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

### **17 C.F.R. § 240.10b-5. Employment of manipulative and deceptive devices.**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

# **APPENDIX B**

## **Rules of Professional Conduct (RPC)**

### **RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

...

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

## **Rules for Lawyer Discipline (RLD)**

### **RULE 1.1**

#### **GROUNDS FOR DISCIPLINE**

A lawyer may be subjected to the disciplinary sanctions or actions set forth in these rules for any of the following:

(a) The commission of any act involving moral turpitude, dishonesty, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding;

# APPENDIX C

FILED  
JAN 14 2009  
DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re:

J. David Smith  
Lawyer (Bar No.8993)

Public No. 04#00032

HEARING, FINDINGS, CONCLUSION,  
AND RECOMMENDATION

I. HEARING

Date: This matter came before Donald W. Carter, the undersigned Hearing Officer, on the 10<sup>th</sup> day of December, 2008.

1.1 Appearances: The Bar Association was represented at the hearing by its counsel, Erica Temple; also present on behalf of the Bar Association were Kevin Bank, Thea Armour, paralegal, and Lori Thompson, court reporter. The respondent J. David Smith appeared personally and through his counsel, Kurt Bulmer.

1.2 Purpose: The hearing was conducted to determine the appropriate sanction for the respondent's actions. The hearing officer granted the Bar Association's Motion for an

HEARING, FINDINGS, CONCLUSION,  
AND RECOMMENDATION - 1

CARTER & FULTON, P.S.  
Attorneys at Law  
A Professional Service Corporation  
3731 COLBY AVENUE  
EVERETT, WA 98201  
(425) 258-3538 • FAX (425) 339-2527

010

1 Order Finding Misconduct Based on the Pleadings pursuant to ELC 10.10(6) by entry of the  
2 order thereon on April 21, 2008. That order held that respondent Smith had committed the  
3 misconduct as charged in Count I of the formal complaint.

4 1.3 Evidence: Admitted into evidence at the hearing were the Bar Associations  
5 exhibits A101, A102, A103, A104, A105, A106, A107, A108, and A111. Those exhibits were  
6 admitted for the purpose of determining whether there were aggravating and/or mitigating  
7 factors which might affect the imposition of the appropriate sanctions. The exhibits were  
8 public records relating to the respondent's criminal conviction in the United States District  
9 Court for Western Washington and were the records of that court. (See, ER 1005, ER 803(22)).  
10  
11

## 12 II. FORMAL COMPLAINT

13 2.1 Complaint: The respondent was charged by formal complaint dated June 3,  
14 2004 with one count in violation of the Rules of Professional Conduct (RPC). The  
15 Association's Formal Complaint alleged:  
16

### 17 COUNT I

18 By committing the acts that resulted in the conviction for conspiracy as set forth  
19 above, respondent violated RPC 1.2(d), 4.1(a), 4.1(o), 8.4(b), and/or 8.4(c) and/or  
20 former RLD 1.1(a) currently RPC 8.49(i).

## 21 III. RESPONSE TO FORMAL COMPLAINT

22 3.1 In Respondent's Answer to WSBA's Formal Complaint: Affirmative Defenses/  
23 Mitigating Circumstances, Mr. Smith argues that Title 18 U.S.C. unconstitutional and therefore  
24 his plea and conviction are "void ab initio".

25 3.2 Respondent then asserts that the facts he admitted at his sentencing in the two  
26 plea agreements and in open are not correct and denies most of the facts alleged in the formal  
27 complaint which were taken directly from the plea agreements.  
28  
29



- 1
- First, that the respondent did knowingly conspire, combine and agree with others to commit offense against the United States;

2

  - Second, that the respondent knew the unlawful purpose of the agreement and joined in it willfully, that its, with the intent to further the unlawful purpose;

3

  - Third, that one of the conspirators during the existence of the conspiracy knowingly committed at least one of the event acts described in the indictment, in order to accomplish some object purpose of the conspiracy (Exhibit A-104).

4

5

6

7           4.5   Facts Supporting Plea/Conviction: In his superceding plea agreement at  
8 paragraph 8 subsections a – p the respondent admitted the following facts:

- 9
- 10           a.     At all relevant times J. DAVID SMITH was an attorney licensed to  
11           practice law in the state of Washington. Mr. SMITH acted in that  
12           capacity for an individual named Terry Martin in connection with a  
13           series of development projects planned and pursued by Mr. Martin. Mr.  
14           SMITH also performed tasks other than providing legal advice.
- 15           b.     Beginning in approximately late 1998, Mr. SMITH assisted Mr. Martin  
16           in the planning of a project called the Silver Sound Corporate Center, an  
17           office park comprised of six buildings and a total of more than 500,000  
18           square feet of commercial office space to be located near Paine Field  
19           within the boundaries of the City of Everett, Washington. Mr. SMITH  
20           also assisted Mr. Martin in obtaining participations in the project by the  
21           Holmes Harbor Sewer District (HHSD) located on Whidbey Island,  
22           Washington. The plan involved HHSD issuing approximately \$20  
23           million in tax-exempt municipal bonds to acquire a portion of the  
24           development property and to construct public infrastructure such as  
25           sewage, drainage, water service and roads. The project included Mr.  
26           Martin's purported acquisition of an additional \$43 million in private  
27           financing to construct six office buildings on the remaining portion of  
28           the property. Repayment of the bonds was to be made from assessments  
29           levied upon Mr. Martin's portion of the property, and the source of  
            revenue to pay those assessments was to be rents from the office  
            buildings.
- c.     The total area of the development land was approximately 40 acres.  
            Pursuant to Mr. Martin's development plan, HHSD would own 15 acres  
            of the property on which the public infrastructure was to be constructed,  
            including such things as roads, drainage structures, and wetlands. HHSD  
            would pay for those 15 acres with about \$6.2 million in bond proceeds.  
            Mr. Martin would own the other 25 acres on which the six office  
            buildings would be constructed. Mr. SMITH knew and understood the

1 importance of establishing the value of the 15 acres to be purchased by  
2 HHSD. Mr. SMITH also knew that HHSD believed it would be  
3 purchasing its 15 acres from Mr. Martin. In truth and in fact, however,  
4 Mr. SMITH knew that HHSD had been misled by Mr. Martin. Mr.  
5 Martin would to independently purchase the 40 acres, but instead would  
6 use HHSD's \$6.2 million in bond proceeds to pay the seller for the full  
7 40 acres. Thus, Mr. Martin was going to keep 25 acres for himself while  
8 paying virtually none of his own funds. Mr. SMITH recalls discussing  
9 and planning with Mr. Martin that the purchase and sale transaction  
10 would be "bumped up" between related companies to make it appear that  
11 one of Mr. Martin's companies had purchased it for \$6.2 million and  
12 then sold it to another of Mr. Martin's companies at a higher price, but  
13 no such transaction occurred. Instead, at closing of the bond issuance the  
14 \$6.2 million disbursement of bond funds was paid into escrow and then  
15 to the seller, while HHSD received title to its 15 acres and Mr. Martin's  
16 company received title to his 25 acres. In other words, Mr. SMITH  
17 knew and understood that Mr. Martin had contrived to obtain his 25  
18 acres essentially for free. Mr. SMITH knew and understood that this was  
19 an omission of material information from HHSD, the broker/dealers and  
20 the bond purchasers. Mr. SMITH also knew and understood that several  
21 letters provided to the HHSD purporting to support a value of about \$6.2  
22 million for HHSD's 15 acres were false and misleading.

23 d. Mr. SMITH knew and understood that construction of the Silver Sound  
24 Corporate Center was critical to the HHSD bond issuance and  
25 understood further that various permits and entitlements were required  
26 for construction to occur. Beginning in at least April 2000, Mr. SMITH  
27 was aware that Mr. Martin was making misrepresentations and false  
28 statements to HHSD and others concerning the status of the permits. In  
29 April 2000, Mr. SMITH knew that Mr. Martin, in conjunction with the  
HHSD's Engineer, Les Killingsworth, authored a letter falsely stating  
that the necessary permits to begin construction were in place. Mr.  
SMITH was present at various HHSD Board of Commissioner meetings  
where Mr. Martin misled the Commissioners to believe that the permits  
were in place. Mr. SMITH also knew at the time the bond issuance  
closed, on or about October 26, 2000, that representations contained in  
the bond documents were false and fraudulent concerning the status of  
the permits and entitlements.

e. Various documents related to the bond issuance, including the  
Preliminary Official Statement (POS) and Official Statement (OS),  
represented that all 500,000 square feet of office space at the Silver  
Sound Corporate Center had been pre-leased. Initially, Mr. Martin told  
Mr. SMITH the tenant was Microsoft and displayed what purported to be  
a binding lease with the tenant's name blacked out. Mr. Martin claimed

1 that Microsoft required its identity as the tenant to be kept confidential.  
2 By approximately June of 2000, however, Mr. SMITH knew and  
3 understood that the so-called Microsoft lease was fraudulent. Mr.  
4 SMITH nevertheless assisted Mr. Martin in the preparation and  
5 distribution of various documents purporting to terminate the fictitious  
6 lease. Mr. SMITH knew that too, was false.

7 f. In the fall of 2000, Mr. SMITH learned that Mr. Martin had negotiated a  
8 lease with a company called R.A. King. As Mr. SMITH also knew, R.A.  
9 King was reluctant to bind itself to a lease, and Mr. Martin proposed that  
10 he execute a side-agreement that would enable R.A. King to repudiate  
11 the lease for any reason or no reason at all. Mr. SMITH prepared the  
12 side-agreement at Mr. Martin's direction and delivered it to R.A. King.  
13 Mr. Martin directed Mr. SMITH to keep the side-agreement secret,  
14 which he did. Mr. SMITH knew and understood that the secret side-  
15 agreement rendered the R.A. King Lease illusory.

16 g. At some point in time, Mr. SMITH also became aware that Edward  
17 Tezak had executed a document on behalf of a company named J. Zacket  
18 Enterprises, Inc., representing that the company was a subsidiary of R.A.  
19 King and indicating an intention to lease Silver Sound Corporate Center.  
20 Beginning in approximately September 2000, when Mr. Tezak began  
21 working in Mr. Martin's office (where Mr. SMITH also worked), and  
22 continuing until February 2001, when Mr. SMITH moved out, Mr.  
23 SMITH observed Mr. Tezak providing increasing assistance to Mr.  
24 Martin in the HHSD municipal bond matter. From his dealing with R.A.  
25 King and Mr. Martin, Mr. SMITH knew and understood that there was  
26 no relationship between R.A. King and Mr. Tezak or his company, J.  
27 Zacket Enterprises, Inc. At a later date Mr. Smith discovered the letter of  
28 intent from Mr. Tezak, and Mr. Smith understood the letter was false and  
29 fraudulent. Mr. SMITH, Mr. Martin and Mr. Tezak all understood that  
HHSD, the broker-dealer, and the bond investors relied upon the  
existence of a binding lease as a material element on the bond issuance.  
Mr. SMITH fully understood that representations in various bond  
documents describing the leases were false and fraudulent. Mr. SMITH  
also knew that the existence of a valid and binding lease was the primary  
basis of the appraised value of the property and an essential component  
of the bond offering.

h. The bond documents stated that Mr. Martin had a construction loan  
commitment from an entity called Goldman Sig, Inc., in the amount of  
\$43 million, as well as an additional commitment from the same entity  
for approximately \$20 million acting as a guarantee for repayment of the  
bonds. By at least the time of the bond closing on October 26, 2000, Mr.  
SMITH knew and understood that these representations were false. Mr.

1 SMITH had assisted in the preparation of the construction loan  
2 agreement for the purported financing and drafted the incorporation  
3 documents for Goldman Sig, Inc. In a conversation between Mr. Martin  
4 and Mr. SMITH, Mr. Martin stated that the related equity participation  
5 agreement, drafted by Mr. Martin and Mr. Tezak, was a sham and was  
6 only for the purpose of being included in the bond documents and  
7 satisfying the bond underwriters. Based on that conversation and  
8 everything else he knew by that time Mr. SMITH believed and  
9 understood that the other financing documents were also fraudulent. Mr.  
10 SMITH also knew and understood that the name "Goldman" has been  
11 selected to create the false impression that Goldman Sachs was the  
12 lender. In the Goldman Sig incorporation documents, which Mr. SMITH  
13 drafted under the direction of Mr. Martin, Mr. White and Mr. Tezak,  
14 Goldman Sachs was falsely identified as a funding source. In meetings  
15 with the HHSD Board of Commissioners, Mr. SMITH relayed to them  
16 that Goldman Sachs was the lender. By the time of closing, Mr. SMITH  
17 knew that was false. From conversations and from other dealings with  
18 Mr. Martin and Mr. Tezak, when the bonds were issued on or about  
19 October 26, 2000, Mr. SMITH knew and understood that there were no  
20 loan funds as represented. Mr. SMITH became aware that Mr. Tezak  
21 and Mr. Martin prepared draw schedules by which Mr. Martin expected  
22 to receive additional bond funds to construct the infrastructure for  
23 HHSD's 15 acres. By mid-October, 2000, Mr. SMITH knew and  
24 understood that Mr. Martin and Mr. Tezak had prepared these schedules  
25 well knowing that there was no private funding in place for construction  
26 of the office buildings.

- 17 i. Mr. Tezak told Mr. SMITH that he had arranged the approximately \$63  
18 million in private financing for construction of the private component of  
19 the Silver Sound Corporate Center and for the guarantee for the bonds.  
20 Mr. Tezak identified to Mr. SMITH the individual who was to provide  
21 the funds. Mr. Tezak claimed that this individual (who has the initials  
22 DB) had large amounts of money that he was willing to lend for the  
23 Silver Sound project. Mr. SMITH learned, either by the time of closing  
24 or shortly thereafter, that Mr. Tezak's claims were false. Mr. SMITH  
25 later learned from Mr. Martin that DB had never agreed to loan the  
26 funds.
- 27 j. At the time of bond closing, Mr. Martin's company Silver Legacy was  
28 paid about \$1.2 million out of the bond proceeds, purportedly as  
29 reimbursement for costs his company had previously incurred on the  
Silver Sound project. Mr. SMITH knew and understood that the bond  
proceeds could be used only to reimburse for work already performed  
and could not be disbursed for future work or any type of credit. Mr.  
SMITH was aware of Mr. Martin's reimbursement request and knew that

1 significant portions of the request were for work that had not in fact been  
2 performed. Mr. SMITH also knew that a large portion of the request was  
3 related to costs which had purportedly been incurred by the prior owner  
4 and was purportedly transferred to Mr. Martin. Mr. SMITH knew and  
5 understood that any reimbursement for private costs was contrary to  
6 restrictions contained in the bond documents. He also knew that the  
7 purported transfer was pursuant to a document that Mr. Martin and Mr.  
8 Tezak generated and back-dated. Mr. SMITH knew and understood that  
9 Mr. Martin's reimbursement request was false and fraudulent.

10 k. At the time of bond closing on or about October 26, 2000 Mr. SMITH  
11 signed a certification as counsel for the developer, Mr. Martin, affirming  
12 that information from the developer and information in the bond  
13 documents was true and accurate. That certification was false. Mr.  
14 SMITH knew and understood that many representations made by Mr.  
15 Martin and many representations contained in the bond documents were  
16 false and fraudulent.

17 l. Mr. SMITH was aware that on or about December 7, 2000, Mr. Martin  
18 and the HHSD Engineer, Les Killingsworth, submitted another pay  
19 request in the approximate amount of \$902,000. Mr. Martin directed Mr.  
20 SMITH not to reveal this pay request and the accompanying invoices  
21 were false and fraudulent in that they claimed payment for work that had  
22 not occurred. Mr. SMITH attempted without success to persuade Mr.  
23 Martin not to submit the request. Mr. SMITH alerted the HHSD Board of  
24 Commissioners that another pay request was coming and that essentially  
25 no work had been done. The HHSD Board thereafter disapproved the  
26 pay request.

27 m. From about February 1999 until about June 2001, Mr. SMITH was paid  
28 a monthly retainer by Mr. Martin of approximately \$6,800. Mr. SMITH  
29 also received \$100,000, beyond his retainer, from bond proceeds at the  
time the board issuance closed on about October 26, 2000. Additionally,  
Mr. SMITH and Mr. Martin had agreed that Mr. SMITH would receive  
further amount ranging from \$100,000 to \$500,000 for assistance on this  
and other projects.

n. Mr. SMITH was aware from discussions with Mr. Martin and Mr. Tezak  
that Mr. Tezak was to be paid for his role in purportedly arranging  
private financing for the Silver Sound Corporate Center project. Mr.  
SMITH also learned, at a later time, that Mr. Martin in fact paid Mr.  
Tezak \$50,000 for these services shortly after bond closing on October  
26, 2000.

- 1           o.     Mr. SMITH's actions as described above were taken knowingly,  
2                 deliberately and with the intent to defraud. He knowingly conspired and  
3                 agreed with others to commit the offenses of securities fraud and wire  
4                 fraud.
- 5           p.     The above acts occurred within the Western District of Washington  
6                 (Exhibits A-102).

7           The statements of facts contained in the superseding plea agreement were identical to  
8 those set forth in the original plea agreement at paragraph 8, a – p executed by Mr. SMITH on  
9 April 28, 2004.

10           4.6    Knowing Admission of Facts: At the time of his entering his plea on June 1,  
11 2005 to the Superseding Indictment pursuant to the superseding Plea Agreement, the  
12 respondent was sworn in and under oath stated:

- 13           1.     That he was "totally competent" (Exhibit A-106 @ page 7, lines 24-25).
- 14           2.     That he freely and voluntarily entered into the plea agreement and no  
15                 threats or promises were made, other than those contained in the plea  
16                 agreement (Exhibit A-107 page 5 lines 17-20).
- 17           3.     That he had no questions about the elements of the crime as charged  
18                 (Exhibit A-106 page 10 lines10-13).
- 19           4.     That he was knowingly and voluntarily waiving the followed rights: (a)  
20                 the right to plead not guilty and persist in a plea of not guilty; (b) the  
21                 right to a speedy trial and public trial before a jury of his peers; (c) the  
22                 right to effective assistance of counsel at trial, including the right to have  
23                 the Court appoint an attorney for him if he could not afford one; (d) the  
24                 right to be presumed innocent until and unless the guilt has been  
25                 established at trial beyond a reasonable doubt; (e) the right to confront  
26                 and cross-examine the witnesses against him at trial; (f) the right to  
27                 compel or subpoena witnesses to appear on his behalf at trial; (g) the  
28                 right to testify or remain silent at trial, and should he remain silent a trial,  
29                 such silence could not be used against him; (h) the right to appeal a  
               finding of guilt or any pretrial rulings made by the court (Exhibit A-106  
               pages 11 lines 8-25 page12 lines1-22).
- 5.     That respondent Smith had had the opportunity to review the lengthy  
               statement of facts set forth in paragraph 8 of the plea agreement which

1 started on page 4 of that document and continued onto page 10 and that  
2 he was admitting those facts at his hearing (Exhibit A-106' page 15,  
3 lines 6-13).

- 4 6. That respondent and his counsel, Fred Zulauf had received the prepared  
5 plea agreement from the government and had "worked on it therefrom"  
6 (Exhibit A-106 page 15 lines 16-18).
- 7 7. That respondent stated in court that he understood the facts set forth in  
8 the plea agreement and he could not later disagree with those facts  
9 (Exhibit A-106 page 16 lines 14-19).
- 10 8. That the Court at the hearing of June 1, 2005 reviewed the collateral  
11 consequences of a plea of guilty which were not contained in the plea  
12 agreement and those included the right to vote, the right to possess a  
13 firearm, and "of course, though your license to practice law is affected"  
14 (Exhibit A-107, pg. 10, lines 19-25, page 11 lines 1-3).
- 15 9. That Mr. Smith acknowledged he was aware entering a plea of guilty to  
16 the offense could affect the rights described by the Court (Exhibit A-  
17 107).
- 18 10. That the Court found that "Mr. Smith has made this plea of guilty  
19 knowingly and voluntarily. He understands his rights, and he intends to  
20 waive them by entering this guilty plea." (Exhibit A-107 page 12 lines 5-  
21 8).
- 22 11. That Mr. Smith was aware of the consequences of his actions and stated  
23 under oath at his sentencing hearing "...obviously, I'm going to lose my  
24 license and I don't intend to ask for it back. You know, I don't know if I  
25 could practice. I have lost my integrity through this process, my  
26 reputation, and I don't think going and trying to start it up again is  
27 something I should do. I don't intend to do that." (Exhibit A-108 page  
28 21 lines 23-25, page 22 lines 1-4).

29 **V. CONCLUSIONS OF LAW**

Based upon the forgoing finding, the Hearing Officer now makes the following  
conclusions of law:

5.1 Violation RPC 1.2(d): The Respondent's actions violated RPC 1.2(d) which  
provides:

1 A lawyer shall not counsel a client to engage, or assist a client, in conduct  
2 that the lawyer knows is criminal or fraudulent, but a lawyer may discuss  
3 the legal consequences of any proposed course of conduct with a client  
4 and may counsel a client or assist a client to make a good faith effort to  
5 determine the validity scope and meaning of the applicable law. Lawyers  
6 shall not counsel a client to engage or assist a client in conduct that the  
7 lawyer knows is criminal or fraudulent. (Emphasis added).

8 Respondent Smith admitted in writing, not once but twice, to facts establishing his  
9 knowing participation in a conspiracy to commit fraud. The admission of facts contained in  
10 both the plea agreements were acknowledged “voluntarily, intelligently, and knowingly”, in  
11 open court before respondent entered his plea of guilty. There were two hearings at which  
12 respondent entered his plea of guilty and admitted to the facts set forth at paragraph 3.5 (a – p)  
13 above.

14 The actions admitted by Mr. Smith and as alleged in the Formal Complaint by the Bar  
15 association constitute a clear violation of RPC 1.2 (d).

16 5.2 Violation of RPC 4.1: The respondent’s actions violated RPC 4.1(a) and (b).

17 That RPC provides as follows:

18 In the course of representing a client a lawyer shall not knowingly:

- 19 a. Make a false statement of material fact or law to a third person; or  
20 b. Fail to disclose a material fact to a third person when disclosure is necessary  
21 to avoid assisting a criminal or fraudulent act by a client ...

22 Respondent Smith violated both RPC 4.1 and (6) making misrepresentations of material  
23 facts as admitted in his plea agreement. Further, Mr Smith also failed to disclose the fraudulent  
24 and/or criminal acts of Terry Martin and others under the fact pattern he admitted in his plea  
25 agreement (and as alleged in the formal complaint).  
26

1 By his knowing and volitional actions, Mr. Smith clearly violated both RPC 4.2(a) and  
2 4.2(b).

3 5.3 Violations 8.4 (b): The Respondent violated RPC 8.4(b) which provides that it  
4 is misconduct for a lawyer to:

5 **Commit a criminal act that reflects adversely on a lawyer's honesty,**  
6 **trustworthiness, or fitness as a lawyer in other respects.**

7 The respondent committed the crime of conspiring with others in a plot to defraud  
8 HHSD and ultimately the bond holders. He admitted that much in his plea agreement(s) and  
9 testified to undertaking those actions in open court at the time he entered his plea.  
10

11 By participating in the Silver Sound conspiracy, respondent committed a criminal act  
12 which, reflected adversely on his honesty and trustworthiness. Respondent Smith had special  
13 skills as a lawyer and utilized those skills in assisting in the perpetuation of the fraud and  
14 financial damages to bond holders, bond underwriters, and the citizens of the Holmes Harbor  
15 Sewer District. Because of his position as a lawyer Mr. SMITH occupied a position of trust  
16 and knew or should have known people would rely on his honesty and forthrightness.  
17 Respondent's actions were not honest and as he testified in court at his sentencing, "I have lost  
18 my integrity through this process, my reputation..."  
19  
20

21 There can be no argument that by his actions, Mr. Smith did not adversely affect the  
22 public's perception of lawyers. His actions have enhanced the all too prevalent concept that  
23 members of our profession are dishonest and untrustworthy. The admitted facts demonstrate a  
24 clear violation of RPC 8.4 (b).  
25

26 5.4 Violation RPC 8.4(c): The Respondent violated RPC 8.4(c) which states it is  
27 professional misconduct for a lawyer to:  
28  
29



1 Generally, applying the ABA Standards involves a two-step process. The first is to  
2 determine a presumptive sanction by considering (1) the ethical duty violated; (2) the lawyer's  
3 mental state, and (3) the extent of the actual or potential injury caused by the misconduct. In re  
4 Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The second  
5 step is to consider any aggravating or mitigating factors that might alter the presumptive  
6 sanction. Id. The issues of the violations of Mr. Smith's ethical duties have been examined  
7 previously. It is of consequence that his actions were knowingly made. This was not a series  
8 of innocent mistakes, but a series of knowing separate acts made for the enrichment of his  
9 client and himself.

10  
11  
12 Turning to the, "injury", the term as used herein means harm to a client, the public, the  
13 legal system or the profession that results from a lawyer's misconduct. Injury may be actual or  
14 potential "[A] disciplinary proceeding does not require a showing of actual harm. . . . The  
15 rationale is the need for protection of the public and the integrity of the profession." Halverson,  
16 140 Wn.2d at 486.

17  
18 Although the injury caused by respondent to the profession, the Holmes Harbor Sewer  
19 District, and individual investors was profound, the relevant ABA Standard 5.1, (see below),  
20 assumes injury to the profession. No further showing of injury to individuals or other entities is  
21 required.

22  
23 ABA Standard 5.1 applies to Respondent's violation of RPC 1.2(d), 4.1(a), 4.1(b),  
24 8.4(b) and 8.4(c), and former RLD 1.1(a) (currently RPC 8.4(i)).

25 **5.1 *Failure to Maintain Personal Integrity***

26 **5.11 Disbarment is generally appropriate when:**

- 27 (a) a lawyer engages in serious criminal conduct, a necessary element of  
28 which includes intentional interference with the administration of  
29 justice, false swearing, misrepresentation, fraud, extortion,

1                   misappropriation, or theft; or the sale, distribution or importation of  
2                   controlled substances; or the intentional killing of another; or an  
3                   attempt or conspiracy or solicitation of another to commit any of  
4                   these offenses; or

5                   (b) a lawyer engages in any other intentional conduct involving  
6                   dishonesty, fraud, deceit, or misrepresentation that seriously  
7                   adversely reflects on the lawyer's fitness to practice. (Emphasis  
8                   Added)

9                   5.12 Suspension is generally appropriate when a lawyer knowingly engages in  
10                  criminal conduct which does not contain the elements listed in Standard 5.11  
11                  and that seriously adversely reflects on the lawyer's fitness to practice.

12                  5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any  
13                  other conduct that involves dishonesty, fraud, deceit, or misrepresentation and  
14                  that adversely reflects on the lawyer's fitness to practice law.

15                  5.14 Admonition is generally appropriate when a lawyer engages in any other  
16                  conduct that reflects adversely on the lawyer's fitness to practice law.

17                  In this case, both 5.11(a) and 5.11(b) apply. Respondent pled guilty to Conspiracy, a  
18                  felony, as described in the Superseding Indictment. The objects of the conspiracy, as described  
19                  in the Superseding Indictment (Ex. A-103), were:

20                  To unlawfully, knowingly, and willfully, directly and indirectly, by the use and  
21                  means and instrumentalities of interstate commerce, and of the mails, use and  
22                  employ, in connection with the purchase and sale of securities, manipulative and  
23                  deceptive devices and contrivances, by (a) employing devices, schemes and  
24                  artifices to defraud; (b) making untrue statements of material facts and omitting  
25                  to state material facts necessary to make the statements made, in light of the  
26                  circumstances in which they were made, not misleading; and (c) engaging in acts,  
27                  practices and courses of business which operated and would operate as a fraud  
28                  and deceit upon other persons, in violation of Title 15, United States Code,  
29                  Sections 78j(b) and 78ff(a) and Title 17, Code of Federal Regulations, Section  
                    240, 10b-5.

                    To knowingly and willfully transmit and cause to be transmitted by wire  
                    communications in interstate and foreign commerce, writings, signs, signals,  
                    picture and sounds, in furtherance of a scheme and artifice and to obtain money  
                    and property by means of false and fraudulent pretenses, representations and  
                    promises, in violation of Title 18, United States Code, Section 1343.

1 By his engaging in the admitted course of criminal conduct, Respondent violated RPC  
2 1.2(d), 4.1(a), 4.1(b), 8.4(b) and 8.4(c), and former RLD 1.1(a) (currently RPC 8.4(i)). The  
3 respondent knowing participation in such a conspiracy to defraud the public, and by his  
4 knowingly and willfully committing fraudulent, deceptive and dishonest acts in his capacity as  
5 a lawyer adversely reflect on his fitness to practice. Without any doubt Respondent's actions  
6 also reflect adversely on the legal profession as a whole.  
7

8 When deciding the appropriate sanction in a case where the lawyer has committed a  
9 crime, the Supreme Court shall consider the severe damage to the integrity of the profession.  
10 In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 846 P.2d 1330 (1993). In  
11 Petersen, the Court emphasized that it was ordering disbarment because "violations of the law  
12 by lawyers contribute to the erosion of respect for legal institutions and the law." Id. at 872.  
13 When lawyers intentionally commit criminal acts, imposition of the presumptive sanction of  
14 disbarment serves the crucial purpose of lawyer discipline in preserving public confidence in  
15 the legal system. Id.; see generally In re Pence, 91 Wn.2d 1, 2, 586 P.2d 850 (1978)  
16 ("conviction of a felony generally begets disbarment").  
17  
18

19 Respondent's actions are of the type and nature to erode the public's faith, trust, and  
20 respect for legal instructions and lawyers. The duty of a lawyer to be truthful and refrain from  
21 knowingly making misrepresentations are paramount to retaining the integrity of the legal  
22 system. Also, the duty of a lawyer to prevent misrepresentations being made by a client are a  
23 corner stone in the legal systems foundation.  
24  
25  
26  
27  
28  
29

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

VII. AGGRAVATING FACTORS

Section 9.22 of the ABA Standards sets forth a list of aggravating factors to be considered in deferring the appropriate disciplinary sanctions. The following aggravating factors apply in this matter:

- (a) **DISHONEST OR SELFISH MOTIVES:** From February 1999 until June 2001 Respondent Smith received a retainer of \$6,800 per month from his client. Additionally, the Respondent received \$100,000 following the bond closing, which only occurred based upon his false and fraudulent swearing of the bond document misrepresented the truthfulness of the statements of those bond documents. The total compensation was \$290,400. Further, Respondent had been promised a sum between \$100,000 and \$500,000 for future services. The factual pattern of this matter establish by the clear preponderance of the evidence that the respondent had a significant incentive to participate in the conspiracy and was functioning in his own self-interest based on his motivation for financial gain.
- (b) **A PATTERN OF MISCONDUCT:** Respondent Smith engaged in the activities which have led him to this point from 1999 through 2001 when the bond scam collapsed. During that timeframe, there were multiple acts in violation of the RPCs. The Respondent's actions can never be classified as a single act, but instead were a series of separate distinct actions all in the furtherance of the conspiracy in which he was a willing participant.
- (c) **SUBSTANTIAL EXPERIENCE IN THE PRACTICE OF LAW:** Respondent was admitted to practice in 1979 and had been engaged in the practice of law for almost 20 years when he began representing Terry Martin. His statement that he had not done this type of work of any great degree rings hollow as a defense. The actions which have lead him to this point were such blatant violations of the RPC's that it is inconceivable that Mr. Smith, as a lawyer with twenty years experience would not recognize them as violations.
- (d) **REFUSAL TO ACKNOWLEDGE WRONGFUL NATURE OF CONDUCT:** At his sentencing the Respondent made statements before Judge Lasnick which, before receiving his sentence sounded genuinely contrite. The answer and affirmative defenses evidence a total lack of contrition on Mr. Smith's part and he tries to claim that his plea agreement was not bargained for. Unfortunately, his testimony at his hearing evidences the contrary. In exchange for his plea he received a substantially reduced sentence. He stated under oath he and his counsel had worked on the agreement, etc. Interestingly, no remorse is expressed for the multiple victims he helped defraud by his actions.

1 VIII. MITIGATING FACTORS

2 The ABA Standards at Section 9.32 sets forth a list of mitigating factors. The following  
3 is the only mitigating factor to apply in this proceeding:  
4

5 (a) ABSENCE OF A PRIOR DISCIPLINARY RECORD: Mr. Smith has no  
6 prior violation of the Rules of Professional Conduct.

7 The criminal sentence imposed upon Mr. Smith is not a mitigating factor in this matter.  
8 In Re Disciplinary Proceedings Against Perez-Pena, 161 Wn.2d 820, 835 (2007) the issue was  
9 raised of whether or not serving a criminal sentence should be considered as a mitigating factor.  
10 The Perez-Pena Court soundly rejected respondent's argument that a criminal punishment  
11 should somehow mitigate the disciplinary sanction, citing: In re Disciplinary Proceeding  
12 Against Haley, 156 Wn.2d 324, 126 P.3d 1262 (2006):  
13

14 In *Haley*, we rejected the proposition that disciplinary proceedings are a  
15 punishment scheme, noting that "our primary concern is with protecting the  
16 public and deterring other lawyers from similar misconduct."

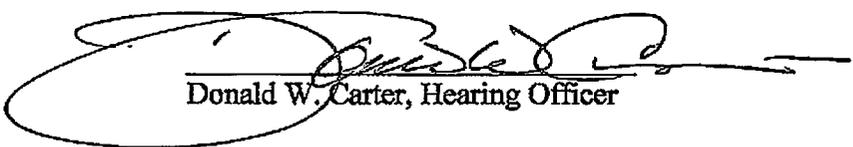
17 Here in this instance, because the offense was so serious as to require a prison sentence,  
18 the most severe disciplinary sanction is appropriate.

19 The mere fact that the Respondent spent time in prison is not a factor which should  
20 somehow lessen the sanction imposed for his serious and multiple violations of the Rules of  
21 Professional Conduct.  
22

23 IX. RECOMMENDATION

24 The only recommendation the Hearing Office can make at this time is that the  
25 Respondent be disbarred.  
26

DATED this 7<sup>th</sup> day of January, 2009.

  
Donald W. Carter, Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the ~~the Hearing Findings, Conclusion, and Recommendation~~  
to be delivered to the Office of Disciplinary Counsel and to be mailed  
to Kurt R. Baker, Respondent/Respondent's Counsel  
at 745 Belmont Street, Seattle WA, by Certified/~~first class~~ mail,  
postage prepaid on the 14 day of January, 2009.

Baker COJ  
Clerk/Counsel to the Disciplinary Board

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

# APPENDIX D

FILED

OCT 21 2009

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re

**J. DAVID SMITH,**  
Lawyer (WSBA No. 8993)

Proceeding No. 04#00032

AMENDED DISCIPLINARY BOARD  
ORDER

This matter came before the Disciplinary Board at its July 24, 2009 meeting, on automatic review of Hearing Officer Donald W. Carter's decision recommending disbarment following a hearing. The parties jointly requested amendments to the order.

Having heard oral argument and reviewed the materials submitted by the parties, and the applicable case law and rules;

**IT IS HEREBY ORDERED THAT** the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation are adopted with the following modifications. The Board affirms the violations of RPC 8.4(b), 8.4(c) and 8.4(i). The Board concludes that the record does not support violations of RPCs 1.2(d) and 4.1. The Board agrees that the appropriate sanction is disbarment.<sup>1</sup>

**CONCLUSION OF LAW 5.1**

The record does not establish a violation of RPC 1.2(d) by a clear preponderance

<sup>1</sup> The vote on this matter was unanimous. Those voting were Anderson, Bahn, Barnes, Cena, Coppinger-Carter, Greenwich, Handmacher, Meehan, Stiles and Ureña.

1 of the evidence. The allegation of a violation of RPC 1.2(d) is dismissed.<sup>2</sup>

## 2 CONCLUSION OF LAW 5.2

3 The record does not establish a violation of RPC 4.1 by a clear preponderance of  
4 the evidence. The allegations of violations of RPC 4.1(a) and (b) are dismissed.<sup>3</sup>

## 4 DISCUSSION

5 The hearing officer decided this matter on the pleadings pursuant ELC 10.10. Pursuant  
6 to ELC 10.10(d) the Hearing Officer could only consider the complaint and answer. (BF 056)  
7 The charging language in the Formal Complaint states: "by committing the acts that resulted in  
8 the conviction for Conspiracy as set forth above, Respondent violated RPC 1.2(d), 4.1(a),  
9 4.1(b), 8.4(b) and/or 8.4(c), and/or former RLD 1.1(a) (currently RPC 8.4(i))." The elements of  
10 Respondent's crime do not involve counseling or assisting clients. Although the facts in the  
11 Complaint and Answer establish the criminal conduct, they do not establish violations of RPC  
12 1.2(d)<sup>4</sup>, RPC 4.1(a)<sup>5</sup> or 4.1(b)<sup>6</sup>. The allegations in the complaint do establish violations of RPC

11 <sup>2</sup> The Hearing Officer's Conclusion of Law 5.1 stated: "Violation of RPC 1.2(d): The Respondent's actions violated  
12 RPC 1.2(d) which provides: A lawyer shall not counsel a client to engage, or assist a client, in conduct that the  
13 lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course  
14 of conduct with a client and may counsel a client or assist a client to make a good faith effort to determine the  
15 validity, scope and meaning of the applicable law. Lawyers shall not counsel a client to engage or assist a client in  
16 conduct that the lawyer knows is criminal or fraudulent. (Emphasis added). Respondent Smith admitted in  
17 writing, not once but twice, to facts establishing his knowing participation in a conspiracy to commit fraud. The  
admission of facts contained in both the plea agreements were acknowledged "voluntarily, intelligently, and  
knowingly," in open court before respondent entered his plea of guilty. There were two hearing at which  
respondent entered his plea of guilty and admitted to the facts set forth at paragraph 3.5 (a-p) above. The  
actions admitted by Mr. Smith and as alleged in the Formal Complaint, by the Bar association[sic] constitute a  
clear violation of RPC 1.2(d)."

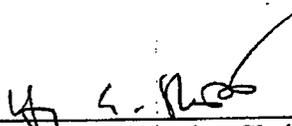
15 <sup>3</sup> The Hearing Officer's Conclusion of Law 5.2 stated: "Violation of RPC 4.1: The respondent's actions violated RPC  
16 4.1(a) and (b). That RPC provides as follows: in the course of representing a client, a lawyer shall not knowingly:  
17 (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third  
person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. . .  
Respondent Smith violated both RPC 4.1 and (6)[sic] making misrepresentations of material facts as admitted in  
his plea agreement. Further, Mr. Smith also failed to disclose the fraudulent and/or criminal acts of Terry Martin  
and others under the fact pattern he admitted in his plea agreement (and as alleged in the formal complaint). By  
his knowing and volitional actions, Mr. Smith clearly violated both RPC 4.2(a) and 4.2(b)."

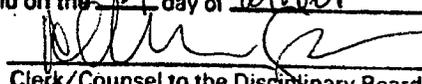
17 <sup>4</sup> RPC 1.2(d) states: "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer  
knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of

1 8.4(b), 8.4(c) and 8.4(i).

2 The Board agrees with the Hearing Officer that disbarment is the appropriate sanction  
3 based on ABA Standard 5.11(a).

4 Dated this 21st day of October, 2009.

5   
6 H.E. Stiles, II Acting Chair  
7 Disciplinary Board

8  
9  
10  
11 **CERTIFICATE OF SERVICE**  
12 I certify that I caused a copy of the Amended Disciplinary Board Order  
13 to be delivered to the Office of Disciplinary Counsel and to be mailed  
14 to RUTH BURMAN Respondent/ Respondent's Counsel  
15 at FLORIAN MONTI - 11-11-09 11-11-09 by Certified/first class mail  
16 postage prepaid on the 21st day of October, 2009  
17   
Clerk/Counsel to the Disciplinary Board

15 conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity,  
16 scope, meaning or application of the law."

16 <sup>5</sup> RPC 4.1(a) states: "in the course of representing a client a lawyer shall not knowingly make a false statement of  
17 material fact or law to a third person."

17 <sup>6</sup> RPC 4.1(b) states: " in the course of representing a client a lawyer shall not knowingly fail to disclose a material  
disclosure if prohibited by Rule 1.6."

# APPENDIX E

Jurisdiction	Rule	Text
Alaska	AK State Bar Rule 26(c)	A certificate of conviction for any crime will be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against an attorney based upon the conviction.
Arizona	AZ Supreme Court Rule 53(h)(1)	Proof of conviction shall be conclusive evidence of guilt of the crime for which convicted in any discipline proceeding based on the conviction.
Arkansas	AR Proc. Regulating Prof. Conduct of Attorneys § 15(c)(3)	A certified copy of the judgment of conviction shall be conclusive evidence of the attorney's guilt.
California	CA Bus. & Prof. Code §6101(a)	Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension. In any proceeding, whether under this article or otherwise, to disbar or suspend an attorney on account of that conviction, the record of conviction shall be conclusive evidence of guilt of the crime of which he or she has been convicted.
Colorado	CO Rules of Proc. Re Attorney Disc. Rule 251.20(a)	Proof of Conviction. Except as otherwise provided by these Rules, a certified copy of the judgment of conviction from the clerk of any court of criminal jurisdiction indicating that an attorney has been convicted of a crime in that court shall conclusively establish the existence of such conviction for purposes of disciplinary proceedings in this state and shall be conclusive proof of the commission of that crime by the respondent.
Connecticut	CT Superior Court Rules, Practice Book § 2-41(e)	Upon receipt of the written notice of conviction the disciplinary counsel shall obtain a certified copy of the attorney's judgment of conviction, which certified copy shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that attorney on the basis of the conviction.
District of Columbia	DC Bar Rule XI Section 10	Proof of Criminal Convictions. A certified copy of the court record or docket entry of a finding that an attorney is guilty of any crime, or of a plea of guilty or nolo contendere by an attorney to a charge of any crime, shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based thereon.
Florida	FL State Bar Rule 3-7.2(b)	Determination or Judgment of Guilt, Admissibility; Proof of Guilt. Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial of or plea to any crime under the laws of this state, or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, shall be admissible in proceedings under these rules and shall be conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules.  Reported case: <u>The Florida Bar v. Kandekore</u> , 766 So. 2d 1004 (FL 2000)
Hawaii	HI Supreme Court Rule 2.13(e)	The final conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.
Idaho	ID Bar Comm'n Rule 512(c)	Conviction as Conclusive Evidence. The final conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.

Jurisdiction	Rule	Text
Illinois	Ill Supreme Court Rule 761(f)	Proof of Conviction. In any hearing conducted pursuant to this rule, proof of conviction is conclusive of the attorney's guilt of the crime.
Iowa	Iowa Code § 602.10122(1) Iowa Court Rules R 35.7(3)	Iowa Code § 602.0122 The following are sufficient causes for revocation or suspension: 1. When the attorney has been convicted of a felony. The record of conviction is conclusive evidence.  Iowa Court Rules, Rule 35.7(3) Principles of Issue Preclusion may be used by either party in a lawyer discipline case if all of the following conditions exist: a. The issue has been resolved in a civil proceeding that resulted in a final judgment, or in a criminal proceeding that resulted in a finding of guilt, even if the Iowa Supreme Court Attorney Disciplinary Board was not a party to the prior proceeding. b. The burden of proof in the prior proceeding was greater than a mere preponderance of the evidence. c. The party seeking preclusive effect has given written notice to the opposing party, not less than ten days prior to the hearing, of the party's intention to invoke issue preclusion.
Kansas	Rules Re Disc, of Attorneys Rule 202	. . . A certificate of a conviction of an attorney for any crime or of a civil judgment based on clear and convincing evidence shall be conclusive evidence of the commission of that crime or civil wrong in any disciplinary proceeding instituted against said attorney based upon the conviction or judgment.
Louisiana	LA Supreme Court Rule 19 Section 19 (E)	. . . At the hearing before a hearing committee, the certificate of the conviction of the respondent shall be conclusive evidence of his/her guilt of the crime for which he/she has been convicted.
Maine	ME Bar Rule 7.3 (d)(2)	A certificate of final judgment of conviction of any attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based upon the conviction subject to the provisions of paragraph (5) below.
Maryland	MD Rules, Rule 16.771(g)	Conclusive Effect of Final Conviction of Crime. In any proceeding under this Chapter, a final judgment of any court of record convicting an attorney of a crime, whether the conviction resulted from a plea of guilty, nolo contendere, or a verdict after trial, is conclusive evidence of the guilt of the attorney of that crime.
Massachusetts	MA SJC Rule 4:01 Section 12(2)	A conviction of a lawyer for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that lawyer based upon the conviction.
Michigan	MI Court Rule 9.120(B)(2)	In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.  Reported Case: <u>Grievance Administrator v. Deutch</u> , 455 Mich. 149, 565 N.W. 2d 369 (1997)

Jurisdiction	Rule	Text
Minnesota	MN Rules on Lawyer Prof. Resp. Rule 19(a)	Criminal Conviction. A lawyer's criminal conviction in any American jurisdiction, even if upon a plea of nolo contendere or subject to appellate review, is, in proceedings under these Rules, conclusive evidence that the lawyer committed the conduct for which the lawyer was convicted. The same is true of a conviction in a foreign country if the facts and circumstances surrounding the conviction indicate that the lawyer was accorded fundamental fairness and due process.
Mississippi	MS State Bar Disc. Rule 6(a)	Whenever any attorney subject to the disciplinary jurisdiction of the Court shall be convicted in any court of any state or in any federal court, or enter a plea of guilty or a plea of nolo contendere therein, or tender a guilty plea pursuant to the provisions of Miss.Code Ann. § 99-15-26 (Supp.1993), or any similar provision in state or federal law therein of any felony (other than manslaughter) or of any misdemeanor involving fraud, dishonesty, misrepresentation, deceit, or willful failure to account for money or property of a client, a certified copy of the judgment of conviction or order accepting or acknowledging the offer or tender of a guilty plea pursuant to the provisions of Miss.Code Ann. § 99-15-26 (Supp.1993), or any similar provision in state or federal law shall be presented to the Court by Complaint Counsel and shall be conclusive evidence thereof.
Montana	MT Rules for Lawyer Disc. Enforcement Rule 23(D)	Certificate of Conviction Conclusive. A certificate of conviction of a lawyer for a criminal offense shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the lawyer based upon the conviction.
Nebraska	NE Court Rule § 3-326(A)	For the purposes of Inquiry of a Complaint or Formal Charges filed as a result of a finding of guilt of a crime, a certified copy of a judgment of conviction constitutes conclusive evidence that the attorney committed the crime, and the sole issue in any such Inquiry should be the nature and extent of the discipline to be imposed.
Nevada	NV Supreme Court Rule 111(5)	Certified document conclusive. A certified copy of proof of a conviction is conclusive evidence of the commission of the crime stated in it in any disciplinary proceeding instituted against an attorney based on the conviction.
New Hampshire	NH Supreme Court Rule 37(9)(c)	A certified copy of any court record establishing the conviction of an attorney for any "serious crime" shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.
New Jersey	NJ Rules of Disc. Of Members of the Bar Rule 1:20-13(c)(1)	Conclusive Evidence. In any disciplinary proceeding instituted against an attorney based on criminal or quasi-criminal conduct, the conduct shall be deemed to be conclusively established by any of the following: a certified copy of a judgment of conviction, the transcript of a plea of guilty to a crime or disorderly persons offense, whether the plea results either in a judgment of conviction or admission to a diversionary program, a plea of no contest, or nolo contendere, or the transcript of the plea.
New Mexico	NMRA, Rule 17-207(C)	Evidence of Commission of Crime. A judgment or plea of guilty or no contest by an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based upon the conviction.
New York	NY Court Rules § 603.12(c)	A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him and based on the conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime

Jurisdiction	Rule	Text
		except such evidence as was not available either at the time of the conviction or in any proceeding challenging the conviction.
North Carolina	NC State Bar Rules Ch.1, Subch. B .0115 (c)	A certificate of the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.
North Dakota	ND Rules for Lawyer Discipline, Rule 4.1(f)	Certificate Conclusive. A certificate of a conviction of an attorney for any crime is conclusive evidence of the commission of that crime in any disciplinary proceeding based upon the conviction.
Ohio	OH State Govt Bar Rule, Sect. 5(B)	Conclusive evidence. A certified copy of a judgment entry of conviction of an offense or of a determination of default under a child support order shall be conclusive evidence of the commission of that offense or of the default in any disciplinary proceedings instituted against a justice, judge, or an attorney based upon the conviction or default.
Oklahoma	OK Rules Governing Disciplinary Proceedings, Rule 7.2	The clerk of any court within this State in which a lawyer is convicted or as to whom proceedings are deferred shall transmit certified copies of the Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and judgment and sentence of conviction to the Chief Justice of the Supreme Court and to the General Counsel of the Oklahoma Bar Association within (5) days after said conviction. The documents may also be furnished to the Chief Justice by the General Counsel. Such documents, whether from this jurisdiction or any other jurisdiction shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules.
Oregon	ORS 9.527(2)	The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:  ... (2) The member has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States, in any of which cases the record of the conviction shall be conclusive evidence;
Pennsylvania	PA Rules for Disc. Enforcement, Rule 214(e)	A certificate of conviction of an attorney for a crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.
Rhode Island	RI Supreme Court Rules, Discipline Procedure for Attorneys, Rule 12(b)	A certificate of a conviction of an attorney for such a crime shall be conclusive evidence of the conviction of that crime in any disciplinary proceeding instituted against him or her based upon the conviction.
South Carolina	SC Rules for Lawyer Disc. Enforcement, Rule 16(d)	Conviction as Conclusive Evidence. A certified copy of a judgment of conviction constitutes conclusive evidence that the lawyer committed the crime, and the sole issue in any disciplinary proceedings based on the conviction shall be the nature and extent of the discipline imposed.

Jurisdiction	Rule	Text
South Dakota	SDCL § 16-19-58	A certificate of conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based upon the conviction.
Tennessee	TN Supreme Court Rule 14.3	A certificate of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.
Texas	Texas Statute § 81.078(d)	In an action to disbar any attorney for acts made the basis of a conviction for a felony involving moral turpitude or a misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, the record of conviction is conclusive evidence of the guilt of the attorney for the crime of which he was convicted.
Utah	UT Rules Gov. State Bar, Rule 14-519(e)	Conviction as conclusive evidence. Except as provided in paragraph (b), a certified copy of a judgment of conviction constitutes conclusive evidence that the respondent committed the crime.
Washington	ELC 10.14(c)	Proceeding Based on Criminal Conviction. If a formal complaint charges a respondent lawyer with an act of misconduct for which the respondent has been convicted in a criminal proceeding, the court record of the conviction is conclusive evidence at the disciplinary hearing of the respondent's guilt of the crime and violation of the statute on which the conviction was based.
West Virginia	WV Lawyer Discipline Rule 3.18(e)	Upon receipt of the order or judgment, which shall be conclusive evidence of the guilt of the crime or crimes of which the lawyer has been convicted, the Office of Disciplinary Counsel shall prepare formal charges to be filed with the Clerk of the Supreme Court of Appeals, with a copy provided to the Chairperson of the Hearing Panel of the Lawyer Disciplinary Board.
Wisconsin	WI Supreme Court Rule 22.20(5)	Proof of guilt. In a proceeding based on an attorney's having been found guilty or convicted of a crime, a certified copy of the record in the proceeding or the certificate of conviction shall be conclusive evidence of the attorney's guilt of the crime of which found guilty or convicted.
Wyoming	Disciplinary Code for WY State Bar § 18(d)	A certified copy of the judgment of conviction of a serious crime as defined in Section 3(h) shall be conclusive evidence of the commission of that crime in any disciplinary proceeding.
United State Dept. of Justice, Executive Office for Immigration Review (EOIR)	[Re: discipline of attorneys who practice before Immigration Courts or BIA]  C.F.R. § 1003.103(b)(!)	In matters concerning criminal convictions, a certified copy of the court record, docket entry, or plea shall be conclusive evidence of the commission of the crime in any summary disciplinary proceeding based thereon.