

No. 200,811-9

BEFORE THE SUPREME COURT OF THE STATE OF
WASHINGTON

In Re:

W. RUSSELL VAN CAMP,
Lawyer (Bar No. 5385)

STATE OF WASHINGTON
2010 OCT -5 AM 8:12
BY BOARD OF APPELLATE
CLERK

W. RUSSELL VAN CAMP'S REPLY BRIEF

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REPLY ARGUMENT

I. THE DISCIPLINARY BOARD'S PENALTY RECOMMENDATION IS UNSUPPORTABLE

A. COUNTS 4 and 5

1. Injury

a. The knowing conduct caused no injury

The Hearing Officer found the combination of knowing conduct and selfish motive **ONLY** as to one thing: "providing" Mr. Honkala with an ambiguous written fee agreement. The Hearing Officer found no great injury as a result of this and her decision is correct because the ambiguous written fee agreement caused no injury at all: it was abandoned before the determination of a fee was ever made.

- RANDY HONKALA would have paid a \$ 25,000.00 retainer one way or another.
- When the question arose whether Mr. VAN CAMP would bill against the funds or take the whole thing as flat fee Mr. VAN CAMP promptly agreed to ignore the flat fee agreement.
- Honkala met with VAN CAMP on March 4, 2007 to discuss the fee. Honkala then waited until August to write a complaint asserting he didn't agree to a flat fee, not to VAN CAMP but to the Bar Association. [Grievance Exh.

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- For the first time, on 8/9 [ex 253] HONKALA directly said to VAN CAMP, 'you didn't explain flat fee to us.' VAN CAMP responded, "I would be happy to meet and discuss all these concerns." [Exh. 255]
- VAN CAMP then replied to the Bar Complaint saying,

If the case is settled, I will be happy to review the fee with Mr. HONKALA. If I feel it is unreasonable I will refund some part of it. If not, and if he disagrees, then I will submit the matter to fee arbitration. If the case is not settled then I will proceed with litigation. [Exhibit 61, VAN CAMP's August 9, 2007 letter to the Bar]
- At the time VAN CAMP still represented Honkala and the case was not finished, so the fee was necessarily still in question and more work was needed.
- Mr. Honkala's eventual reply was "we believe Mr. VAN CAMP should refund the full \$ 25000 retainer." [exh 290]

The point simply being: the ambiguous written fee agreement caused no injury. If there was an injury, it was caused by VAN CAMP's later assertion of a right to retain an allegedly unreasonable fee. Had there been no confusion as to the nature of the fee, that \$25,000.00 would still have been paid, the lawsuit might not have settled before the money was exhausted. Had VAN CAMP invested significant effort early on to resist the preliminary injunction that would have used up significant amounts of

the fee.

**b. “Injury” involves a question of fact that was resolved
by the Hearing Officer**

The Hearing Officer correctly applied ABA Standards § 7.2 finding no serious harm. There is no clear definition of ‘serious harm.’ E.g., *In re Disciplinary Proceeding Against Marshall*, ___ Wn.2d ___, ¶ 92, 217 P.3d 291 (2009); *In re Disciplinary Proceeding Against Hicks*, ___ Wn.2d ___, 214 P.3d 897 (2009)

The Association engages in the same analysis they take Appellant to task saying Mr. Honkala testified the fee was a lot of money; but the Hearing Officer had a number of other factors to consider, including Honkala’s lifestyle, having just purchased two very expensive automobiles, [Tr. 318] that he owned a valuable home which he was preparing to sell. [Tr. 318-319] and borrowing may have been just a means of dealing with cash flow.

Her determination of ‘serious’ harm was an inference based on Honkala’s testimony and should be upheld as in See, e.g., *In re Disciplinary Proceeding Against Hicks*, ___ Wn.2d ___, ¶30, 214 P.3d 897 (2009). The Board's divided recommendation is entitled to less weight. *In re Disciplinary Proceeding against Marshall*, 160 Wn.2d 317, 157 P.3d 859 (2007).

2. Mental State

a. Negligence

The only finding of “knowing” conduct was the provision of the ambiguous written agreement. Everything else was negligent. Even if the written agreement was knowingly drafted there is no finding that Mr. VAN CAMP knew his explanation of the fee was ambiguous when he entered into the agreement and the hearing officer’s finding [Finding 19 p. 8 line 10] supports that the nature of the fee was not discussed; Honkala’s differing, subjective understanding of the fee was not communicated to Mr. VAN CAMP at the time of the initial retainer. Later VAN CAMP agreed to ignore the flat fee.

VAN CAMP’s mental state then must be that of ‘negligence’ rather than ‘intent’ or ‘knowledge.’ VAN CAMP intended to sign Mr. Honkala up to a flat fee agreement which by itself is not improper and VAN CAMP did not know Honkala misunderstood it. This is negligence at worst, based on the ‘conscious awareness’ standard of *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 318, 209 P.3d 435 (2009) and *In re Disciplinary Proceeding against Stansfield*, 164 Wn.2d 108, 127, 187 P.3d 254 (2008). The findings show Mr. VAN CAMP was not consciously aware he had made an ambiguous deal with Honkala: at worst he was negligent in using a poor form and doing a poor job of explaining.

b. Selfish Motive

Mr. VAN CAMP intended to benefit, but not unfairly.

3. Amount of Fee

The argument that the fee was never finally determined is hardly “remarkable.” When Honkala first complained VAN CAMP still represented him and there was still work to do. Once he was fired VAN CAMP offered to resolve the fee and Honkala refused to participate, demanding a full refund. VAN CAMP was willing to return part of the fee if it was found he owed anything, but Mr. Honkala needed to participate. As is, although part of the fee has been repaid Honkala is still on record wanting a full refund: avoiding this type of ambiguity was the whole point of suggesting arbitration.

B. COUNTS 1,2, 3 and 9

The Board held that suspension is the presumptive sanction for counts 1, 2, 3 and 9. Mr. VAN CAMP does not agree, asserting that his state of mind in each case was negligence and there was no harm to Mr. Honkala. These issues are discussed below.

C. UNANIMITY AND PROPORTIONALITY

1. Not unanimous

The Disciplinary Board decision was non-unanimous.

2. Not proportional

The apples and oranges issue is always a factor in legal analysis, and no two cases are ever identical. Disbarment is reserved for grievous

acts of ethical misconduct generally in the categories (1) commission of a felony of moral turpitude, ... (2) forgery, fraud, giving false testimony and knowing misrepresentations to a tribunal, (3) misappropriation of client funds, and, (4) extreme lack of diligence. *In re Disciplinary Proceeding Against Eugster*, 166 Wash.2d 293, 320, 209 P.3d 435 (2009). None of these apply here. At worst Mr. VAN CAMP used a fee agreement he should have known was ambiguous, was sloppy in his handling of the case and his communication with the client and failed to identify the goal of quick settlement as one of the conflicting goals Honkala advanced. Honkala would have needed to spend money on a lawyer and very likely would have spent more than he was ultimately charged on a more aggressive lawyer.

As to suspension the cases cited in our opening brief suggest a suspension of 6 months is the maximum supportable for what amounts to a fee dispute where the client was unhappy with the lawyer's performance.

D. AGGRAVATING AND MITIGATING FACTORS

1. Prior Discipline

The 2002 matter involving a similar phrase in the fee agreement, No. 01#00067 [Exh. 71] certainly should be *considered* by this Court, but not as a recurrence of identical misconduct. The issue there was not whether the fee was refundable or not, [Exh. 71 P. 3 ¶ 3][Exh. 71 P. 11 ¶ 44] nor did the Hearing Officer hold that the phrase "earned retainer" was

improper: it was unclear in the context of that case, as to whether it applied to fees or costs.

2. Prior Success

Mr. VAN CAMP's history of success as a litigator is relevant in one particular: his judgment as to the tactical process of the litigation, and his choice to pursue mediation, should be given the benefit of the doubt based on his history of success.

II. PROCEDURAL ERRORS

The Hearing Officers errors that deprived Mr. VAN CAMP of a fair hearing.

A. PERMITTING THE ASSOCIATION TO CALL A REBUTTAL EXPERT

Any decision of this nature is discretionary. But the Hearing Officer abused discretion by failing to recognize how fundamental the expert issue was to VAN CAMP's case. The whole defense was based on the Association not calling an expert. The error could not be cured by VAN CAMP calling his own expert in rebuttal: all the testimony elicited during hearing was shaped by the absence of an expert on behalf of the Association. To allow the expert later, to testify as if in the case in chief, made it impossible for VAN CAMP to catch up.

B. LIMITING QUESTIONING REGARDING

MEDIATION

Mr. Honkala's duplicity, evident in his contradictory testimony and statements, would have been more obvious had the mediation been discussed openly.

III. OPPOSITION TO SUBSTANTIVE FINDINGS

The Hearing Officer's mixed findings of law and fact are not supported by the record.

A. COUNT 1 FAILURE TO INFORM AND FOLLOW GOALS

1. Conflicting Instructions

The Hearing Officer's contradictory findings are crucial. Mr. Honkala's goals changed during the lawsuit, [Finding 67] her findings show Mr. VAN CAMP was lacked clear instruction. [Finding 52, 72] Honkala wanted the impossible: to get the case over with immediately and get money. His preference as to which result was his primary goal changed, sometimes daily. But even after he fired Mr. VAN CAMP, he was still trying to get money: [Finding 72] he could have chosen to quit at mediation or anytime thereafter but elected to continue.

HONKALA could not keep his story straight, whether he didn't know what the injunction called for [original bar grievance received 8/8/2007,Exh. 60, 289] even though he had it in hand

before hiring VAN CAMP [Exh. 217], or his later story that he didn't know agreeing to the injunction would end the suit, which he admitted he was told at mediation [Exh. 290 p. 2]. Then he complained VAN CAMP didn't explain the injunction to him, although he admitted discussing it [Exh. 289, Exh. 290 p. 2, Exh. 294]. He really just didn't like the advice, that agreeing was tantamount to giving up. He claims he wanted to negotiate the *terms* of the injunction, although the injunction he eventually agreed to was not meaningfully different from what was proposed from the start. [Exh. 293]

VAN CAMP subjectively, reasonably believed the case was primarily one for Honkala's damages against Wendle. [Finding No. 39], a belief supported by the record. [Findings 6 and 7; Exhibit 222 referenced by the Hearing Officer in Finding 25; RP 182:6] Honkala repeatedly said he wanted the case "resolved" but he never clearly said "give up and quit." [Ex. 14, Finding 44, 45; Exh. 17 Finding 46; Exh. 239]. Mr. VAN CAMP steered a middle course, setting up mediation, and Judge Clark thought he might be able to get Honkala some money. [Exh. 283; 285] There is nothing in the record suggesting the VAN CAMP was told, before late August, the Wendle would never pay any money.

A lawyer simply cannot be held to discipline for his inability

to pick out of a client's contradictory instructions, that course of action the client, in hindsight, claims he really wanted.

2. VAN CAMP DID ADVISE HONKALA

The Hearing Officer's findings that VAN CAMP never explained the injunction to HONKALA and that HONKALA never understood it are not supported by substantial evidence. **He did discuss the injunction, Honkala did not like the advice.** [Exh. 289, Exh. 290 p. 2, Exh. 294].

3. MR. HONKALA KNEW HE COULD SETTLE

The record does not support a conclusion that Honkala did not understand he could resolve the case by agreeing to an injunction. Honkala's own words contradict this position, [Exh.289, 290 Finding 52] as does Judge Clark's testimony. [Tr. 515]

B. COUNT 2: FAILURE TO PURSUE SETTLEMENT

VAN CAMP did pursue settlement through mediation. In his professional discretion this was a legitimate method of going forward. RPC 1.4 Comment 1 and 2.

C. COUNT 3: FAILURE TO PROVIDE COPIES

Mr. VAN CAMP made mistakes in understanding what documents he had received and in getting copies to Mr. Honkala. These were errors of negligence and Mr. Honkala already had the critical documents.

D. COUNT 4: FAILURE TO COMMUNICATE FEE AGREEMENT

The fee agreement is discussed above.

1. Offer to Arbitrate

The Hearing Officer's contradictory findings; [No. 70, offer to Arbitrate prior to August 31, 2007; No. 80, offer made several months after termination.] must be resolved by the written record: Exhibit 61, VAN CAMP's August 9, 2007 letter to the Bar after Mr. Honkala's first grievance, while still employed by Honkala, offered to negotiate or arbitrate. Honkala however demanded a full refund [exh 290] and admitted that he knew Mr. VAN CAMP was willing to arbitrate the fee, but refused to do so. [TR 376].

2. UNCLEAR FEE AGREEMENT

a. REQUIREMENTS FOR FLAT FEE AGREEMENTS

In 2006-2007, flat fees did not **require** a written fee agreement. But the ambiguous fee agree agreement itself caused no injury as noted above: Honkala paid his money (apparently) believing he would be charged against it hourly. The Hearing Officer found VAN CAMP did discuss that if the case was resolved quickly, he would refund part of the fee. [Finding 19]

As soon as Mr. Honkala discussed his misunderstanding with

Mr. VAN CAMP and learned that there was a difference of understanding as to the meaning of the fee agreement, the effect of the written fee agreement ceased. Honkala was not induced to pay by the written agreement; not did his posture change as a result prior to learning there was a disagreement as to its meaning. Thereafter the parties were proceeding on a dispute as to their verbal agreement, the written agreement ceased to be relevant.

Mr. Honkala didn't raise the issue until about 3 months after hiring VAN CAMP. When he did VAN CAMP discussed it with Honkala and again believed Honkala was in agreement. Honkala didn't inform him to the contrary until early August, when VAN CAMP agreed to negotiate or arbitrate the fee. person and by email. VAN CAMP did not violate RPC 1.5 because he clarified the fee agreement to Honkala within a reasonable time.

B. TESTIMONY SHOWING EXPLANATION

The record shows Mr. SHAW explained the flat fee to HONKALA.

C. VAN CAMP'S MENTAL STATE

Mr. VAN CAMP knowing used the written fee agreement, true: but his mental state as to the overall fee was negligence at worst, since he attempted to resolve the misunderstanding.

D. COUNT 5: UNREASONABLE FEE

A \$25,000.00 flat fee for all work necessary to defend a case like this through trial and appeal was reasonable if understood by the client. The fee finally charged, \$ 10,000.00 after refund, is also reasonable. The delay in payment was due to Honkala's refusal to participate in any process to determine the fee and his insistence that he get back the entire fee.

2. ASSERTED INCOMPETENCE

As an experienced and successful litigator Mr. VAN CAMP knew how far he could stretch the system and still make litigation work. Since he was not allowed to complete representation it is impossible to say that his representation was ineffective.

E. COUNT 9: MISREPRESENTATION

No Finding of Fact supports this conclusion.

CONCLUSION

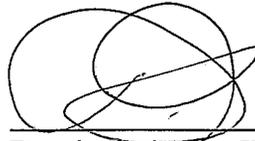
This Court should:

1. Order a new hearing.
2. Alternatively find that Mr. VAN CAMP did not violate RPC 1.5, or other provisions as argued above, acted at worst negligently and without great harm to the client, and impose only a suspension of 6 months or less.

/

/

October 4, 2010



Dustin Deissner WSB# 10784

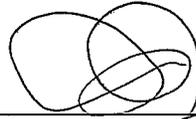
CERTIFICATE OF SERVICE

Oct 4 2010

I hereby certify that on ~~July 5, 2010~~ *Oct 4 2010* I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

<input type="checkbox"/> U.S. Mail	To:	Diane Abelson
<input type="checkbox"/> Hand Delivered		Disciplinary
<input checked="" type="checkbox"/> Overnight Mail		Counsel
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