200750-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re J. David Smith, Lawyer (Bar No. 8993).	Supreme Court No. 200,750-3 ASSOCIATION'S PETITION FOR INTERIM SUSPENSION (ELC 7.2(a)(2))

As required by Rule 7.2(a)(2) of the Rules for Enforcement of Lawyer Conduct (ELC), the Washington State Bar Association petitions this Court for an Order suspending Respondent J. David Smith from the practice of law during the remainder of disciplinary proceedings against him. This petition is based on the Amended Disciplinary Board Order filed October 21, 2009. The Board unanimously recommended that Respondent be disbarred for his violations of RPC 8.4(b), 8.4(c), and 8.4(i).

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BACKGROUND

In April 2004, Respondent was convicted of conspiracy, a felony, in violation of 18 U.S.C. § 371.[1] On May 25, 2004, this Court suspended Respondent from the practice of law under ELC 7.1(e)(1).[2] After a disciplinary hearing on December 10, 2008, the hearing officer

[1] Hearing, Findings, Conclusion, and Recommendation; attached hereto as Appendix A.

[2] Order of Suspension Pursuant to ELC 7.1, Supreme Court No. 200,132-7, attached as Appendix B.

recommended that Respondent be disbarred.[3] On September 29, 2009, the Disciplinary Board unanimously adopted the hearing officer's recommendation.[4] The Board filed a corrected decision with the same unanimous recommendation on October 21, 2009.[5] On October 1, 2009, Respondent filed a Notice of Appeal.

ARGUMENT

When the Board enters a decision recommending disbarment, disciplinary counsel *must* file a petition for the respondent's suspension during the remainder of the proceedings. ELC 7.2(a)(2).[6] The respondent *must* be suspended absent an affirmative showing by the respondent that his continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, or contrary to the public interest. Id.

The rule presumes that when the Board recommends disbarment, allowing the respondent to practice law pending appeal would be detrimental to the integrity and standing of the bar and the administration of justice, and contrary to the public interest. That presumption should be

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[3] Appendix A.

[4] Disciplinary Board Order, attached hereto as Appendix C.

[5] Amended Disciplinary Board Order, attached hereto as Appendix D.

[6] The rule provides that a petition need not be filed if the Board's decision is not appealed, but it does not provide an exception for a lawyer such as Respondent who is currently suspended under ELC 7.1(e)(1).

even stronger where, as here, the Board's decision is unanimous. Allowing Respondent, a convicted felon, to practice law pending appeal from a unanimous Board recommendation of disbarment would necessarily be detrimental to the integrity and standing of the bar and the administration of justice, and contrary to the public interest.

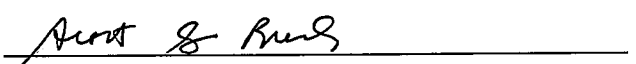
CONCLUSION

The Association respectfully asks this Court to issue an order under ELC 7.2(b)(2) requiring Respondent to appear before the Court to show cause why this petition should not be granted. The Association further asks that the Court issue an order suspending Respondent from the practice of law under ELC 7.2(a)(2) during the remainder of these proceedings.

DATED THIS 2d day of November, 2009.

Respectfully submitted,

WASHINGTON STATE BAR ASSOCIATION



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APPENDIX A

FILED
JAN 14 2009
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re:	
J. David Smith	Public No. 04#00032
Lawyer (Bar No.8993)	HEARING, FINDINGS, CONCLUSION, AND RECOMMENDATION

I. HEARING

Date: This matter came before Donald W. Carter, the undersigned Hearing Officer, on the 10th 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

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

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

II. FORMAL COMPLAINT

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

COUNT I

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

III. RESPONSE TO FORMAL COMPLAINT

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

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

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3.3 Respondent also asserts that the plea agreement he signed was an adhesion contract not bargained for between the government and himself.

3.4 Respondent denies responsibility for his actions in his Answer: Affirmative Defenses.

IV. FINDINGS OF FACT

The following facts were proven by a clear preponderance of the evidence:

4.1 Admission to Practice: Respondent J. David Smith was admitted to practice law in the state of Washington May 15, 1979.

4.2 Felony Charge – Conspiracy: On February 12, 2004 the respondent was charged with one count of conspiracy by the superseding indictment in the United States District Court for the Western District of Washington State under cause number CR 03-03770RSL (Exhibit A103).

4.4 Plea Agreement: Respondent J. David Smith executed a plea agreement on April 28, 2004 to the superseding indictment admitting that he had committed a violation of Title 18, USC, Section 371. In that plea agreement Mr. Smith agreed to the existence of the facts which are set forth at Paragraph 8 sub-paragraphs a - p of that document. At the hearing before the magistrate determined respondent's guilty plea was "knowingly, intelligently, and voluntarily made" (Exhibit A-101). On June 1, 2005 the respondent executed the superseding plea agreement in which he again entered a plea of guilty to the single count of conspiracy as alleged (Exhibit A-103). In that superseding plea agreement the respondent admitted for a second time committing the following elements of the offense of conspiracy in violation of Title 18 USC § 371:

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

- 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;

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

a. At all relevant times J. DAVID SMITH was an attorney licensed to practice law in the state of Washington. Mr. SMITH acted in that capacity for an individual named Terry Martin in connection with a series of development projects planned and pursued by Mr. Martin. Mr. SMITH also performed tasks other than providing legal advice.

b. Beginning in approximately late 1998, Mr. SMITH assisted Mr. Martin in the planning of a project called the Silver Sound Corporate Center, an office park comprised of six buildings and a total of more than 500,000 square feet of commercial office space to be located near Paine Field within the boundaries of the City of Everett, Washington. Mr. SMITH also assisted Mr. Martin in obtaining participations in the project by the Holmes Harbor Sewer District (HHSD) located on Whidbey Island, Washington. The plan involved HHSD issuing approximately $20 million in tax-exempt municipal bonds to acquire a portion of the development property and to construct public infrastructure such as sewage, drainage, water service and roads. The project included Mr. Martin's purported acquisition of an additional $43 million in private financing to construct six office buildings on the remaining portion of the property. Repayment of the bonds was to be made from assessments 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

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

d. Mr. SMITH knew and understood that construction of the Silver Sound Corporate Center was critical to the HHSD bond issuance and understood further that various permits and entitlements were required for construction to occur. Beginning in at least April 2000, Mr. SMITH was aware that Mr. Martin was making misrepresentations and false statements to HHSD and others concerning the status of the permits. In 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

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

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

g. At some point in time, Mr. SMITH also became aware that Edward Tezak had executed a document on behalf of a company named J. Zacket Enterprises, Inc., representing that the company was a subsidiary of R.A. King and indicating an intention to lease Silver Sound Corporate Center. Beginning in approximately September 2000, when Mr. Tezak began working in Mr. Martin's office (where Mr. SMITH also worked), and continuing until February 2001, when Mr. SMITH moved out, Mr. SMITH observed Mr. Tezak providing increasing assistance to Mr. Martin in the HHSD municipal bond matter. From his dealing with R.A. King and Mr. Martin, Mr. SMITH knew and understood that there was no relationship between R.A. King and Mr. Tezak or his company, J. Zacket Enterprises, Inc. At a later date Mr. Smith discovered the letter of intent from Mr. Tezak, and Mr. Smith understood the letter was false and 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.

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

i. Mr. Tezak told Mr. SMITH that he had arranged the approximately $63 million in private financing for construction of the private component of the Silver Sound Corporate Center and for the guarantee for the bonds. Mr. Tezak identified to Mr. SMITH the individual who was to provide the funds. Mr. Tezak claimed that this individual (who has the initials DB) had large amounts of money that he was willing to lend for the Silver Sound project. Mr. SMITH learned, either by the time of closing or shortly thereafter, that Mr. Tezak's claims were false. Mr. SMITH later learned from Mr. Martin that DB had never agreed to loan the funds.

j. At the time of bond closing, Mr. Martin's company Silver Legacy was paid about $1.2 million out of the bond proceeds, purportedly as 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

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

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

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

m. From about February 1999 until about June 2001, Mr. SMITH was paid a monthly retainer by Mr. Martin of approximately $6,800. Mr. SMITH 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.

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o. Mr. SMITH's actions as described above were taken knowingly, deliberately and with the intent to defraud. He knowingly conspired and agreed with others to commit the offenses of securities fraud and wire fraud.

p. The above acts occurred within the Western District of Washington (Exhibits A-102).

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

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

1. That he was "totally competent" (Exhibit A-106 @ page 7, lines 24-25).

2. That he freely and voluntarily entered into the plea agreement and no threats or promises were made, other than those contained in the plea agreement (Exhibit A-107 page 5 lines 17-20).

3. That he had no questions about the elements of the crime as charged (Exhibit A-106 page 10 lines10-13).

4. That he was knowingly and voluntarily waiving the followed rights: (a) the right to plead not guilty and persist in a plea of not guilty; (b) the right to a speedy trial and public trial before a jury of his peers; (c) the right to effective assistance of counsel at trial, including the right to have the Court appoint an attorney for him if he could not afford one; (d) the right to be presumed innocent until and unless the guilt has been established at trial beyond a reasonable doubt; (e) the right to confront and cross-examine the witnesses against him at trial; (f) the right to compel or subpoena witnesses to appear on his behalf at trial; (g) the right to testify or remain silent at trial, and should he remain silent a trial, 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

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

6. That respondent and his counsel, Fred Zulauf had received the prepared plea agreement from the government and had "worked on it therefrom" (Exhibit A-106 page 15 lines16-18).

7. That respondent stated in court that he understood the facts set forth in the plea agreement and he could not later disagree with those facts (Exhibit A-106 page 16 lines 14-19).

8. That the Court at the hearing of June 1,2005 reviewed the collateral consequences of a plea of guilty which were not contained in the plea agreement and those included the right to vote , the right to possess a firearm, and "of course, though your license to practice law is affected" (Exhibit A-107, pg. 10, lines 19-25, page11 lines 1-3).

9. That Mr. Smith acknowledged he was aware entering a plea of guilty to the offense could affect the rights described by the Court (Exhibit A-107).

10. That the Court found that "Mr. Smith has made this plea of guilty knowingly and voluntarily. He understands his rights, and he intends to waive them by entering this guilty plea." (Exhibit A-107 page 12 lines 5-8).

11. That Mr. Smith was aware of the consequences of his actions and stated under oath at his sentencing hearing "...obviously, I'm going to lose my license and I don't intend to ask for it back. You know, I don't know if I could practice. I have lost my integrity through this process, my reputation, and I don't think going and trying to start it up again is something I should do. I don't intend to do that." (Exhibit A-108 page 21 lines 23-25, page22 lines 1-4).

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:

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> 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 conduct with a client and may counsel a client or assist a client to make a good faith effort to determine the validity scope and meaning of the applicable law. Lawyers shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal or fraudulent. (Emphasis added).

Respondent Smith admitted in 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 hearings 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 constitute a clear violation of RPC 1.2 (d).

5.2 Violation of RPC 4.1: The respondent's actions violated RPC 4.1(a) and (b). That RPC provides as follows:

> In the course of representing a client a lawyer shall not knowingly:
>
> 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) 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).

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

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

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

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

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

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

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

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(c) Engage in conduct involving dishonestly, fraud, deceit, or misrepresentation.

The respondent admitted actions evidenced dishonestly, fraud, and deceit. When Respondent's misrepresentations were made, he knew or should have known that there would be reliance upon those misrepresentations. Based upon the facts of this matter, the only conclusion which can be reached is that the actions of Mr. Smith clearly violated RPC 8.4(c).

5.5 Violation RPC 8.4 (i) (formerly RLD 1.1): Rules of Professional Conduct at RPC 8.4 (i) formerly RLD 1.1 provide that it is misconduct for a lawyer to:

> (i) Commit any act involving moral turpitude or corruption ... or 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 conditioned preceded to disciplinary action, nor shall equital or dismissal thereof preclude the commencement of a disciplinary proceeding.

The respondent violated his position of trust as a lawyer for personal financial gain. For the same purpose Mr. Smith made and participated in the misleading and false representations which affected public welfare.

The Black Law definition of moral turpitude is:

"Conduct contrary to justice, honesty, modesty, or good morals." (Black Law Dictionary, 4th Edition, 1968).

VI. PRESUMPTIVE SANCTIONS

6.1 The Washington Supreme Court requires the Hearing Officer to apply the American Bar Association's Standards for Imposing Lawyer Sanctions in all cases involving the discipline of lawyers. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000); Johnson, 114 Wn.2d at 745.

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

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

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

ABA Standard 5.1 applies to Respondent's violation of RPC 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)).

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

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,

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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. (Emphasis Added)

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

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

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

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

> To unlawfully, knowingly, and willfully, directly and indirectly, by the use and 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) 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.

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By his engaging in the admitted course of criminal conduct, Respondent violated RPC 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 respondent knowing participation in such a conspiracy to defraud the public, and by his knowingly and willfully committing fraudulent, deceptive and dishonest acts in his capacity as a lawyer adversely reflect on his fitness to practice. Without any doubt Respondent's actions also reflect adversely on the legal profession as a whole.

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

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

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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.

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VIII. MITIGATING FACTORS

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

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

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

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

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

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

IX. RECOMMENDATION

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

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DATED this 7th day of January, 2009.

Donald W. Carter, Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the ~~the~~ Hearing, Finding, Conclusion, and Recommendation to be delivered to the Office of Disciplinary Counsel ~~and to be~~ mailed to Kurt Rubner, Respondent/Respondent's Counsel at 740 Belmont Pl E#, Seattle WA 98102, by Certified/~~first class mail~~, postage prepaid on the 14 day of January, 2009

Clerk/Counsel to the Disciplinary Board

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APPENDIX B

RECEIVED
MAY 26 2004

THE SUPREME COURT OF WASHINGTON

IN RE: J. DAVID SMITH, ATTORNEY AT LAW.	BAR NO. 8993 Supreme Court No. 200,132-7 ORDER OF SUSPENSION PURSUANT TO ELC 7.1

This matter came before the Supreme Court on the Washington State Bar Association's Petition for Immediate Interim Suspension of J. David Smith, pursuant to ELC 7.1, conviction of a crime. The petition is based upon J. David Smith pleading guilty on April 28, 2004, to Conspiracy (a felony), entered in United States v. J. David Smith, Cause No. CR03-0370RSL (W.D. Wa). Now, therefore, it is hereby

ORDERED:

J. David Smith is suspended from the practice of law in the State of Washington pending final disposition of disciplinary proceedings pursuant to ELC 7.1.

DATED at Olympia, Washington, this 25th day of May, 2004.

FILED
SUPREME COURT
STATE OF WASHINGTON
2004 MAY 25 P 12:08
BY C.J. MERRITT
CLERK

For the Court

Henry L. Alexander

CHIEF JUSTICE

451/192

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APPENDIX C

FILED

SEP 29 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 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.

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) and 8.4(c). 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.[1]

CONCLUSION OF LAW 5.1

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

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

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of the evidence. This count is dismissed.[2]

CONCLUSION OF LAW 5.2

The record does not establish a violation of RPC 4.1 by a clear preponderance of the evidence. This count is dismissed.[3]

DISCUSSION

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

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[2] The Hearing Officer's Conclusion of Law 5.1 stated:"Violation of RPC 1.2(d): The Respondent's actions violated RPC 1.2(d) which provides: 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 conduct with a client and may counsel a client or assist a client to make a good faith effort to determine the validity , scope and meaning of the applicable law. Lawyers shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal or fraudulent. (Emphasis added). Respondent Smith admitted in 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)."

[3] The Hearing Officer's Conclusion of Law 5.2 stated: "Violation of RPC 4.1: The respondent's actions violated RPC 4.1(a) and (b). That RPC provides as follows: in the course of representing a client, a lawyer shall not knowingly: (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)."

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

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4.1(a)[5] or 4.1(b)[6]. The allegations in the complaint do establish violations of RPC 8.4(b), 8.4(c) and 8.4(i).

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

Dated this 29th day of September, 2009.

H.E. Stiles, II Acting Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Disciplinary Board Order to be delivered to the Office of Disciplinary Counsel ~~and to be mailed~~ to Kurt Bullmer, Respondent/~~Respondent's Counsel~~ at 740 Belmont Pl. E #3 Seattle, WA 98102 by Certified/first class mail, postage prepaid on the 29th day of September, 2009.

Clerk/Counsel to the Disciplinary Board

[5] RPC 4.1(a) states:"In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."

[6] RPC 4.1(b) states:" in the course of representing a client a lawyer shall not knowingly 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, unless disclosure if prohibited by Rule 1.6."

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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.[1]

CONCLUSION OF LAW 5.1

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

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

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of the evidence. The allegation of a violation of RPC 1.2(d) is dismissed.[2]

CONCLUSION OF LAW 5.2

The record does not establish a violation of RPC 4.1 by a clear preponderance of the evidence. The allegations of violations of RPC 4.1(a) and (b) are dismissed.[3]

DISCUSSION

The hearing officer decided this matter on the pleadings pursuant ELC 10.10. Pursuant to ELC 10.10(d) the Hearing Officer could only consider the complaint and answer. (BF 056) The charging language in the Formal Complaint states: "by committing the acts that resulted in the conviction for Conspiracy as set forth above, Respondent violated RPC 1.2(d), 4.1(a), 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 Respondent's crime do not involve counseling or assisting clients. Although the facts in the Complaint and Answer establish the criminal conduct, they do not establish violations of RPC 1.2(d)[4], RPC 4.1(a)[5] or 4.1(b)[6]. The allegations in the complaint do establish violations of RPC

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[2] The Hearing Officer's Conclusion of Law 5.1 stated:"Violation of RPC 1.2(d): The Respondent's actions violated RPC 1.2(d) which provides: 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 conduct with a client and may counsel a client or assist a client to make a good faith effort to determine the validity , scope and meaning of the applicable law. Lawyers shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal or fraudulent. (Emphasis added). Respondent Smith admitted in 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)."

[3] The Hearing Officer's Conclusion of Law 5.2 stated: "Violation of RPC 4.1: The respondent's actions violated RPC 4.1(a) and (b). That RPC provides as follows: in the course of representing a client, a lawyer shall not knowingly: (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)."

[4] 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

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

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

Dated this 21st day of October, 2009.

H.E. Stiles, II Acting Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Amended Disciplinary Board Order to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bulmer, Respondent/Respondent's Counsel at 710 Belmont N-E #3 Seattle WA 98122 by Certified/first class mail, postage prepaid on the 21st day of October, 2009.

Clerk/Counsel to the Disciplinary Board

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

[5] RPC 4.1(a) states:"In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."

[6] RPC 4.1(b) states:" in the course of representing a client a lawyer shall not knowingly 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, unless disclosure if prohibited by Rule 1.6."

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