

No. 200,761-9

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In The  
**Supreme Court of the State of Washington**

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In re PAUL H. KING,  
*Attorney,*

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**On Appeal from the Washington State Bar Association**

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**BRIEF OF ATTORNEY**

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## **I. INTRODUCTION**

This case involves a motion to disqualify disciplinary counsel that was not ruled upon. The record was not settled by the Hearing Officer in accordance with the rules. Pled by Mr. King in the case below was that he lacked the opportunity to enter an *Alford* plea in the federal case and thus he is not automatically subject to disbarment for the conviction.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING**

### **Assignment of Error A:**

The disciplinary counsel, Scott Busby, WSBA # 17522, was disqualified for lack of appearance of fairness.

### **Issues Pertaining to Assignment of Error A:**

- 1) There has been misconduct on the part of Scott Busby, who knowingly had joint counsel with the Disciplinary Board.
- 2) Prosecution of the respondent attorney becoming intertwined with the investigative and adjudicative functions of the Disciplinary Board denies due process and lacks appearance of fairness.
- 3) Apparent ex parte contacts between Disciplinary Counsel, the Hearing Officer in another case, and members of the Disciplinary Board

required different Disciplinary Counsel.

- 4) Different Disciplinary Counsel should be appointed due to past misconduct by Mr. Busby

**Assignment of Error B**

A Motion to Disqualify Scott Busby, Sub 43, CP 103-115, was filed and was not decided as required by ELC 10.8(c) and (d).

**Issues Pertaining to Assignment of Error B:**

- 1) Should the Hearing Officer decide the Motion to Disqualify Scott Busby, Sub 43, CP 103-115, from the proceedings?

**Assignment of Error C:**

The transcript was not settled by the Hearing Officer as required under ELC 11.4.

**Issues Pertaining to Assignment of Error C:**

- 1) Are the Proposed Corrections, Sub 39, CP 96-97 incorporated?

**Assignment of Error D:**

The Hearing Officer and the Disciplinary Board recommended disbarment for Mr. King based on his felony conviction in federal court without consideration of the lack of opportunity in the federal courts to

enter an *Alford* plea.

**Issues Pertaining to Assignment of Error D:**

- 1) Lack of Opportunity to enter a negotiated *Alford* plea unfairly resulted in a lack of opportunity to contest disbarment.
- 2) As a federal defendant lacks an opportunity to enter a negotiated *Alford* plea, a federal plea should not bind civil litigation in the Washington courts.
- 3) Whether lack of opportunity to enter an *Alford* plea should avoid preclusive effect in subsequent proceedings is an issue of first impression and therefore should not be precluded.

**III. STATEMENT OF THE CASE**

**A. Fair Statement of the Facts**

A case under the Writs Act, chapter 7.16 RCW, was pending against Mr. Busby and the Disciplinary Board in *Scannell v. Busby*, King County Superior Court No. 06-2-33100-1 SEA. The case was filed on October 16, 2006 and presented to Mr. Busby on November 1, 2006.

An appearance was entered by Robert Welden, WSBA # 5947, for the WSBA for all the defendants, including the Disciplinary Board. The

matter was heard in King County Superior Court before the Honorable Judge Erlick. The matter was dismissed under theory that only the Washington State Supreme Court may hear matters relating to attorney discipline. This decision was upheld in Court of Appeals, Division One, No. 60623-9 and review was denied on September 30, 2009 by the Supreme Court of Washington, No. 83205-6.

During this litigation, a motion was filed by Robert Welden claiming that the plaintiff claimant's motions "were denied because they are without legal or factual basis". This motion was filed after the plaintiffs had only filed an amended petition but had yet to brief the issues or present any declarations from witnesses. This assertion demonstrates that members of the Disciplinary Board have prejudged that case without reading a single brief or hearing from a single witness in that case. The basis of their argument that the plaintiff's arguments were without "legal or factual basis" could only have been made by relying on the factual and legal assertions of their co-defendant Scott Busby. These assertions deal with the two primary issues of this case. First, the board has concluded that the grievances have been ruled upon. As can be seen from the

briefing, the Respondent Lawyer denies that his motions have been ruled upon. Second the Board has concluded that the motion was “without a legal or factual basis.” This means that the board has come to a conclusion without once considering the legal argument advanced by the Respondent Lawyer that are the subject of that action.

Furthermore, as can be seen from their briefs presented in the Court of Appeals in No. 60623-9 and this Court in No. 83205-6, the respondents have failed to alter their position, nor even address arguments raised by the petitioner. This demonstrates that not only have the board members prejudged the case apparently after consulting with disciplinary counsel through their joint counsel, they have been unwilling to alter their judgment in this case by even addressing the arguments raised by the petitioner, once it is brought to their attention. This clearly indicates that Scott Busby has poisoned the well with his ex parte contact with the Disciplinary Board.

To make these arguments, the Respondent Lawyer filed his Motion to Disqualify Scott Busby, Sub 43, CP 103-115, on July 20, 2009. However, the Hearing Officer entered his Findings of Fact, Conclusions of

Law, and Hearing Officer's Recommendation, Sub 44, CP 1-10 on July 30, 2009 without addressing the Motion to Disqualify Scott Busby.

As established by the testimony of Federal Public Defender Nancy Tenney, WSBA #35304, who represented Mr. King in *United States v. King*, W.D. Wash. No. Cr08-263, and by other evidence presented herein, Mr. King did not have an opportunity to enter a negotiated plea under *North Carolina v. Alford*, (1970) 400 U.S. 25, 27 L. Ed. 2d. 162, 91 S. Ct. 160 and *State v. Newton*, (1976) 87 Wash. 2d. 363, 552 P. 2d. 682. In such a plea, a defendant does not admit responsibility for the crime or the facts alleged, but concedes that a trial may result in a finding of guilty.

Ms. Tenny testified that it was her experience that *Alford* pleas are not allowed in the Western District of Washington. She testified that such an attempt to negotiate a plea would have been futile and she so advised her client.

**B. Procedural History:**

On December 16, 2008, the Formal Complaint, Sub 1, CP 14-18, was filed.

On January 7, 2009, the Answer to the Formal Complaint, Sub 6,

CP 25-27, was filed.

On February 20, 2009, the First Amended Formal Complaint, Sub 13, CP 36-40, was filed.

On March 18, 2009, the Hearing Schedule, Sub 14, CP 41-43, was filed.

On March 24, 2009, another First Amended Formal Complaint, Sub 16, CP 45-49, was filed.

On May 12, 2009, the Answer to Second Amended Formal Complaint, Sub 25, CP 63-66, was filed.

On July 20, 2009, the Motion to Disqualify Scott Busby, Sub 43, CP 103-115 was filed.

On July 30, 2009, the Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation, Sub 44, CP 1-10, was filed.

On July 31, 2009, another Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation, Sub 44.1, CP 126-136, was filed.

On August 6, 2009, the Association's Answer to Respondent's Motion to Disqualify Scott Busby, Sub 45, CP 137-278, was filed.

On September 27, 2009, Brief on Appeal to Disciplinary Board,

Sub 52, CP 281-288, was filed.

On September 8, 2009, the Association's Response to Hearing Officer's Recommendation, Sub 54, CP 289-315, was filed.

On December 3, 2009, the Disciplinary Board Order Adopting Hearing Officer's Decision, Sub 62, CP 11-12, was filed.

On December 18, 2009, the Notice of Appeal, Sub 65, CP 13, was filed.

#### IV. ARGUMENT

##### A. **There Has Been Misconduct on the Part of Scott Busby, Who Knowingly Had Joint Counsel With the Disciplinary Board**

By hiring joint counsel, Robert Welden, with the Disciplinary Counsel, and then prejudging the case on the basis of an investigation conducted by the Disciplinary Counsel, the Disciplinary Board has shown bias in that case.

At a minimum, these decision-makers should have put on the record the nature of the representation and the existence of any Chinese walls. By not doing so, there now is a clear presumption of ex parte contact that has not been addressed. Disciplinary Counsel claims that any litigant could sabotage his own prosecution ignores the simple remedy of

having the Bar appoint separate counsel for the hearing officer and the Disciplinary Board which would have easily resolved the issue.

The Disciplinary Board is acting as an appellate forum in a matter that may be reviewed by this Court. The Respondent Lawyer contends that as appellate judges the Board is subject to the Code of Judicial Conduct. The following opinions are relevant in determining the propriety of having the Disciplinary Board having joint counsel with the Disciplinary Counsel.

#### **Ethics Advisory Committee**

##### **Opinion 93-14**

###### Question

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

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

###### Answer

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

When an appellate court judge has retained an attorney, the appellate court judge is required to disclose that relationship when a member of that law firm appears in court on a totally unrelated matter and should recuse if there is any objection. This is also true

for cases which are presently under consideration but not yet decided.

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

In the Superior Court case, the Disciplinary Board, along with another hearing officer engaged Robert Welden, Bar Counsel as their attorney. Disciplinary Counsel. Mr. Busby practices with Mr. Welden in the same firm. This is an automatic disqualification.

In addition, since Mr. Busby has the same attorney for virtually the same issues before the Board, now indicate an ex parte contact and also is a direct violation of CJC 3.

### **Opinion 89-13**

#### **Question**

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

#### **Answer**

CJC Canon 3(C) requires judges to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. Therefore, a court commissioner may not hear any matters which are not agreed (whether the same be actively contested or any posture of default) in which the attorney who represents the commissioner in a lawsuit in the commissioner's

personal capacity is involved or the opposing counsel in the lawsuit is involved. This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination. The type of lawsuit is not relevant to the issue of disqualification. The court commissioner may hear matters in which the attorney is associated with either the commissioner's attorney or opposing counsel if 1) the commissioner discloses on the record the relationship to the commissioner's attorney or opposing counsel, 2) that attorney is not associated in any way with the commissioner's lawsuit and the commissioner's attorney or opposing counsel have not been involved in the matter before the commissioner, and 3) offers to recuse. The commissioner may enter all agreed orders brought by the commissioner's attorney, opposing counsel, or any of their associates.

In this case, a Hearing Officer, Disciplinary Counsel, Mr. Busby and the Disciplinary Board together have engaged Mr. Welden as their counsel. Canon 3(D) of the Code of Judicial Conduct imposes a duty on judges to disqualify themselves:

**(D) Disqualification.**

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: .

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In this case, the entire Disciplinary Board must disqualify themselves on the basis of this rule alone. By having their counsel file an answer declaring the grievances of the undersigned "frivolous", the Board

has demonstrated an incredible personal bias or prejudice concerning the Responding Lawyer and have also apparently gained personal knowledge of disputed evidentiary facts concerning the proceeding through Disciplinary Counsel.

This kind of appearance problem was addressed in *In re Discipline of Sanders*, (2006) 159 Wash. 2d 517, 524-525, 145 P.3d 1208:

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

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

This court in *In re Disciplinary Proceeding Against Sanders* noted that the interest of the State in maintaining and enforcing high standards of judicial conduct under the auspices of Canon 1 is a compelling one. In *Sanders*, this Court balanced that interest against Justice Sanders' First Amendment rights and found that an independent basis for finding a violation of Canon 1 under those circumstances was not possible. Justice Sanders argues that the

language in Canon 1 is hortatory and therefore cannot stand as an independent basis for a violation of the Code of Judicial Conduct. In the instant case, Canon 1 sets the conceptual framework under which Canon 2(A) operates. Canon 2(A) provides the more specific restraint, to wit: "Judges should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Under the circumstances of this case, Canon 1 taken in conjunction with Canon 2(A) provides a sufficiently specific basis to find a violation of the Code of Judicial Conduct. Here, it was clear that there was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court and that this contact would be viewed as improper. We concur with the Commission's finding that it was clearly reasonable to question the impartiality of the justice under the circumstances of this case

*Sherman* is *Sherman v. State*, (1995) 128 Wash. 2d. 164, 905 P. 2d. 355.

The first *Sanders* proceeding referenced is *In re Discipline of Sanders*, (1998) 135 Wash. 2d. 175, 955 P. 2d. 369. By having the same attorney represent both Disciplinary Counsel and the Disciplinary Board, as well as a hearing officer, the Board has presented an appearance that it is fashioning a joint defense with Disciplinary Counsel to the petition of the attorneys in the suit. It is virtually impossible for the attorney representing the hearing officer, Disciplinary Counsel, and the Disciplinary Board to fashion a joint defense without some type of communication occurring between them. This appearance cannot be cured disclosing the contents or

nature of the representation without breaking attorney-client privilege of other parties to the suit.

**B. Prosecution of the Respondent Attorney Becoming Intertwined With the Investigative and Adjudicative Functions of the Disciplinary Board Denies Due Process and Lacks Appearance of Fairness**

A leading case on this issue is *Washington Medical Disciplinary Board v. Johnston*, (1981) 29 Wash. App. 613, 630 P.2d 1354, where it was held that if the prosecution became connected with the investigative and adjudicative roles of an agency, a due process violation might result.

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

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

While conceding that combining the investigative and adjudicative function does not necessarily lead to a due process violation, *Johnston* found that a different result would occur if there was a commingling of the prosecutorial function citing *Huber Pontiac, Inc. v. Allphin*, (S.D. Ill. 1977) 431 F. Supp. 1168, vacated on other grounds sub nom. *Huber Pontiac, Inc. v. Whitler*, (7th Cir. 1978) 585 F.2d 817. Importantly, that a violation of the appearance of fairness doctrine occurs.

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

The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgement of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should

not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People v. Suffolk Common Pleas*, 18 Wend. 550:

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

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

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

*Beam v. Fulwiler*, 76 Wash. 2d 313, 315-16, 456 P.2d 322 (1969):

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

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

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

In conclusion, we feel compelled by our holding to discuss future proceedings. By our decision we do not hold that all Disciplinary Board proceedings, as currently conducted, are

invalid. We note that as presently enacted the statute governing the Disciplinary Board provides for the appointment of pro tem members for the purpose of participating in disciplinary proceedings. RCW 18.72.135. As we read the current statute, the problems inherent when the Board members who investigate charges are the same members who ultimately act as decision makers can be avoided by the convening of separate panels to investigate and adjudicate specific charges. Such a procedure is an alternative method of eliminating the inconsistent nature of the assistant attorney general's dual capacity, as he or she would be acting as adviser to one panel and prosecutor to a separate panel.

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

Here, as argued earlier, there is an appearance of ex parte contacts between a hearing officer, the Disciplinary Board and the Disciplinary Counsel, Mr. Busby, who have had joint representation with him in a previous court hearing concerning the very issues that are before the Disciplinary Board now. In addition, by filing a motion with Disciplinary Counsel, the Disciplinary Board has indicated it has prejudged the case

based upon the ex parte communication with Disciplinary Counsel and has been unwilling to alter their biased viewpoint by even addressing the arguments of the Respondent Lawyer, once it was brought to their attention. This co-mingling of prosecutorial and adjudicative functions is even worse than in *Johnston* and should now be allowed to stand. Disciplinary Counsel, Mr. Busby's pleadings should be stricken because of his ex parte prosecutorial misconduct.

**C. Apparent Ex Parte Contacts Between Disciplinary Counsel, the Hearing Officer in Another Case, and Members of the Disciplinary Board Required Different Disciplinary Counsel**

While the rules allow for an appeal of a hearing officer's decision to the Disciplinary Board, the existing conflicts of pre-existing lawsuits and apparent ex parte contacts between Disciplinary Counsel, members of the Disciplinary Board, and a previous hearing officer through joint representation through the same attorney has not only poisoned the well in that case, but has tainted the prosecution of any other cases, because of Mr. Busby's misconduct has rendered such an appeal impossible.

**D. Different Disciplinary Counsel Should be Appointed Due to Past Misconduct by Mr. Busby**

In addition to the apparent ex parte communications leading to

preconceived bias on the part of the Disciplinary Board, there are other reasons indicating that prosecutorial misconduct has occurred. In what appears to be effort to enhance the penalties and allow for the highest penalties possible he has in another case engaged in what appears to be vindictiveness for his failure to properly set a deposition as a result.

Whenever a prosecutor brings more serious charges following exercise of procedural rights, “vindictiveness” is presumed, provided that the circumstances present itself in actual or realistic fear of vindictiveness.

*United States v. Spence*, (11<sup>th</sup> Cir. 1983) 719 F. 2d. 358, 361:

In the classic prosecutorial vindictiveness case, the subsequent charges are merely “harsher variations of the original

Since Mr. Busby has engaged in prosecutorial misconduct against the appellant, he must be removed from this case to avoid the appearance of vindictiveness.

**E. Motion to Disqualify Scott Busby Not Decided in Accordance With ELC 10.8(c) and (d)**

The Motion to Disqualify Scott Busby, Sub 43, CP 103-115, was not decided in accordance with ELC 10.8, which reads in significant part:

(a) Filing and Service. Motions to the hearing officer, except motions which may be made ex parte or motions at hearing, must be in writing and filed and served as required by rules 4.1 and 4.2.

(b) Response. The opposing party has five days from service of a motion to respond, unless the time is shortened by the hearing officer for good cause. A request to shorten time for response to a motion may be made ex parte.

(c) Consideration of Motion. Upon expiration of the time for response, the hearing officer should promptly rule on the motion, with or without argument as may appear appropriate. Argument on a motion may be heard by conference telephone call.

(d) Ruling. A ruling on a written motion must be in writing and filed with the Clerk.

A finding by the Hearing Officer granting or denying the Motion should have been made promptly upon receipt of the Response or after hearing any oral argument should the Hearing Officer decide he needed such. Absence of such ruling leaves the issue of fairness of this proceeding unresolved.

**F. Transcript Not Settled in Accordance With ELC 11.4**

The Lawyer filed a Correction Page to Verbatim Transcript, Sub 39, CP 96-97 on July 20, 2009 and the Association filed its Association's Objection to Respondent's Proposed Correction to Transcript, Sub No. 41, CP 99-101, on the same day. The Hearing Officer did not settle the Transcript in accordance with ELC 11.4. ELC 11.4 reads:

(d) Settlement of Transcript. If either party files objections to any proposed correction under section (c), the hearing officer, upon review of the proposed corrections and objections, enters an order settling the transcript. Otherwise, the transcript is deemed settled

and any proposed corrections deemed incorporated in the transcript.

Mr. King's proposed corrections are thus incorporated.

**G. Lack of Opportunity to Enter *Alford* Plea**

Mr. King lacked an opportunity to enter a negotiated plea under *North Carolina v. Alford*, (1970) 400 U.S. 25, 27 L. Ed. 2d. 162, 91 S. Ct. 160 and *State v. Newton*, (1976) 87 Wash. 2d. 363, 552 P. 2d. 682. In such a plea, similar to no contest, a defendant does not admit responsibility for the crime or the facts alleged, but concedes that a trial may result in a finding of guilty. Such pleas allow a defendant to accept leniency in terms offered by the prosecution without admitted fact of guilt.

United States Attorney's Manual 9-27.440 recommends that *Alford* pleas be avoided except in the rarest of circumstances:

The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to plead guilty.

Despite the constitutional validity of *Alford* pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government.

As a result of the policies of the United States Attorney's office and Western Washington District of the United States District Court, Mr. King had no chance to plead to a lesser charge and therefore no opportunity to receive a sentence other than the one he would have received after a full jury trial that ended in full conviction on all counts.

**H. *Alford* Plea is Not Binding on Subsequent Litigation**

In Washington, an *Alford* plea is not binding on subsequent civil litigation. *Clark v. Barnes*, (2004) 150 Wn. 2d 905, 912, 919, 84 P.3d 245 reasoned that that while an *Alford* plea is an admission, in a subsequent civil action an *Alford* plea may not be conclusive of guilt. *Id.* at 915 (citing *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 605-06, 375 P.2d 439, 25 Cal. Rptr. 559 (1962)). *Clark* stated that while strong policy considerations give preclusive effect to a criminal conviction, essential to the underlying rationale of such a result is that a criminal trial provides a defendant a full and fair opportunity to develop and litigate the issues in the criminal case. However the *Clark* court found that such an opportunity is not present in an where the conviction results form an *Alford* plea citing *Falkner v. Foshaug*, 108 Wn. App. 113, 122-23, 29 P.3d 771 (2001); *N.Y.*

*Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 550, 794 P.2d 521 (1990) (both citing *Safeco Ins. Co. of Am. v. McGrath*, 42 Wn. App. 58, 62-64, 708 P.2d 657 (1985), *review denied*, 105 Wn.2d 1004 (1986)).

In so ruling, the court pointed out the powerful coercive forces might prevent a criminal defendant from going to trial, citing *McGrath*:

The court reasoned that a criminal defendant faces powerful coercive forces when deciding whether to (1) contest criminal charges and risk prolonged incarceration if he or she is found guilty or (2) plead guilty to reduced charges in exchange for a lesser sentence. *McGrath*. Such coercion, the court concluded, undermines the policy behind collateral estoppel and makes it such that a defendant who enters an *Alford* plea "has not had a 'full and fair opportunity' to litigate the issues normally decided in a full-fledged criminal trial." *Id.* at 63. Thus the court held collateral estoppel could not be used to give McGrath's *Alford* plea preclusive effect in the insurers' civil action. *Id.*

Thus *McGrath* and *Clark* found that the powerful coercive forces imposed upon a criminal defendant in deciding to enter a plea undermine the policy behind collateral estoppel such that a defendant who enters an *Alford* plea has not had a full and fair opportunity to litigate the issues in the criminal case.

**I. Absent Opportunity to Enter *Alford* Plea, a Federal Plea Should Not Bind Subsequent Litigation in Washington Courts**

In this instant case, Mr. King was under a federal indictment for

several counts of Mail Fraud, defined by 18 U.S.C. §1341. Had Mr. King been allowed to enter an *Alford* plea to the plea negotiated, and had he done so, then the precedents established in *McGrath* and *Clark* would apply herein and the factual issue of whether he committed the crime of Mail Fraud as defined by 18 U.S.C. §1341 would have to be litigated herein to be established as a felony upon which a disbarment or other lawyer discipline could be based.

However, by not being allowed to enter such plea negotiations in the federal court, the powerful coercive forces that would lead an indicted defendant to consider entering an *Alford* plea are now applied to the stark either or choice of pleading guilty and admitting a set of facts that meets the statutory definition of all the crimes charged, or going to trial before either a jury or a judge. Thus a federal defendant is coerced into entering guilty plea without the option of not admitting the facts of the crime and therefore is denied the same full and fair opportunity to litigate the issues of the criminal charge in the same way that a defendant in a state court who enters an *Alford* plea is so denied.

Because of these factors, Mr. King was not allowed "a full and fair

opportunity to litigate the issues of the criminal charge", for the purpose of considering whether he is collaterally stopped from challenging the fact of guilt of a federal felony of mail fraud in this present civil proceeding. Therefore he should not be collaterally stopped from challenging such fact of criminal wrongdoing.

**J. Case of First Impression**

*In re Personal Restraint of Metcalf*, (1998) 92 Wash. App. 165, 174-6, 963 P. 2d. 911 the court found:

Metcalf concedes that the analogous state constitutional provisions upon which he relies receive an interpretation identical to the analogous federal ones. Several of Metcalf's constitutional issues are thus identical to issues resolved in *Wright*.

The adjudication in *Wright* ended in a final judgment on the merits, and as a member of the certified class, Metcalf was a party to the prior litigation. Collateral estoppel thus bars Metcalf's federal (and analogous state) constitutional claims unless application of the doctrine would work an injustice.

We reject Metcalf's claim that the federal magistrate and the district judge did not give full consideration to the inmates' claims. Metcalf relies on *State v. Frederick*, 100 Wn.2d 550, 559, 674 P.2d 136 (1983), wherein our Supreme Court declined to apply collateral estoppel where the prior adjudication failed to fully consider the evidence and apply the appropriate law. In that case, the asserted "prior adjudication" was a single-sentence order refusing to consider a petitioner's personal restraint petition, concluding that it had "no basis either in fact or law and appear[ed] frivolous on its face." The Supreme Court proceeded to consider the merits. *Id.* at 559.

This case differs greatly from *Frederick*, because here the

federal court did not issue a perfunctory order. To the contrary, the claims were carefully considered and discussed.

*Wright is Wright v. Riveland*, W.D. Wash. No. C95-5381 FDB. Even so, *Metcalf* concluded at 92 Wash. App. 176:

Metcalf is correct that Washington follows the rule that "an important issue of law should not be foreclosed by collateral estoppel." *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn.2d 413, 418-19, 780 P.2d 1282 (1989) (citing *Kennedy v. City of Seattle*, 94 Wn.2d 376, 379, 617 P.2d 713 (1980)). There can be little question as to the importance of the issues raised here, given the large numbers of inmates affected and the gravity of the challenges asserted. We therefore elect to consider the merits of Metcalf's claims.

*Kennedy v. City of Seattle*, (1980) 94 Wash. 2d. 376, 379, found:

There are a number of requirements for the application of the doctrine of collateral estoppel. See *Beagles v. Seattle First Nat'l Bank*, 25 Wn. App. 925, 610 P.2d 962 (1980). We need consider only one: that application of the doctrine must not work an injustice. *Henderson v. Bardahl Int'l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967). It would be manifestly unjust not only to litigants Kennedy and McGuire but to other houseboat and moorage owners for the constitutionality of the houseboat ordinance to be determined by a municipal court ruling unappealed by the City. Furthermore, the relitigation of an important public question of law such as the validity of the houseboat ordinance should not be foreclosed by collateral estoppel. *Los Angeles v. San Fernando*, 14 Cal. 3d 199, 230, 537 P.2d 1250, 123 Cal. Rptr. 1 (1975).

Although *Alford* squarely accepted the joinder of a guilty plea with

refusal to admit guilt, at least as to any constitutional bar to such joinder, the Court also recognized that a defendant "does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . ." *Id.* at 38 n. 11, 91 S. Ct. at 168. However, the Court noted that while Rule 11 of the Federal Rules of Criminal Procedure provides that the trial court "may refuse to accept a plea of guilty," it added that "[w]e need not now delineate the scope of that discretion." *Id.*

Thus in *Alford*, the Supreme Court ruled that while there was no "absolute" right to an *Alford* plea, it held open the possibility that denial of an *Alford* plea might rise to a denial of a constitutional right in certain circumstances.

At least one federal court has held that it was an abuse of discretion to deny a Federal defendant the right to plead *Alford* instead of guilty. In *United States v. Gaskins*, 485 F.2d 1046, (3d. Cir. 1973) the court reasoned that on the basis of its own precedents, a denial of guilty plea simply because the defendant refused to admit his guilt was an abuse of discretion:

In *McCoy v. United States*, 124 U.S. App.D.C. 177, 178, 363 F. 2d. 306, 307 (1966) this Court acknowledged that a literal reading of Rule 11's language "resposes a discretion" in the court to refuse a

guilty plea, but added, "the plea should not be refused without good reason." The Court recognized that "guilt . . . is at times uncertain and elusive" and emphasized that "the court is not required to insist that the accused concede the inevitability or correctness of a verdict of guilty were the case tried." 124 U.S. App. D. C. at 179, 363 F. 2d at 308.

However, in *Gaskins*, the defendant had the benefit of a negotiated plea agreement where the prosecutor joined the defense in urging the court to accept a negotiated settlement. That is unlike the experience of Mr. King, where the Federal Western District Court of Washington and the federal prosecutor's office have all but ruled out the possibility of an Alford plea. If Mr. King did have a right to a negotiated *Alford* plea as in *Gaskins*, then such a right to a negotiated plea could be vetoed by the prosecutor by simply refusing to negotiate, as it is in most cases in the Western District of Washington.

It would be manifestly unjust to Mr. King and to other Washington residents indicted by federal grand juries but not afforded an opportunity to enter negotiated *Alford* pleas to fully consider and adjudicate this issue in this present forum.

The lawyer in this case concedes that this Court, has by rule, mandated that a conviction of a felony means disbarment. But for the

same reasons that collateral estoppel do not apply, Washington should also make an exception for the rule since to say otherwise could mean that some criminal defendants might be denied a right of constitutional magnitude.

**V. CONCLUSION**

For the reasons stated herein, the findings below should be vacated or reversed and new disciplinary counsel or dismissal should be mandated upon remand.

Respectfully submitted this 5<sup>th</sup> day of March, 2010,

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PAUL KING,

WSBA #7370