

Supreme Court No. 200,917-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

THOMAS F. MCGRATH

Lawyer (Bar No. 13836).

**ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION**

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Appendix A: Second Amended Findings of Fact, Conclusions of Law,
and Hearing Officer's Recommendation

Appendix B: Pertinent Rules of Professional Conduct

Appendix C: Pertinent ABA Standards

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Appendix G: Findings and/or Orders from Pertinent Discipline Cases

I. COUNTERSTATEMENT OF THE ISSUES

1. The hearing officer found that McGrath repeatedly obstructed and delayed litigation by failing to make a reasonable inquiry when responding to requests for production and that he intentionally falsely certified that he had made such an inquiry when he had not. Then, while the court was considering the imposition of sanctions, McGrath sent the court two ex parte communications disparaging the plaintiff based on her nationality. Below, McGrath testified that he made little or no effort to inquire about or search for documents but argued that this constituted a reasonable inquiry. He admitted that he made discriminatory ex parte statements but argued that there was no harm. The hearing officer did not credit McGrath's testimony and found that McGrath's actions caused harm. The Board affirmed. Should the Court retry the facts?

2. Generally, the presumptive minimum sanction is not less than six months. The hearing officer found that the presumptive sanction was suspension and found four aggravating and one mitigating factor, but recommended a sanction of three consecutive thirty-day suspensions. The Disciplinary Board rejected this recommendation, finding no basis to go below the presumptive minimum suspension. It unanimously recommended a single suspension of 18 months. Should the Court affirm the Board's unanimous sanction recommendation?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

In December 2009, the Association filed a Formal Complaint charging Respondent Thomas McGrath with five counts of misconduct arising from his representation of his wife, Melinda Maxwell, and her business, Chiropractic Wellness Centers. BF 2. A hearing was held in May 2010. Transcript (TR) 1, 243, 468. The hearing officer entered his Findings of Fact and Conclusions of Law and Recommendation on June 10, 2010, as amended on June 14, 2010 and July 21, 2010. BF 23, 25, 32. The hearing officer dismissed one count and concluded that the Association proved the following counts by a clear preponderance of the evidence:

- Count 1: By providing discovery responses to opposing counsel without conducting a reasonable inquiry into the truthfulness of the responses in circumstances where inquiry and investigation by Respondent was clearly called for, McGrath violated RPC 8.4(d);¹
- Count 3: By making false certifications to discovery requests, McGrath violated RPC 8.4(c) and RPC 8.4(d);
- Count 4: By engaging in conduct, while representing a client, that manifests prejudice and bias toward another party on the basis of national origin, McGrath violated RPC 8.4(h) (conduct prejudicial to the administration of justice by manifesting prejudice);

¹ The relevant RPC are attached as Appendix B. All citations are to the RPC in effect at the time of the misconduct.

- Count 5: By communicating ex parte with Judge Jim Rogers of the King County Superior Court without authorization to do so by law or court order, McGrath violated RPC 3.5(b) (impartiality and decorum of the tribunal).

BF 32, Second Amended Findings of Fact and Conclusions of Law (FFCL)² at 11-13. The hearing officer found that McGrath acted more than negligently with respect to Count 1 and intentionally with respect to Counts 3, 4 and 5. FFCL at 12-14.

For Count 1, the hearing officer determined that the presumptive sanction under the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb 1992 Supp.) (ABA Standards) was reprimand, applying ABA Standard 6.1.³ FFCL at 13. For Counts 3, 4 and 5, the hearing officer found the presumptive sanction was suspension, applying ABA Standard 6.2 to Count 3, ABA Standard 7.2 to Count 4 and ABA Standard 6.22 and 6.32 to Count 5. Id. 14-15. The hearing officer found four aggravating factors: prior disciplinary offense, multiple offenses, refusal to acknowledge the wrongful nature of the conduct (as to Count 4), and substantial experience in the practice of law. Id. at 15. He found one mitigating factor, remoteness of the prior offense. Id. at 16. The hearing officer recommended a reprimand for Count 1 and three 30-

² The Second Amended FFCL is attached to this brief as Appendix A.

³ The relevant ABA Standards are attached to this brief as Appendix C.

day suspensions for Counts 3, 4 and 5, consecutively imposed as one three-month suspension. FFCL 13-14, 16.

Both parties challenged the recommended sanction before the Disciplinary Board. The Board adopted the hearing officer's findings of fact and conclusions of law without amendment. BF 57, Corrected Disciplinary Board Order Modifying Hearing Officer's Decision (DB) at 1.⁴ The Board found that McGrath's ex parte request that the judge freeze Ms. Ellison's assets because she was not a U.S. citizen was a serious violation of the RPC. DB at 2. The Board also found that McGrath's role as the defendant's husband, a corporate officer, and previous counsel to the corporation in business and litigation matters distinguished McGrath's conduct from a simple discovery issue. Id. The Board found "no basis for recommending the minimum six-month suspension" and instead recommended that the Court impose one 18-month suspension. Id. This recommendation was unanimous. Id. at 1, n.1.

B. SUBSTANTIVE FACTS

1. McGrath's Background

McGrath was admitted to practice law in Washington on March 6, 1970. FFCL at 3; TR 478. He was disbarred in December 1982 after being convicted of assault with a deadly weapon. In re Disciplinary

⁴ The Disciplinary Board's order is attached to this brief as Appendix D.

Proceeding Against McGrath, 98 Wn.2d 337, 655 P.2d 232 (1982); EX A-35. He was readmitted to practice on June 22, 1993. FFCL at 3.

In July 2001, McGrath married Melinda Maxwell (Maxwell). TR 412. Maxwell is a chiropractor and, at the time, owned two chiropractic businesses, Chiropractic Wellness Center at Capitol Hill and Chiropractic Wellness Center at New Castle Washington (collectively CWC). TR 33, 35. McGrath was the attorney for CWC as well as its corporate secretary. TR 365-66, 489. The business office for CWC where corporate records were kept was located in McGrath's office suite. TR 38, 371. McGrath's and Maxwell's businesses shared a reception area, file and copy room, and accountant. TR 39-40, 379, 380. McGrath was intimately involved in the employment procedures of CWC, functioning "in every sense" as "a de facto in-house human resource director of CWC, both the corporations and Dr. Maxwell." TR 166. In this role, he conducted interviews, drafted covenants not to compete, participated in exit interviews, and filed suits against former employees. TR 44, 165, 367-68.

2. The Ellison Litigation

On February 11, 2005, McGrath filed suit on behalf of CWC of Capitol Hill, alleging unfair competition and breach of duty by a former employee, chiropractor Katherine Ellison (Ellison). TR 41; EX A-1.

Ellison is a Canadian citizen working in Washington State. TR 46. She counterclaimed, alleging that Maxwell violated state and federal laws by discriminating against her based on gender and alienage. EX A-2. Because she worked at both clinics, her counterclaims and a third-party complaint were filed against both CWC facilities. EX A-2. Maxwell, McGrath, and their marital community also were named as defendants. TR 47, EX A-2.

In October 2007, CWC's suit was dismissed in its entirety on summary judgment. EX A-3. Ellison's claims, however, proceeded to trial. A jury awarded her over \$400,000, finding discrimination and disparate treatment by CWC based on her gender and Canadian alienage. EX A-30. A judgment was entered against CWC, Maxwell, and McGrath and Maxwell's marital community. EX A-32.

3. Ex Parte Contact and Biased Statements

On February 20, 2008, while Judge Rogers was considering a motion for default filed by Ellison, McGrath faxed two letters to him. EX A-26, A-27. In his first two-page, typewritten letter McGrath argued points about the pending motion and asked for a delay of the decision. EX A-26. McGrath hand-wrote across the bottom of the second page of that letter:

Your decision is going to effect [sic] American's [sic]—
How [sic] are you going to trust and believe—a alien or a
U.S. citizen. Thomas McGrath #1313.

EX A-26, attached as Appendix E. The letter stated, “All my
correspondence to the Judge’s chambers will be attached to my declaration
as exhibits and made part of this record, if needed for appeal or for
whatever purpose.” Id. The letter showed that a copy had been sent to
Ellison’s attorney, Dan’L Bridges (Bridges), so Judge Rogers assumed
that he had a copy of the letter. Id.; TR 450-451. But the copy that
McGrath sent to Bridges did not contain the handwritten note. TR 209.

That same day, McGrath faxed a second, handwritten letter to
Judge Rogers stating:

2-20-08

Dear Judge Rogers:

How many jobs do we give to Aliens like Dr.
Ellison? She was schooled here in the U.S. & refuses to
become a U.S. Citizen. She needs to go back to Canada.

In that regard, I am asking the Court to freeze all of
her assets pending the outcome of this case.

Thomas F. McGrath, Jr.
Attorney for Π CWC
King County Sup. Ct.

EX A-27 (emphasis in original), attached as Appendix F. McGrath did not
send a copy of the second letter to Bridges. TR 210.

In a declaration dated February 20, 2008, McGrath swore under
penalty of perjury that he had sent letters to the court with copies to

defense counsel. EX A-100. He attached the February 20, 2008 letter but, again, this copy did not contain the handwritten notation. The second handwritten letter was not attached at all. Id. TR 209-210, 334.

On March 11, 2008, Judge Rogers issued his ruling on Ellison's motion for default. In his order, Judge Rogers addressed McGrath's handwritten statements:

Sanctions: Mr. McGrath shall show cause why sanctions should not be imposed for his comments in his letters (1) arguing that the court should give greater credence to an American citizen solely based upon citizenship over a resident alien and (2) asking this court to freeze a party's assets without giving a legal basis or following any court rules. The parties shall propose a date for such a hearing based upon Mr. McGrath's recovery.

EX A-28 at 6-7.

McGrath never proposed a date for a hearing. TR 463. Bridges testified that because he had not received copies of the letters he did not immediately understand what Judge Roger's order meant and assumed that it was based on similar comments that McGrath had made in a responsive pleading to Ellison's motion for default. TR 234-35. Bridges reviewed his file again before trial and realized that he may have been missing something. TR 236. He emailed the court asking to see the letters, which had not been filed with the court. EX A-29. The clerk did not provide these to him until the second day of trial. TR 208-9.

Bridges immediately showed the letters to Ellison, who registered physical shock. TR 211. She could not understand how a lawyer could be allowed to communicate like that to the judge. TR 211. Bridges testified that had he known about the comments when they were made he would have added McGrath personally as a defendant in the case because the letter showed his discriminatory animus. TR 211, 230.

Judge Rogers filed a grievance with the Association based on McGrath's slurs against Ellison and request for relief without justification. EX A-34. In response, McGrath wrote that "I am not award [*sic*] of any specific section of the CPR [*sic*] that I have violated. It seems to be simply a first amendment right of freedom of speech." EX A-103.

At hearing, McGrath testified that he regretted not sending Bridges a copy of his remarks, but felt that the remarks themselves were appropriate because they were relevant to the litigation. TR 510-11, 581, 583. He stated, "I suspect that had I sent this to Mr. Bridges, it wouldn't have been a big deal." TR 510.

4. Bad Faith Conduct During Discovery

On October 5, 2006, earlier in the litigation, Bridges served Requests for Production (RFP) on CWC, requesting several classes of documents that were necessary to prove Ellison's claim that she was paid disproportionately to her male counterparts and that CWC and Dr.

Maxwell treated Canadians less favorably than naturalized American citizens. TR 167-169; EX A-4.

CWC delegated the responsibility of responding to the requests to McGrath. TR 331; EX A-102. McGrath testified that his practice upon receiving discovery requests and orders compelling production was to give the discovery request or order to his wife and ask her to assemble the responsive information and material. FFCL at 4-5; TR 518-19, 537, 543, 589. McGrath testified that he made little or no effort to inquire about or search for documents or information. FFCL at 5; TR 519-20, 597, 602. Instead, he made a number of general objections applicable to every request. EX A-5 at 2. He also made specific objections to the majority of the requests and refused to provide basic information. Id. at 2-7.

a. Ellison Documents

Ellison requested “all documents in your possession control or obtainable by you that pertain to Katherine Ellison in any way.” EX A-4 at 4 (RFP 7). The request included emails. Id. McGrath objected to this request stating that it was “unduly burdensome and [was] promulgated with the intent to harass and/or intimidate.” EX A-5 at 4. Although he did provide some documents, the response included very few emails. TR 184.

b. Personnel Rosters

Ellison also requested a full and complete personnel roster, identifying all individuals employed by CWC for a period of five years before the hiring of Ellison to the present. EX A-4 at 4-5 (RFP 9). The request asked for the position held by each employee, the dates of the employment, and the reasons for separation. Id. McGrath objected to this request as well, stating that it was “duly [*sic*] burdensome and [was] promulgated with the intent to harass and/or intimidate and will not likely lead to the discovery of relevant evidence.” EX 5 at 4. He only produced the names and last known addresses of the chiropractors that were employed by CWC since 1999. Id. He did not produce contact information for any other employees. EX A-6 at 2.

c. Time Cards

Ellison also requested copies of all time cards for each and every chiropractor hired by CWC at both locations. EX A-4 at 7 (RFP 18). These were documents that were required to be kept by the chiropractors and were important to prove Ellison’s disparate wage claims. TR 170-171. McGrath objected, alleging that the request was harassing, burdensome, and unlikely to lead to relevant evidence. EX A-5 at 6. He also stated, “Chiropractors were not ordinarily required to have a time

card. Therefore information is not available. Further, there are no records prior to 2000.” Id.

d. Steenburg Documents

Ellison requested the production of any and all income paid to another Canadian employee, Belinda Steenburg (Steenburg), including any and all W-2s generated during her employment. EX A-4, at 8 (RFP 21). These records were sought to show how CWC treated Canadian employees compared to the American employees. TR 171-172. McGrath objected to this request, stating that Steenburg “was not a chiropractor and a Canadian citizen” so that the amount paid to her was not relevant or likely to lead to the discovery of relevant evidence. EX A-5 at 6.

e. Marketing Calendars

Ellison also requested copies of the marketing calendars for each clinic and the marketing calendar for every chiropractor that worked in the clinics. EX A-4 at 8-9 (RFP 22, 23). McGrath objected to both, stating respectively that “Ellison must define what a ‘Marketing Calendar’ [*sic*]” and “What is a ‘Marketing Calendar.’” EX A-5 at 7. In fact, a marketing calendar was a specific compilation of information and dates described in CWC’s office manual and was a term understood by CWC and McGrath. FFCL at 4; TR 182. This term was identified in the office manual and job descriptions that McGrath produced as a response in these same requests.

TR 172-173. The office manual required each chiropractor to keep and maintain them. TR 182. McGrath testified that he knew what a marketing calendar was “but we didn’t know if they did.” TR 553.

f. McGrath’s Discovery Responses

McGrath signed CWC’s First Response. EX A-5 at 7. Under Rule 26(g) of the Superior Court Civil Rules (CR), this signature was a certification that the answers were made in good faith.⁵ See FFCL at 5.

On January 2, 2007, Justin Bolster (Bolster), one of Ellison’s lawyers, wrote to McGrath pointing out several deficiencies in his production and explained the relevance of his requests. EX A-6. In this letter, Bolster specifically challenged McGrath’s contention that no time cards were available, stating:

The time card is mentioned in the bonus structure outline and thus to assert that chiropractors are not required to use them is disingenuous. If it was used towards calculation of bonuses, records of such must have been kept. These documents must be disclosed.

EX A-6 at 2.

⁵ CR 26(g) provides: “The signature of an attorney or party constitutes a certification that he has read the request, response or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry, it is: (1) consistent with these rules and warranted by existing law or good faith argument . . .; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .”

Bolster also challenged McGrath's objections regarding the marketing calendar stating:

How can you assert that you do not know what a "marketing calendar" is when on page 262 of the discovery turned over the job description of an Association Doctor number 17 specifically refers to "the marketing calendar." This must be turned over.

Id.

McGrath wrote back stating that he would not provide answers to many of the requests without a court order. EX. A-7. This refusal encompassed the request for marketing calendars, Ms. Steenburg's personnel file, and the time cards. Id.

Bridges moved for an order to compel production, further explaining the relevance of the requested production and the probable existence of the documents given what had already been disclosed. EX A-9 at 10-14. The court found that CWC exercised bad faith in making its responses to Ellison and that "CWC's use of generic and blanket general objections, cut and paste objections to essentially all of the discovery requests, and refusal to provide responses to questions as basic as asking CWC to produce an employee roster violated CWC's duty to exercise good faith under both CR 26 and CR 37. . . ." EX A-15 at 2. The court ordered CWC to withdraw all general and boilerplate objections to Ellison's first requests. Id. Further, the court ordered CWC specifically to

produce documents, including the Steenburg documents, the personnel roster, time cards, and marketing calendars. Id. The court ordered CWC to pay \$250 in sanctions to Ellison. Id. Despite this order, McGrath made no effort to search for documents, other than to ask Maxwell to do it. TR 519-520.

On February 23, 2007, McGrath prepared and certified a supplemental response. EX A-16. This response contained the same general objections that the court had found to be boilerplate and had ordered removed. Id. These responses were again deficient. TR 179-80. While an employee roster was provided, it did not list telephone numbers or the reasons for termination of employment. EX A-16 at 4. McGrath did not produce time cards, but instead certified that “the time cards have not been retained and therefore [are] not available.” Id. at 6. Even though the court had directed him to produce Steenburg’s file, McGrath refused, stating that Steenburg was an “independent contractor in marketing matters and a W-2 was not required. There is no law against paying an independent contractor with cash.” Id. at 7. As to the marketing calendars, McGrath stated that if they had not already been produced, they did not exist. Id. McGrath signed this document on February 23, 2007, again under CR 26. Id.

Bridges wrote to McGrath and pointed out that Maxwell had not certified the answers to Ellison's requests. EX A-17 at 1. He also pointed out numerous deficiencies in McGrath's production, including the fact that he had produced very few emails pertaining to Ellison. He wrote:

[I]t is clear that you have not produced any emails as required by the requests. You have produced a selected few emails that you believe are helpful to your case. However that only demonstrates that your client has access to old emails and is not fully producing all emails.

EX 17 at 2.

As to time cards, Bridges wrote, "It is known that all of your clients' employees - including chiropractors - punched in and out with time cards. . . . These documents must be produced." Id. Regarding the marketing calendars. Bridges wrote, "your client asserts that the document 'does not exist.' . . . I believe we both know that response is not accurate."

Id. at 3.

On March 27, 2007, McGrath prepared and certified a second amended response. EX A-18. At Bridges' insistence, Maxwell also certified these requests. EX A-17; EX A-18 at 6. This response included an amended roster, which purported to contain Maxwell's best recollection as to each employee. EX. A-18 at 3. McGrath again refused to provide the employee file for Steenburg. Id. at 4-5. Both McGrath and Maxwell certified that there were no time cards or marketing calendars for the

professional salaried chiropractors. TR 185; EX A-18 at 4. McGrath stated that “all emails that are available had been produced,” while admitting for the first time that there may have been more emails kept on Maxwell’s personal computer but that their IT person was on vacation and had not retrieved them. EX A-18 at 3.

Two days after McGrath and Maxwell certified the second amended responses, Ellison’s lawyer took Maxwell’s deposition. TR 186. In that deposition, Maxwell admitted that CWC had time cards for the chiropractors and, in fact, she had seen them months previously. TR 378, 398-99. She testified that the time cards would go to her accountant, and then to storage, and that she never threw business records away. TR 186-87; 408. Maxwell testified that she had not produced them because she did not think that she had to. Ex. 102 at 35; TR 378, 406, 409. At hearing, McGrath testified that this was the first time that he learned that Maxwell had these documents in her possession. TR 544.

When questioned at her deposition, Maxwell knew immediately what marketing calendars were. TR 182. She admitted that CWC kept marketing calendars and that they were maintained with other business records and on email. Id. She also admitted that she had a “little file” for Steenburg that she had not produced. TR 383. Bridges also learned at

this deposition that Maxwell's personal computers, kept at McGrath's office, had never been checked for emails. TR 199.

Ellison moved for sanctions for CWC's failure to comply with the court's order compelling discovery. EX A-19. In response, Maxwell filed a declaration saying that they had accessed emails from her computer only the day before and were reviewing them for privilege but that it would take some time because there were "hundreds and hundreds" of them. EX A-22 at 5-6. She also stated that she had looked for and found numerous time cards, which would be provided. Id. at 4. She attached some of these cards to her declaration. EX A-22 at 2537, 2540-41.

On April 19, 2007, Judge Cheryl Carey issued an order finding that the documents requested by Ellison were directly material to Ellison's claims. EX A-24 at 6. The court specifically found that the failure to produce payroll information related to Steenburg had materially prejudiced Ellison's ability to litigate her claim of disparate treatment based on national origin. Id. at 7. The court also found that:

- CWC, Maxwell, and McGrath falsely certified responses to Ellison's requests for production;
- CWC, Maxwell, and McGrath have acted in bad faith as to their other responses to discovery;
- CWC, Maxwell, and McGrath's actions were willful and intentional and undertaken to mislead both Ms. Ellison and the court;

- CWC, Maxwell, and McGrath willfully and intentionally disregarded the court's first order to compel;
- Immediately following Maxwell's deposition, CWC, Maxwell, and McGrath were on notice to cure the defects in their responses and should have immediately supplemented their responses and their failure to do so further demonstrated their willful and intentional disregard of the court's order;
- Every day that CWC, Maxwell, and McGrath allow their false certifications on discovery to exist constituted an ongoing false certification.

EX 24 at 7-8. Notwithstanding the court order, McGrath did not produce any of the Steenburg documents, the marketing calendars, or any additional time cards except Ellison's. EX A-22, A-37; TR 198.

In November 2007, Bridges wrote to McGrath and told him that he intended to renew his request for a default judgment. EX A-37. He gave McGrath one last opportunity to provide documents related to Steenburg, the marketing calendars, and the time cards of the other chiropractors. Id. McGrath did not produce any more records. TR 201. In January 2008, Ellison moved for default judgment on liability and an order precluding CWC and Maxwell from presenting argument and evidence in defense of damages on their claims. EX 25. After this motion was filed, McGrath produced some time cards from the other chiropractors. TR 203-204.

On March 10, 2008, Judge James Rogers denied the motion for default but ordered that a jury instruction on spoliation of evidence by CWC be given at trial. EX A-28.

On July 14, 2008, a jury awarded Ellison over \$400,000 in back wages and general and punitive damages. EX A-30 at 4. A judgment was entered on October 30, 2008. EX A-32.

III. SUMMARY OF ARGUMENT

While the court was considering a sanctions motion filed by opposing counsel, McGrath wrote to the court impugning the defendant's credibility and asking the court to freeze her assets because she was not a United States citizen. Although he told the court that he would be sending copies of this communication to opposing counsel, he did not. The defendant and her lawyer did not discover the ex parte communication until several months later, after the trial had already commenced.

In the same case, McGrath repeatedly obstructed litigation by refusing to produce documents requested in discovery, making bad faith objections, and asserting that the documents did not exist when he had not made a reasonable inquiry to determine their existence. He then repeatedly and falsely certified his responses. He continued his misconduct in the face of multiple sanction orders, delaying the litigation and wasting court resources.

The hearing officer found, and the Board agreed, that by intentionally directing argument to the court disparaging the opposing party's credibility based on her national origin and citizenship status and seeking affirmative relief ex parte, McGrath violated RPC 8.4(h) and RPC 3.5(b). The hearing officer also found, and the Board agreed, that McGrath had failed to make a reasonable inquiry into the existence of documents and then intentionally made a false representation that he had done so when he had not, causing harm to the judicial system in violation of RPC 8.4(c) and RPC 8.4(d). The hearing officer recommended three consecutive 30-day suspensions, which the Board unanimously increased to a single 18-month suspension.

McGrath seeks a reprimand, or at most, a six-month suspension. While he admits that he intentionally made prejudicial and biased remarks to the court ex parte, he argues that no harm arose from his conduct. He also argues that he relied on his client to respond to the requests for production, and that his reliance on her constituted a reasonable inquiry. He asks the Court to reverse the hearing officer's factual findings on these issues and consider an additional mitigating factor that he never raised below. But the law is clear that the Court defers to the hearing officer's findings, particularly when credibility and veracity are at issue. Only by retrying the facts can the Court grant McGrath the relief he seeks.

The Board properly applied the ABA Standards and recommended an 18-month suspension. The Court should affirm and adopt this unanimous recommendation.

IV. ARGUMENT

A. STANDARD OF REVIEW

Unchallenged findings of fact are verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005). The Court upholds challenged factual findings if they are supported by substantial evidence. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58-59, 93 P.3d 166 (2004). “Substantial evidence exists if a rational, fair-minded person would be convinced by it. Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. And circumstantial evidence is as good as direct evidence.” Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C., 152 Wn.2d 387, 391, 97 P.3d 745 (2004) (citations omitted); In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 191-92, 117 P.3d 1134 (2005). The substantial evidence standard requires the reviewing body to view the evidence and the reasonable inferences “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.”

Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).

In reviewing the factual findings, the Court does not retry the facts. See In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003). The Court gives particular weight to the credibility determinations of the hearing officer, who has had direct contact with the witnesses and is best able to make such judgments. Id. Thus, “even if this court were of the opinion that the hearing officer should have resolved the factual finding otherwise, it would be inappropriate for it to substitute its judgment for that of the hearing officer or the Board.” In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 512, 29 P.3d 1242 (2001). Parties challenging factual findings must not simply reargue their version of the facts but, instead, must present argument as to why the findings are unsupported by the record. In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 331, 157 P.3d 859 (2007). The Court “will not overturn findings based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer and Board.” Id.

The Court reviews conclusions of law de novo, upholding them if supported by the findings of fact. Guarnero, 152 Wn.2d at 59. It also reviews sanction recommendations de novo, but generally affirms the Board’s sanction recommendation unless it “can articulate a specific

reason to reject” it. Id. (quotations omitted). Where a sanction is recommended by a unanimous Board, the Court will uphold it in the absence of a clear reason for departure. In re Disciplinary Proceeding Against Ferguson, 170 Wn.2d 916, 939-940, 246 P.3d 1236 (2011). And, where the sanction recommendations of the hearing officer and Disciplinary Board differ, the Court gives greater weight to the Board because “the Board is the only body to hear the full range of disciplinary matters and has a unique experience and perspective in the administration of sanctions.” In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 754, 82 P.3d 224 (2004) (quotations and citations omitted).

B. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS OF FACT

McGrath broadly assigns error to the Board’s adoption of the hearing officer’s findings of fact and conclusions of law. Respondent’s Brief (RB) at 1. He does so without citation to the record, and in fact disputes only nine of the hearing officer’s 28 findings. RB at 10-12. Rule 10.3(g) of the Rules of Appellate Procedure (RAP) provides that the “appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 81 n.14, 101 P.3d 88 (2004). When challenging findings of fact, it is incumbent on the appellant to present argument to the Court why specific

findings of fact are not supported by the evidence and to cite to the relevant portion of the record to support that argument. Whitney, 155 Wn.2d at 466 (citing RAP 10.3). The failure to argue error in his brief makes those findings verities on appeal. In re Disciplinary Proceeding Against Van Camp, No. 200,811-9, 2011 WL 2409654, at *1 n.1 (Wash. June 16, 2011).

McGrath's blanket challenge to the Board's adoption of all of the hearing officer's findings of fact and conclusions of law and his failure to cite the record in support of his assignments of error are insufficient to challenge the hearing officer's findings and thus they are verities on appeal. As to the findings that McGrath does challenge, all are supported by substantial evidence and should be upheld.

1. Finding 4.

In Finding 4, the hearing officer found that McGrath's continual objections to Ellison's discovery requests were not made in good faith. As an example, the hearing officer cited McGrath's objections to Ellison's requests for marketing calendars. FFCL at 4. McGrath objects to this finding. RB at 10-11. He argues that his objections regarding the request for marketing calendars were appropriate because a marketing calendar could mean more than one thing. RB at 11. But ample evidence supports the finding that McGrath acted in bad faith. The term "marketing

calendar” was used in CWC’s employee manual which was produced by McGrath as part of his responses. TR 172-173. Maxwell required chiropractors to keep them, and in fact they were kept and distributed by way of email. TR 182, 195-196. When questioned at her deposition, Maxwell immediately knew what marketing calendars were. TR 182. McGrath testified that he also knew what a marketing calendar was at the time that he certified the answers to the first requests, “but we didn’t know if they did.” TR 553.

Additionally, McGrath not only objected to this clear request by stating that it was “vague,” but persisted in this objection after having the request and its relevance explained to him multiple times by opposing counsel and after being specifically ordered to remove it. EX A-5 at 7; EX A-6 at 2; EX A-9 at 13; EX A-16 at 2; EX A-15 at 2.

And McGrath’s bad faith was not limited to the marketing calendar request. McGrath made similar boilerplate objections to each of Ellison’s requests, and continued to object to production of Steenburg’s file after being ordered to produce it. EX A-5 at 2-7; EX A-16 at 2, 7. He also objected to providing personnel information as “unduly burdensome” when such information was readily available simply by asking Maxwell. EX A-5 at 4; EX A-18 at 2.

2. Findings 9, 10 and 13.

In Findings 9, 10 and 13, the hearing officer set forth the Superior Court's findings on Ellison's Motion to Compel and subsequent motion for issue preclusion. EX A-15; EX. A-24. McGrath argues that these findings are hearsay and should not be considered because they were found under a different burden of proof. RB 11. But the hearing officer acknowledged the differing burdens of proof and cited that difference in explaining his conclusion relevant to Count 1. FFCL at 11-12. It was clear at hearing that these orders were not offered at hearing for the truth of the matter asserted, but rather, were specifically admitted to show that McGrath was on notice that his responses were deficient and that additional inquiry and investigation was necessary TR 59, 92, 124. McGrath did not object to their admission for this purpose. Id.

Findings 9, 10 and 13 accurately reflect the orders of the court, are part of the historical record of this case, and were admitted into evidence as exhibits at hearing. TR 92, 125. Each of these findings is therefore supported by substantial evidence and are relevant to show notice. Finding 9 excerpts the superior court's February 2007 order and shows that McGrath was warned that the court considered his objections and his refusal to provide basic documents to be in bad faith and in violation of CR 26. EX A-15; FFCL at 4-5 ¶ 9. Yet McGrath's recalcitrance

continued, requiring Bridges to move the court for sanctions based on McGrath's false discovery responses. EX. A-19. Finding 10 excerpts the superior court's April 2007 order and shows that the court considered McGrath's conduct to be a continued violation of the court's orders and his actions willful. FFCL at 6-7 ¶ 10. Notwithstanding the blunt and explicit language in these orders, McGrath's refusal to produce documents continued. TR 197-202; EX A-25; EX A-37. Finding 13 reflects the court's finding that McGrath had not made certain basic inquiries about certain discovery over a year after the first sanction order was entered. FFCL at 8 ¶ 13. McGrath was therefore on notice that additional inquiry and investigation was "clearly called for." FFCL at 12.

3. Finding 14.

Finding 14 states that:

Respondent, by virtue of his marriage, past representation of CWC, position as a CWC corporate officer and general familiarity with CWC's business operations had reason to believe that responsive documents and information existed and that discovery responses he prepared stating otherwise and his certification pursuant to CR 26(g) were incorrect. Respondent did not conduct a reasonable inquiry into the existence of the responsive documents and information.

FFCL at 8. McGrath argues that there is no evidence in the record to support that he had reason to "disbelieve his wife" when she told him that responsive documents did not exist. RB at 18. This argument

mischaracterizes this finding and simply restates McGrath's position at hearing, which the hearing officer and the Board rejected. Findings should not be overturned based on alternative explanations or versions of the facts previously rejected by the hearing officer and the Board. See, Marshall, 160 Wn.2d at 331.

Finding 14 was supported by substantial evidence. McGrath was the attorney for CWC and its corporate secretary. TR 365-366, 489. He was delegated the responsibility of answering the interrogatories. TR 92; EX A-102. The corporate offices were in his law offices, and the business records and computers that contained the unproduced emails were kept there. TR 166, 199.

The requested documents, such as the time cards and the marketing calendars were mentioned in CWC's guidelines, that McGrath produced in the first Responses, which he signed and certified that he had read. TR 172-73; EX A-5 at 7; See CR 26(g). In addition, the probable existence of the documents was pointed out repeatedly by Ellison's lawyers in letters and motions to the court. EX A-6 at 2; EX A-9 at 10-13; Ex A-11 at 6; EX A-17 at 2-3; EX A-19; EX A-37. And in her deposition, Maxwell readily admitted that these were documents that she kept in her business. TR 194-95. Yet, despite his intimate knowledge of the business, and opposing counsel's frequent notifications that documents such as

marketing calendars existed, McGrath testified that he took Maxwell's production at face value: "I produced what my client gave me; and if they didn't give me any marketing calendars, then I didn't produce them." TR 100. He made no independent inquiry as to the existence of many of the documents, testifying simply that "It wasn't my job." TR 519-20, 597, 602.

4. Finding 15.

Finding 15 states that:

Respondent's conduct caused harm to the administration of justice in frustrating the orderly progression of the case and unnecessarily requiring the court to devote time and resources to addressing frivolous, unfounded and unreasonable discovery objections and responses. Ellison's case was jeopardized by CWC's incomplete discovery responses. Judges Carey and Rogers spent an inordinate number of hours on discovery issues.

FFCL at 8. McGrath asserts that this finding is in error and directs the Court to "see discussion below," but then fails to discuss this finding elsewhere in his brief. RB at 11. The court should decline to consider this argument. Van Camp, 2011 WL 2409654 at *1, n.1.

In any event, substantial evidence supports Finding 15. Both Judge Carey and Judge Rogers testified as to the time and resources that it took to read and decide on Ellison's motions for sanctions. TR 251-55, 454-56. Bridges testified that it became evident that this lack of documentation would hurt Ellison's case when McGrath deposed his

financial expert and McGrath pointed out that the expert did not have a basis to make a wage loss claim because he did not have documents showing the number of hours that each chiropractor worked. TR 202. This information would have been contained in the timecards and calendars. Id.

5. Finding 23.

Finding 23 addresses McGrath's handwritten communication to the superior court and states that "Respondent's ex parte communication addressed matters at issue before the court and were intended by respondent to be persuasive to the court on those issues." FFCL at 11. In contesting this finding, McGrath alleges that there is no evidence that he really thought he was making an argument to the court on this issue and asserts that he was just "blowing off steam." RB 12. McGrath does not cite any evidence to support this statement, and the hearing officer's inference to the contrary was reasonable. McGrath sent these letters to Judge Rogers two days before he was due to issue a written opinion on Ellison's motion for default. EX A-26. He wrote these comments in a letter that was replete with argument, disparaging one of Ellison's witnesses as "not credible," "hostile" and "bias[ed]" and Ellison's arguments as "ridiculous" Id. McGrath himself testified that he felt that the comments had relevance to the litigation and comported with his

theory of the case. TR 510-511. The hearing officer reasonably could conclude that McGrath intended his statements to persuade the court.

6. Finding 27.

Finding 27 states that “Respondent, notwithstanding prior apologies, is of the belief that Ellison’s national origin and immigration status supported a valid argument in support of the relief he sought.” FFCL at 11. McGrath states that this finding is in error because he no longer believes that Ellison’s national and immigration status support a valid argument. RB 12. But McGrath cites no evidence to support his alleged change of heart. At hearing, McGrath testified that he did not believe that the discriminatory slurs against Ellison themselves were inappropriate. TR 510-11; 580-81. He also maintained that he held the same beliefs about Ellison and Canadians that were stated in his letters to the court and he argued that such beliefs justified the legal position taken by him. TR-510-11, 580- 81, 583-84; 586-87.

7. Finding 28.

In Finding 28, the hearing officer found that “Respondent’s conduct caused actual harm to the public’s view of the integrity of the bar and administration of justice.” FFCL at 11. McGrath objects to the finding of “supposed harm.” RB 12. But the evidence amply supports that the harm was not “supposed,” but actual. McGrath’s comments were addressed ex

parte to the judge considering a motion in the case. EX A-26, EX A-27. Judge Rogers testified that he had to consider how to address the comments and whether sanctions would be imposed. TR 452-53. He then had to draft an order directing McGrath to show cause, which McGrath then failed to do. EX A-28 at 6. The harm to the administration of justice was compounded because Ellison and Bridges did not become aware of McGrath's statements until mid-trial, many months later. TR 208-09. Bridges testified that McGrath's ex parte communication to the judge had a profound effect on Ellison, who could not understand how something like this could happen in the judicial process. TR 211. Bridges testified that, had he known about the letter when it was written, he would have added McGrath as a defendant in the case, and so was denied that opportunity. TR 211.

C. THE FINDINGS OF FACT SUPPORT THE HEARING OFFICER'S CONCLUSIONS THAT MCGRATH'S CONDUCT VIOLATED THE RPC

The Board adopted each of the hearing officer's conclusions of law. McGrath contests all but one of them. Conclusions of law are reviewed de novo and must flow from the findings of fact. Guarnero, 152 Wn.2d at 58-59. The Board's conclusions are upheld if "supported by substantial evidence in the record, that is, sufficient evidence to persuade a fair-minded, rational person." Van Camp, 2011 WL 2409654, at *8.

1. The Record Supports the Hearing Officer's Conclusion That McGrath Violated RPC 8.4(d).

The hearing officer's conclusion of law relevant to Count 1 states in relevant part:

Absent evidence that respondent had actual knowledge of existence of the documents, as opposed to remaining consciously ignorant of whether such documents and information existed, it cannot be found by a clear preponderance of the evidence that respondent knowingly made a false statement or violated a court order in violation of RPC 4.1 or intentionally or willfully misrepresented facts in violation of RPC 8.4(c). Respondent violated RPC 8.4(d) in providing discovery responses to opposing counsel without conducting a reasonable inquiry into the truthfulness of the responses in circumstances where inquiry and investigation by Respondent was clearly called for. Had Respondent taken a reasonable inquiry he would have known that the discovery responses were false.

McGrath contests this conclusion, arguing that there was no evidence that his intimate knowledge of Maxwell's business, their office sharing arrangement, or his position on the board of directors and as corporate counsel would have given him reason to know that the requested documents existed. See RB at 16. The hearing officer found that McGrath's familiarity with CWC and Maxwell did give him reason to know. As set forth above, substantial evidence supports this finding. FFCL at 8 ¶ 14.

In any event, the hearing officer did not base this conclusion solely on this finding. This conclusion was also supported by the findings that

McGrath made little or no attempt to inquire about or search for information, despite the fact that many of the documents were kept at his office. FFCL at 4-5; TR 166. It was also supported by the evidence that Ellison's lawyer specifically told McGrath that the documents existed and that the CWC manual that McGrath produced in the first answers to the requests specifically referenced them. EX A-6 at 2. And it was supported by the findings setting forth the court's increasing sanction orders. FFCL at 5-6 ¶¶ 9-10. This evidence, along with the evidence of McGrath's close involvement in Maxwell's businesses, support the conclusion that McGrath had reason to look further.

2. The Record Supports the Hearing Officer's Conclusion That McGrath Intentionally Falsely Certified the Discovery Responses.

The hearing officer concluded that "Respondent's certification [under CR 26] was a false representation to the court and opposing counsel that he had made a reasonable inquiry to determine that the responses were complete and correct. By certifying the responses pursuant to CR 26(g), respondent made an intentional misrepresentation to opposing counsel and the court in violation of RPC 8.4(c) and 8.4(d)." FFCL at 12-13 (emphasis in original).

McGrath argues that he did conduct a reasonable inquiry and so he did not make an intentional misrepresentation. RB at 15. But the hearing

officer specifically rejected this argument, finding that McGrath did not make a reasonable inquiry and that further inquiry and investigation were clearly called for. FFCL at 12. Further, the hearing officer's finding that McGrath's misconduct was intentional is a factual determination and is entitled to great weight. In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 744, 122 P.3d 710 (2005). "[I]t is the province of the finder of fact to determine what conclusions of law reasonably flow from the particular evidence in the case." State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). The evidence supports the inference that McGrath's conduct was intentional.

3. Counts 1 and 3 Address Two Separate Acts of Misconduct.

McGrath argues that Counts 1 and 3 address the same misconduct and so Count 1 should be dismissed. But the basis for the two charges is not the "same conduct," but two different acts—failing to make a reasonable inquiry, and then lying about it. McGrath states that "the finding in Count 1 was that [McGrath] did not know that documents were being withheld." RB at 16. But the hearing officer made no such finding. The hearing officer found that the evidence did not show that McGrath had actual knowledge of the existence of documents but that he was "consciously ignorant" of whether such documents existed. FFCL at 12.

He specifically found that McGrath's conduct was more than merely negligent. FFCL at 14.

McGrath then asserts that Count 3 is in conflict with Count 1 because if he did not know that documents existed, he could not have known that his inquiry was not reasonable. RB at 15-16. But the hearing officer found that that McGrath's "willful ignorance" did not relieve him of the requirements of CR 26(g) and that his false certification was intentional. This is a factual determination and the hearing officer's finding is to be given great weight. Longacre, 155 Wn.2d at 744.

4. The Argument That Lawyers Should Never Be Disciplined for Discovery Violations Lacks Merit.

McGrath argues that, as a policy matter, the Supreme Court should not impose discipline for misconduct related to discovery where the issues were litigated in courts. RB at 9-10. In support of his argument, he cites In re Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996) and Washington State Physician's Insurance Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993), arguing that because he could not find any public discipline for the lawyers involved in those cases, no Washington attorneys should be disciplined for any discovery violation. RB at 9-10. Whether to recommend a matter for hearing and disciplinary charges is an internal decision of the Association's Office of

Disciplinary Counsel that is not reviewed by the Disciplinary Board or the Supreme Court. Such decisions should have no bearing on whether this Court imposes discipline after a hearing officer has found misconduct⁶. Accord, In re Disciplinary Proceeding Against Botimer, 166 Wn.2d 759, 773, 214 P.3d 133 (2009) (evidence that a grievance against another lawyer was dismissed was “not relevant” to case at issue).

Moreover, Washington lawyers have frequently been disciplined for discovery misconduct, even when a court has imposed sanctions. See In re Mary Ruth Mann⁷, Proceeding No. 06#00066 (Sept. 2009) (lawyer reprimanded where court had sanctioned lawyer and dismissed two clients’ cases due to lawyer’s failure to comply with discovery orders); In re John Peter Mele, S.Ct. No. 200,603-5, Proceeding No. 05#00201 (May 2008) (lawyer disbarred where, among other things, he failed to respond to discovery seeking a telephone list of class members and told the court that he had instructed the client to produce the documents when he had not); In re David Ambrose, S.Ct. No. 200,242-1, Proceeding No. 04#00059 (May 2005) (lawyer suspended after being sanctioned over \$10,000 for discovery violations); In re Richard Llewellyn Jones, Proceeding No.

⁶ There is no evidence in the record as to what, if any, action was taken with respect to the lawyers in Fisons and Firestorm.

⁷ The findings and/or orders from the lawyer discipline proceedings referenced in this brief are attached to this brief as Appendix G.

00#00176 (May 2002) (lawyer reprimanded for asserting frivolous claims and failing to comply with discovery requests, after court had sanctioned him for the same conduct).

Moreover, other states have imposed discipline on lawyers who impede their opponent's search for truth through discovery. See e.g., In re Oklahoma Bar Association v. Lloyd, 787 P.2d 855, 860 (Okla. 1990). As Lloyd makes clear, important policy reasons exist for bringing disciplinary actions against lawyers who abuse the very system that they are sworn to uphold. "Discovery is vital to the truth-seeking mechanism of our adjudicative process." Id. at 859; see also In re Jones's Case, 137 N.H. 351, 361, 628 A.2d 254 (1993) ("The courts of our land are looked to for protection of the rights of each of us in regulating disputes that inevitably arise in a free society. To lay waste the energies of the judicial system which protects us all is grievous misconduct indeed.").

In any event, as the Board found, this is not a simple discovery issue. DB at 2. McGrath's conduct involved serious misconduct, including violating court orders and repeatedly making false certifications. And the superior court's increasingly severe sanction orders were unavailing. The disciplinary system "supplements the work of the courts in order to maintain respect for the integrity of legal institutions." In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 771-72, 801

P.2d 962 (1990). The purpose of the disciplinary system would be undermined if a lawyer, having been subject to sanctions which were ineffective in curbing his misconduct, was able to escape disciplinary action.

5. The Hearing Officer Properly Concluded That McGrath's Ex Parte Communications With the Court Disparaging Ellison's Citizenship Status Violated RPC 8.4(h) and RPC 3.5(b).

The hearing officer concluded that, “[b]y directing argument to the court to the effect that the opposing party’s national origin and citizenship status compromised her credibility and legal position, McGrath intentionally violated RPC 8.4(h).” FFCL at 13. The rule requires that the conduct at issue: 1) be in the course of representing a client; 2) is prejudicial to the administration of justice; 3) directed toward certain individuals, including other parties; and 4) be such that a reasonable person would interpret it as manifesting prejudice on the basis of national origin. RPC 8.4(h).

Findings 16-28⁸ set forth the discriminatory comments, and establish that McGrath’s comments related to his representation of Maxwell, were directed to the judge who was deciding a pending motion, and caused harm to the administration of justice. The hearing officer’s

⁸ McGrath does not contest findings 16- 22 or 24-26 and they are verities on appeal. Marshall, 160 Wn.2d at 330.

conclusion that McGrath's conduct violated RPC 8.4(h) thus was supported by the findings of fact.

McGrath appears to assert that his actions caused no harm so therefore his conduct was not prejudicial to the administration of justice. See RB 20. Conduct prejudicial to the administration of justice involves violations of practice norms or physical interference with the administration of justice. In re Disciplinary Proceeding Against Preszler, 169 Wn.2d 1, 17, 232 P.3d 1118 (2010). McGrath's discriminatory arguments were made in his capacity as Maxwell's lawyer and were directed ex parte to the court while it was considering a pending motion. McGrath also misrepresented that he had provided copies to opposing counsel when he had not. This conduct clearly violates practice norms and interfered with the administration of justice in that it cast a pall on the litigation proceedings when the comments were discovered during the trial.

RPC 3.5(b) states that a lawyer shall not communicate ex parte with a judge during a proceeding unless authorized to do so by law. As to this count, the hearing officer concluded that, "[b]y communicating ex parte with a judge and advocating with respect to the merits of a pending dispute, respondent intentionally violated RPC 3.5(b)." FFCL at 13. This conclusion is supported by the hearing officer's uncontested findings of

fact 16 through 25, above, which detail the ex parte nature of McGrath's comments, and that these communications addressed matters at issue before the court and were intended by McGrath to be persuasive on these issues. FFCL at 8-11. McGrath does not deny that these comments were made ex parte but denies that his remarks were intended to be persuasive. RB at 11-12. As noted above, the hearing officer rejected this testimony. FFCL at 11. However, even assuming as true the illogical proposition that comments to a judge impugning a witness's credibility and seeking relief are not meant to be persuasive, the rule does not require that a lawyer intend that the remarks have an impact. Instead, it directly forbids a lawyer from communicating with a judge ex parte except as permitted by law. RPC 3.5(b). These rules "are designed to protect the integrity of the legal system and the ability of courts to function as courts." In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 595, 48 P.3d 311 (2002). The hearing officer's conclusion of law relevant to Count 5 is supported by the unchallenged findings in this case and should be upheld.

D. THE COURT SHOULD ADOPT THE BOARD'S UNANIMOUS RECOMMENDED 18-MONTH SUSPENSION

Under the ABA Standards, the Court first determines the presumptive sanction by examining the ethical duty violated, the lawyer's mental state and the injury caused. In re Disciplinary Proceeding Against

Blanchard, 158 Wn.2d 317, 331, 144 P.3d 286 (2006). It then determines whether the presumptive sanction should be increased or reduced due to aggravating or mitigating factors. Id. The Court gives “great deference to the decisions of a unanimous board[.]” Whitney, 155 Wn.2d at 469.

1. The Hearing Officer and Disciplinary Board’s Determination of the Presumptive Sanction Should Be Affirmed.

The hearing officer and the Board properly found that the presumptive sanction was suspension.

a. The Presumptive Sanction for Count 3 Is Suspension.

The hearing officer and the Board agreed that ABA Standard 6.22 applied to Respondent’s violation of RPC 8.4(c) and 8.4(d), and that the presumptive sanction was suspension. FFCL at 14; DB 1.

McGrath argues that the evidence did not support the finding that he “knew” he had not made a reasonable inquiry. RB at 21-22. “‘Knowledge’ is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” ABA Standards at 17. This inference was supported by the evidence that the CWC manuals that McGrath produced in response to the requests for production specifically mentioned certain documents, yet McGrath made no effort to ascertain their existence aside from giving the request for production to Maxwell

and relying on what she produced. FFCL at 4-5; TR 518-19, 537, 543, 589. His failure persisted even after opposing counsel repeatedly pointed the probable existence of the documents and the court ordered them produced. EX A-6 at 2; EX A-15 at 2; TR 94-95; TR 100-01, 103-05. This inference is also supported by the fact that two days after McGrath and Maxwell certified that documents did not exist, Maxwell testified that they did, but she didn't produce them because she did not think that she had to. EX 102 at 35; TR 378, 406, 409.

State of mind is a factual finding and the hearing officer was in the best position to make this determination based on the evidence presented. Longacre, 155 Wn.2d at 744. His findings are thus given great weight. Id. McGrath's arguments to the contrary are not sufficient to overcome the deference afforded the hearing officer on this issue.

b. The Presumptive Sanction for Count 4 Is Suspension.

The hearing officer and the Board concluded that ABA Standard 7.2 applied to McGrath's violation of RPC 8.4(h) and that the presumptive sanction was suspension. FFCL at 14; DB 1. McGrath argues that this court should apply ABA Standard 7.3, where the presumptive sanction is reprimand. RB 23.

McGrath does not dispute that his conduct in making discriminatory comments to the court was intentional, but argues there

was no harm to the legal system and so the Court should be flexible in applying the Standards. RB at 23. But, in making this argument, McGrath ignores the evidence of harm that his ex parte remarks inflicted on Ellison, who did not know that he had made these prejudicial remarks until after her trial had begun and whose faith in the judicial process was clearly undermined. TR 211. The hearing officer found that McGrath's conduct caused actual harm to the public's view of the integrity of the legal system. FFCL at 11. The extent of harm caused by a violation is a factual finding. In re Disciplinary Proceeding Against Anschell, 149 Wn.2d 484, 501, 69 P.3d 844 (2003). McGrath's argument to the contrary is not sufficient to overcome the deference accorded to the hearing officer on this issue.

c. The Presumptive Sanction for Count 5 Is Suspension.

The hearing officer applied ABA Standards 6.22 and 6.32 to McGrath's ex parte contact with the court. FFCL at 15. This was based on the hearing officer's conclusion that McGrath's conduct in sending the ex parte comments was intentional and that McGrath's conduct caused actual harm to the public's view of the integrity of the bar and the administration of justice. FFCL at 11. Again, McGrath does not dispute that his conduct was intentional, but argues that the presumptive sanction must be lower because there was "no possible actual injury." RB at 24. But

the hearing officer found that there was actual interference with the legal proceeding. FFCL at 11 ¶ 28. As stated above, this finding was supported by substantial evidence.

In any event, the presence of actual injury is unnecessary. ABA Standards 6.32 and 6.22 apply when there is even potential injury. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 493, 998 P.2d 833 (2000). The injury can be to a client, the public or to the legal system. Id. All unauthorized ex parte contact affects the proceedings because they bring the judicial system into disrepute. See In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); see also, In re Anonymous, 729 N.E.2d 566, 569 (Ind. 2000) (“improper ex parte communications . . . threaten not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice”).

Here, McGrath’s unauthorized conduct was intended to affect the outcome of the proceeding by influencing the motion before the court, and it resulted in actual and potential injury to the proceeding and the opposing party. It brought into question the fairness of the legal process for the opposing party. It also placed the judge, the parties, and the litigation in a compromised position. While Judge Rogers did not act on McGrath’s discriminatory requests, the mere fact that he received such improper commentary, intended to promote bias against the opposing party, could

have interfered with the legal proceeding if the judge had improperly acted on such comments. Had opposing counsel learned sooner of the ex parte contact, he also could have justifiably moved for recusal by Judge Rogers, resulting in further increased costs to the system and both parties who were very near to trial.

2. The Court Should Affirm the Board's Application of the Aggravating Factors.

The hearing officer found, and the Board affirmed, the aggravating factors of prior disciplinary offenses, multiple offenses, refusal to acknowledge the wrongful nature of the conduct (count 4), and substantial experience in the practice of law. FFCL at 15. McGrath disputes only the aggravating factor that he refused to acknowledge the wrongful nature of the misconduct. RB at 21. He argues that this aggravating factor should not be applied because he has acknowledged that he should not have made those statements to the judge. *Id.* McGrath does not cite evidence to support his change of heart. Indeed, his argument is contrary to his testimony at hearing where he stated unequivocally that he did not believe that the discriminatory slurs against Ellison were inappropriate, and argued that his beliefs justified the legal position taken by him in the underlying litigation. TR-510-11, 580, 581, 583, 584, 585-87. This aggravating factor is appropriate.

3. McGrath Has Not Met His Burden To Prove the Mitigating Factor of Other Penalties and Sanctions.

McGrath asserts that he should be entitled to the mitigator of imposition of other penalties or sanctions because the Superior Court imposed sanctions against him in the amount of \$5,290. RB at 21. The burden of proof is on the respondent to prove a mitigating factor. In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007). Because McGrath raises this issue for the first time on review, it should not be considered. RAP 2.5(a); In re Disciplinary Proceeding Against Diamondstone, 153 Wn.2d 430, 442, 105 P.3d 1 (2005).

Even if the issue had been properly raised, this mitigating factor is inappropriate here. The evidence showed that sanctions were imposed on multiple occasions. EX A-15; EX A-24; EX A-32. There was evidence at hearing that at least \$8,000 of these sanctions were not paid at the time of the hearing. TR 213; EX A-32; EX A-33. Moreover, regardless of payment, McGrath continued to violate the February and April 2007 orders, requiring a motion for additional sanctions and penalties. TR 197-201. A lawyer should not be credited with this mitigating factor when the asserted other penalty or sanction had no deterrent effect on the behavior.

4. An 18-Month Suspension Is Appropriate Given the Serious Nature of the Misconduct and the Aggravating Factors.

When suspension is the presumptive sanction, the appropriate range is generally six months to three years, with the minimum sanction being appropriate only when the mitigating factors outweigh the aggravating factors. In re Disciplinary Proceeding Against Trejo, 163 Wn.2d 701, 722, 185 P.3d 1168 (2008). ABA Standard 2.3. The Board found no basis to recommend the minimum sanction on the facts of this case. McGrath urges this Court to disregard the Board's recommendation and give deference to the hearing officer's determination. RB at 25. This approach would be contrary to this Court's policy of giving more weight to the Board's sanction recommendation based on its unique experience and perspective in the administration of sanctions. Preszler, 169 Wn.2d at 19 (citing Cohen, 150 Wn.2d at 754).

McGrath also argues that the Board erred in imposing consecutive, rather than concurrent, suspensions. This argument is a red herring. Nothing in the Board's decision suggests that it imposed consecutive suspensions. At oral argument before the Board, disciplinary counsel argued that the minimum sanction of six months was the starting point under the ABA Standards and that this minimum was not appropriate where the aggravating factors outweighed the mitigating factors. Oral

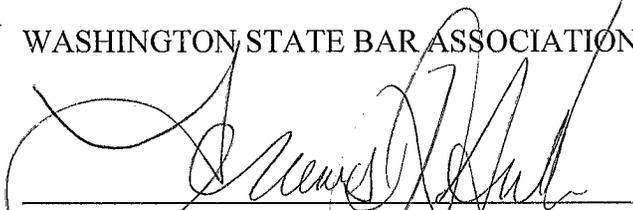
Argument Before the Disciplinary Board, BF 51 at 11-13. The Board specifically countered McGrath's attempt to cast the sanction as a concurrent versus consecutive issue. BF 51 at 7. The Board found that based upon McGrath's conduct a suspension was appropriate sanction, and then found that the multiple offenses and other serious aggravators warranted higher than the presumptive minimum sanction of six months. DB at 2. It then recommended a single, 18-month suspension. Id.

V. CONCLUSION

McGrath engaged in serious misconduct by repeatedly obstructing litigation and by making ex parte prejudicial remarks about the opposing party to the court. A unanimous Board recommended that he be suspended for 18 months. This Court should affirm.

RESPECTFULLY SUBMITTED this 29th day of June, 2011.

WASHINGTON STATE BAR ASSOCIATION



Francesca D'Angelo, Bar No. 22979
Disciplinary Counsel

APPENDIX A

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FILED

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DISCIPLINARY BOARD

BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

THOMAS F. MCGRATH, JR.,

Lawyer (WSBA No. 1313)

NO. 09#00070

**SECOND AMENDED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
HEARING OFFICER'S
RECOMMENDATION**

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), a hearing was held before the undersigned Hearing Officer on May 24, 25, and 26, 2010. Disciplinary counsel Kathleen Dassel appeared for the Association, and respondent appeared through counsel Kurt Bulmer.

I. FORMAL COMPLAINT

The respondent was charged by Formal Complaint dated December 18, 2009, with five counts of violating the Rules of Professional Conduct:

**SECOND AMENDED FINDINGS OF
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III. FINDINGS OF FACT

The following facts were proven by a clear preponderance of the evidence as required by ELC 10.4(b).

A. Counts 1, 2 and 3

1. Respondent was admitted to practice law in Washington on March 6, 1970, disbarred by order of the Washington Supreme Court on December 9, 1982, and readmitted to practice law on June 22, 1993.

2. A grievance was filed against respondent on July 21, 2008, by Judge Jim Rogers of the King County Superior Court [Exhibit A-34].

3. On February 11, 2005, respondent filed a Summons and Complaint on behalf of his client Chiropractic Wellness Center at Capitol Hill P.S., Inc., a Washington professional service corporation against Katherine Ellison, John Doe Ellison and Always Chiropractic and Wellness, LLC (hereinafter "Ellison"). [Exhibit A-1] By Amended Answer, Counterclaims, and Third-Party Complaint, Ellison counterclaimed against Chiropractic Wellness Center of Capitol Hill P.S., Inc., and impleaded Chiropractic Wellness Centers P.S., Inc., Melinda Maxwell D.C. and respondent Thomas F. McGrath, Jr. (erroneously named as "John McGrath" in the caption) and their marital community (hereinafter "CWC"). [Exhibit A-2] Respondent represented the CWC parties throughout the litigation with co-counsel. All of CWC's claims were dismissed on summary judgment, and the caption was re-styled to denominate Ellison as plaintiff and the CWC entities and persons as defendants. The case proceeded to trial on Ellison's claims. The litigation was contentious and difficult.

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1 4. During the litigation, the parties served each other with discovery requests.
2 Respondent continually interposed general and specific objections to Ellison's discovery
3 requests and made express representations that documents within the scope of the discovery
4 requests did not exist. In response to Ellison's First Requests for Production of Documents,
5 respondent interposed general objections to all of the requests and specific objections to the
6 majority of the requests. Many of the objections were not made in good faith. For example,
7 Ellison's Request for Production No. 23 stated:

8 Produce a copy of the marketing calendar for each and every
9 chiropractor hired, retained, or contracted by you to provide
10 chiropractic services at every location you conducted business
 in, for a period of two years before Katherine Ellison became
 employed by you and to date.

11 Respondent prepared and served the following response:

12 Objectionable. What is a "Marketing Calendar." (sic) This
13 request is vague, overbroad, ambiguous, burdensome and
 invasive.

14 A "Marketing Calendar" was a specific compilation of information and dates
15 described in CWC's office manual, referred to by CWC employees and was a term
16 understood by CWC and respondent.

17 5. Additional discovery requests served by Ellison sought payment and other
18 business records relevant to Ellison's claims for employment discrimination, disparate
19 treatment, failure to pay wages owed, and other issues central to her claims.

20 6. Respondent testified that his practice upon receiving discovery requests and
21 orders compelling production was to give the discovery request or order to his wife and ask

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**SECOND AMENDED FINDINGS OF
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1 her to assemble responsive information and material. Respondent testified that he made little
2 or no effort to inquire about or search for documents or information. Respondent's wife
3 testified to the same effect.

4 7. Respondent was defendant Maxwell's husband, was a corporate officer of the
5 CWC professional service corporations, had previously represented CWC in business matters
6 and litigation and shared office space with defendant Maxwell.

7 8. Discovery responses were signed by respondent. CR 26(g) provides in
8 pertinent part:

9 Every request for discovery or response or objection thereto
10 made by a party represented by an attorney shall be signed by
11 at least one attorney of record in his individual name The
12 signature of the attorney or party constitutes a certification that
13 he has read the request, response, or objection, and that to the
14 best of his knowledge, information, and belief formed after a
15 reasonable inquiry it is: (1) consistent with these rules and
16 warranted by existing law or good faith argument ...; (2) not
17 interposed for any improper purpose, such as to harass or to
18 cause unnecessary delay or needless increase in the cost of
19 litigation; and (3) not unreasonable or unduly burdensome or
20 expensive, given the needs of the case, the discovery already
21 had in the case, the amount in controversy, and the importance
22 of the issues at stake in the litigation.

9. On Ellison's motions, the court entered orders directing respondent's clients to
"withdraw all 'general objections' to Ms. Ellison's first requests for production," "to
withdraw all boilerplate objections to Ms. Ellison's first requests for production," and
compelling responses to the requests for production that were the subject of the motion to
compel. By Order dated February 13, 2007, the court found:

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... CWC exercised bad faith in its responses to Ms. Ellison's first requests for production. This court finds that CWC's use of generic and blanket general objections, cut-and-paste objections to essentially all of the discovery requests, and refusal to provide responses to questions as basic as asking CWC to produce an employee roster violated CWC's duty to exercise good faith under both CR 26 and CR 37....

[Exhibit A-15, p. 2, line 19]

10. The court entered a further order on April 19, 2007, finding that CWC had not complied with its previous order compelling production and finding that:

CWC, Ms. Maxwell, and McGrath falsely certified responses to Ms. Ellison's requests for production.

[Exhibit A-24, p. 7, line 11]

The court further stated:

This court also finds that CWC, Ms. Maxwell, and Mr. McGrath have acted in bad faith as to their other responses to discovery.

[Exhibit A-24, p. 7, line 19]

The court further stated:

This court finds that Ms. Maxwell's, CWC's, and Mr. McGrath's actions as described above were willful and intentional and undertaken to mislead both Ms. Ellison and this court in regard to the completeness of their discovery responses. This Court also finds that Ms. Maxwell, CWC, and Mr. McGrath have willfully and intentionally disregarded this Court's prior order to compel.

[Exhibit A-24, p. 8, line 4]

The court further stated:

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This court finds that Ms. Maxwell, CWC, and Mr. McGrath had actual knowledge of these violations. This court also finds that those individuals had actual knowledge that the responses and certifications were not simply incorrect, but were falsely sworn.

[Exhibit A-24, p. 8, line 17]

The court further stated:

This court finds that if in response to clear requests for production, and an order to compel, CWC, Ms. Maxwell, and Mr. McGrath have still knowingly and willfully withheld documents material to Ms. Ellison's claims that they knew were both requested and ordered compelled, that no order this court could fashion now would be sufficient to ensure their compliance in the future. This court finds its previous order was clear.

[Exhibit A-24, p. 9, line 4]

The court further found:

Ms. Maxwell, CWC, and Mr. McGrath falsely certified responses to requests for production

[Exhibit A-24, p. 10, line 11]

11. Documents within the scope of the requests for production, that respondent and his client had denied existed, were later located by CWC.

12. The court's findings were based largely on deposition testimony of Melinda Maxwell wherein she acknowledged the existence of records that CWC discovery responses had described as non-existent. Dr. Maxwell testified in this proceeding that she was responsible for gathering all information responsive to the discovery requests.

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1 13. After entry of the above-cited Orders, Ellison moved for a default judgment
2 for failure to make discovery. The court (Honorable Jim Rogers) issued an order denying the
3 requested relief but stating: “It was evident at the hearing on the Motion that counsel for the
4 Maxwell parties had not yet made certain basic inquiries within his own client’s companies
5 about certain discovery.” [Exhibit A-28, 4th page, line 7]

6 14. Respondent, by virtue of his marriage, past representation of CWC, position as
7 a CWC corporate officer and general familiarity with CWC’s business operations had reason
8 to believe that responsive documents and information existed and that discovery responses he
9 prepared stating otherwise and his certification pursuant to CR 26(g) were incorrect.
10 Respondent did not conduct a reasonable inquiry into the existence of responsive documents
11 and information.

12 15. Respondent’s conduct caused harm to the administration of justice in
13 frustrating the orderly progression of the case and unnecessarily requiring the court to devote
14 time and resources to addressing frivolous, unfounded and unreasonable discovery objections
15 and responses. Ellison’s case was jeopardized by CWC’s incomplete discovery responses.
16 Judges Carey and Rogers spent an inordinate number of hours on discovery issues.

17 B. Counts 4 and 5

18 16. On February 20, 2008, respondent prepared and transmitted to Judge Jim
19 Rogers a typed letter addressing a pending motion. The letter sent to and read by Judge
20 Rogers included the following handwritten postscript added by the respondent.

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**SECOND AMENDED FINDINGS OF
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Your Decision is going to effect American's (sic) – How (sic) are you going to trust and believe – a (sic) alien or a U.S. citizen.

Thomas McGrath (signature) # 1313

[Exhibit A-26]

17. A second letter, also dated February 20, 2008, was handwritten and transmitted by respondent to Judge Rogers. The letter read:

2-20-08

Dear Judge Rogers:

How many jobs do we give to aliens like Dr. Ellison. (sic) She was schooled here in the U.S. and refuses to become a U.S. citizen. She needs to go back to Canada.

In that regard, I am asking the Court to freeze all of her assets pending the outcome of this case.

Thomas P. McGrath, Jr.
Attorney for Plaintiff CWC,
King County Superior Court

[Exhibit A-27]

18. Judge Rogers received and read both letters in due course during the pendency of the motion.

19. The typed February 20, 2008, letter [Exhibit A-26] included the following:

All my correspondence to the Judges (sic) chambers will be attached to my declaration as exhibits and made a part of this record, if needed for appeal or for whatever other purpose.

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All correspondence to your chamber have been sent to opposing counsel either by fax and/or email and/or mail, and if my (sic) fax, this office has kept transmission reports.

Respectfully submitted,
Thomas F. McGrath, Jr.

cc: Dan L. Bridges [opposing counsel]

20. On February 20, 2008, respondent prepared, served and filed the "Declaration of Thomas F. McGrath, Jr. re: Letters to Court" stating in part as follows:

I, Thomas F. McGrath, Jr. declare under penalty of perjury of the laws of the State of Washington that the following statements are true, accurate and correct to the best of my knowledge regarding the current letters I have sent to the Court with copies to co-counsel and defense counsel, which I respectfully be made (sic) a part of this case record:

1. Letter dated January 30, 2008, regarding alleged misstatements in Dr. Ellison's response. Exhibit "A."
2. Letters dated February 8, 2008, regarding counsel's medical reports. Not attached.
3. Letter dated February 13, 2008, self-explanatory, marked Exhibit "B."
4. Letter dated February 20, 2008 (marked Exhibit "C") regarding the motion for Default by Dr. Ellison and the declaration of her husband, Tommy Coburn.

DATED this 20th day of February, 2008.

s/ Thomas F. McGrath, Jr.

[Exhibit A-100]

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1 based on deposition testimony of Melinda Maxwell that is not in evidence in this proceeding,
2 is not consistent with the testimony of Dr. Maxwell in this proceeding and was probably
3 reached on a “preponderance of the evidence” standard. Absent evidence that respondent had
4 actual knowledge of existence of the documents, as opposed to remaining consciously
5 ignorant of whether such documents and information existed, it cannot be found by a clear
6 preponderance of the evidence that respondent knowingly made a false statement or violated
7 a court order in violation of RPC 4.1 or intentionally or willfully misrepresented facts in
8 violation of RPC 8.4(c). Respondent violated RPC 8.4(d) in providing discovery responses to
9 opposing counsel without conducting a reasonable inquiry into the truthfulness of the
10 responses in circumstances where inquiry and investigation by respondent was clearly called
11 for. Had Respondent undertaken a reasonable inquiry, he would have known that the
12 discovery responses were false.

13 **V. CONCLUSIONS OF LAW RELEVANT TO COUNT 2**

14 1. Absent proof of willfulness by a clear preponderance of the evidence, Count 2
15 is dismissed as not proven.

16 **VI. CONCLUSIONS OF LAW RELEVANT TO COUNT 3**

17 1. The Washington Civil Rules for Superior Court govern the administration of
18 justice for civil cases. CR 26(g) provides that an attorney’s signature on a discovery response
19 is a certification and representation that the attorney has read the response and, to the best of
20 his knowledge, information and belief *formed after a reasonable inquiry* is correct as
21 required by the rules, not interposed for improper purpose and not unreasonable or unduly

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1 burdensome to the opposing party. The “reasonable inquiry” requirement exists to prevent
2 frustration of discovery by a willfully ignorant responding attorney. Respondent’s
3 certification was a false representation to the court and opposing counsel that he had made a
4 reasonable inquiry to determine that the responses were complete and correct. By certifying
5 the responses pursuant to CR 26(g), respondent made an intentional misrepresentation to
6 opposing counsel and the court in violation of RPC 8.4(c) and 8.4(d).

7 VII. CONCLUSIONS OF LAW RELEVANT TO COUNTS 4 AND 5

8 1. By directing argument to the court to the effect that the opposing party’s
9 national origin and citizenship status compromised her credibility and legal position,
10 respondent intentionally violated RPC 8.4(h).

11 2. By communicating ex parte with a judge and advocating with respect to the
12 merits of a pending dispute, respondent intentionally violated RPC 3.5(b).

13 VIII. PRESUMPTIVE SANCTION

14 1. Count 1. With respect to respondent’s misrepresentations concerning the
15 existence of documents in violations of RPC 8.4(d), ABA Standard 6.1 dealing with false
16 statements, fraud, and misrepresentation directs that “**suspension** is generally appropriate”
17 where a lawyer “knows” that false statements or documents are being submitted to the court
18 or that material information is improperly being withheld [Section 6.12] [emphasis added]
19 and provides that “**reprimand**” is generally appropriate when a lawyer is “negligent” either
20 in determining whether statements or documents are false or in taking remedial action when
21 material information is being withheld” [Section 6.13]

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**SECOND AMENDED FINDINGS OF
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1 Respondent's misconduct, by his admission and the testimony of his wife, with
2 respect to the provision of discovery responses and documents was more than merely
3 negligent. However, it cannot be found by a clear preponderance of the evidence that
4 respondent had actual knowledge that responsive information and documents were being
5 withheld. Accordingly, the presumptive sanction with respect to the discovery responses is
6 **reprimand** pursuant to Section 6.13.

7 2. Count 3. ABA Standard 6.2 regarding abuse of the legal process provides in
8 pertinent part:

9 **Suspension** is generally appropriate when a lawyer knows that
10 he or she is violating a court order or rule and causes injury or
11 potential injury to a client or a party, or causes interference or
12 potential interference with a legal proceeding.

13 By a clear preponderance of the evidence, respondent served and filed Civil Rule
14 26(g) certifications thereby representing that he had made a reasonable inquiry and certified
15 the discovery responses based on such reasonable inquiry. By the testimony of respondent
16 and his wife, respondent made no reasonable inquiry.

17 The presumptive sanction is, therefore, **suspension**.

18 3. Count 4. ABA Standard 7.2 provides:

19 **Suspension** is generally appropriate when a lawyer knowingly
20 engages in conduct that is a violation of a duty owed as a
21 professional and causes injury or potential injury to client, the
22 public, or the legal system.

Respondent knowingly made statements manifesting prejudice based on national
origin of the opposing party.

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1 The presumptive sanction is, therefore, **suspension**.

2 4. Count 5. ABA Standard 6.22 provides:

3 **Suspension** is generally appropriate when a lawyer knows that
4 he or she is violating a court order or rule, and causes injury or
5 potential injury to a client or a party, or causes interference or
6 potential interference with a legal proceeding.

7 ABA Standard 6.32 provides:

8 **Suspension** is generally appropriate when a lawyer engages in
9 communication with an individual in the legal system when the
10 lawyer knows that such communication is improper and causes
11 injury or potential injury to a party or causes interference or
12 potential interference with the outcome of the legal proceeding.

13 The presumptive sanction is, therefore, **suspension**.

14 IX. AGGRAVATING AND MITIGATING FACTORS

15 A. Aggravating.

16 ABA Standard 9.22 sets forth a list of aggravating factors to be considered in
17 determining the appropriate sanction for professional misconduct. The following aggravating
18 factors apply in this case:

19 1. Prior disciplinary offenses. Respondent was disbarred in 1982 following
20 conviction for second degree assault with a deadly weapon. *See, In re Disciplinary*
21 *Proceeding Against McGrath*, 98 Wn.2d 337, 655 P.2d 232 (1982).

22 2. Multiple offenses.

3. Refusal to acknowledge wrongful nature of conduct (Count 4).

4. Substantial experience in the practice of law.

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B. Mitigating

ABA Standard Section 9.32 sets forth a list of mitigating factors. The following mitigator applies to this matter:

- 1. Remoteness of prior offense in terms of time and nature of offense.

X. RECOMMENDATION

The hearing officer recommends that respondent be suspended as follows:

- 1. Count 3 1 month
 - 2. Count 4 1 month
 - 3. Count 5 1 month
- TOTAL 3 months**

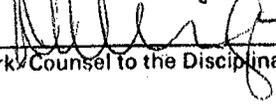
DATED this 20th day of July, 2010.



Timothy J. Parker, WSBA No. 8797
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the second amended F.O.C. by HO's recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Timothy J. Parker, WSBA No. 8797 Respondent/ Respondent's Counsel
at 1400 Commonwealth Avenue, Wallingford, CT 06495 by Certified/first class mail
postage prepaid on the 20th day of July, 2010


Clerk/Counsel to the Disciplinary Board

**SECOND AMENDED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
HEARING OFFICER'S
RECOMMENDATION - 16**

APPENDIX B

PERTINENT RULES OF PROFESSIONAL CONDUCT (RPC)

In re McGrath, Supreme Court No. 200,917-4

RPC 3.5 - IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

...

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

RPC 8.4 - MISCONDUCT

It is professional misconduct for a lawyer to:

...

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

(d) engage in conduct that is prejudicial to the administration of justice;

...

(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.

APPENDIX C

PERTINENT ABA STANDARDS

In re McGrath, Supreme Court No. 200,917-4

6.2 Abuse of the Legal Process

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

- 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
- 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
- 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.
- 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

6.3 Improper Communications with Individuals in the Legal System

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law:

- 6.31 Disbarment is generally appropriate when a lawyer:
 - (a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or
 - (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or
 - (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.
- 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.
- 6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

PERTINENT ABA STANDARDS

In re McGrath, Supreme Court No. 200,917-4

- 6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

7.0 Violations of Duties Owed as a Professional

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

APPENDIX D

FILED

MAR 08 2011

BEFORE THE DISCIPLINARY BOARD
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

THOMAS F. MCGRATH, JR.

Lawyer (WSBA No. 1313)

Proceeding No. 09#00070

CORRECTED DISCIPLINARY BOARD
ORDER MODIFYING HEARING
OFFICER'S DECISION

This matter came before the Disciplinary Board at its January 7, 2011 meeting, on automatic review of Hearing Officer Timothy J. Parker's, July 20, 2010 decision recommending a three month suspension, following a hearing.

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

IT IS HEREBY ORDERED THAT the Hearing Officer's Findings of Fact and Conclusions of Law are adopted. The Board recommends increasing the sanction to an 18-month suspension.¹

The Hearing Officer found that the presumptive sanction for count 1 was reprimand. He also found that the presumptive sanction for counts 3, 4, and 5 was suspension. He found four aggravating factors and one mitigating factor. Then, without any explanation, he recommended a one month suspension for each of the three suspension counts; and then added them together to recommend a three month suspension.

¹ The vote on this matter was unanimous. Those voting were: Bahn, Barnes, Butterworth, Handmacher, Ivarinen, Lombardi, Maier, Ogura, Stiles, Trippett, Waite and Wilson.

057.1

1 The *ABA Standards* state that “[g]enerally, suspension should be for a period of time
2 equal to or greater than 6 months. . .” *ABA Standards for Imposing Lawyer Sanctions* (1992) at
3 page 10. If suspension is the presumptive sanction, the appropriate range is generally six
4 months to three years, with the minimum sanction being appropriate only when the mitigating
5 factors outweigh the aggravating factors. *In re Behrman*, 165 Wn.2d 414, 426, 197 P.3d 1177
(2008).

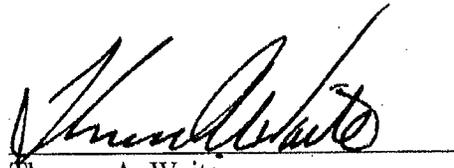
6 In this matter, there is no basis for recommending the minimum six-month suspension.
7 Respondent’s ex-parte request that the judge freeze Ms. Ellison’s² assets because she is not a
8 U.S. citizen is a serious violation of the RPCs. The fact that Respondent was the defendant’s
9 husband, a corporate officer, had previously represented the corporation in business and
10 litigation matters, and shared office space with the defendant distinguishes respondent’s conduct
11 from a simple discovery issue. [Finding 7] Respondent had more knowledge than most lawyers
12 about what documents his client possessed. Additionally, the hearing officer found four
13 aggravating factors and one mitigating factor. The aggravating factors outweigh the mitigating
14 factors. The serious nature of the misconduct, the multiple offenses and the prior discipline all
15 support a suspension longer than the six-month minimum. The Board recommends that the
16 Court impose an 18-month suspension.

17 This order corrects a typographical error in the original Board Order. This order is
effective *nunc pro tunc* to February 7, 2011. The time for appeal runs from the date of the
original order.

² The original Board Order contained a typographical error. It stated that Respondent requested that the judge freeze Ms. Maxwell’s assets. This order corrects that error. There are no other changes in the substance of the order.

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Dated this 2nd day of March 2011.



Thomas A. Waite
Disciplinary Board Vice Chair

APPENDIX E

THE MCGRATH CORPORATION

Attorneys At Law

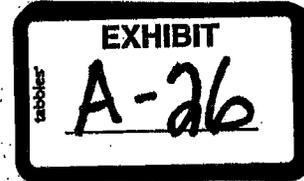
ASR Building, Suite #204
13555 Bellevue Redmond Road
Bellevue, WA 98005

425-644-6997 Fax: 425-644-7204
Toll Free: 1-888-644-6997
Cellular: 425-829-6997
e-mail: mcgrathcor@aol.com

February 20, 2008

Fax transmission to: 206-296-0986 & US Mail

Honorable James Rogers, Judge
King County Superior Court
King County Courthouse
516 Third Avenue
Seattle, WA 98104



Re: Chiropractic Wellness v. Ellison, et ux et al
King County Cause No. 05-2-05569-3 SEA

Dear Judge Rogers:

Your staff has been very gracious and advised me that you will be issuing your written opinion on Friday, February 22, 2008 regarding the motion for default filed by Defendant, Dr. Ellison.

Based upon the following documents just received by mail (02/20/2008) from Dr. Ellison's counsel, it is respectively requested that CWC and Dr. Maxwell be given an opportunity to not only respond to the proposed order of default, but also respond to the outrageous unsigned declaration of Mr. Coburn, and the Sur-Rebuttal filed by defense counsel.

The chiropractic witnesses that Dr. Ellison relied upon to prove her alleged claims have now come forward and declared that they did not keep time cards. Now Dr. Ellison is attacking those Doctors alleging "someone must be keeping track of their time." Why? They were salaried employees. This new argument is another ridiculous attempt to circumvent the true facts of what actually took place at the two clinics.

Mr. Coburn, husband and ex-employee of CWC, is a hostile and bias witness, quit CWC because he claimed it was a hostile environment (created by him) and then applied for unemployment compensation; and, then filed a frivolous complaint against Dr. Maxwell with the Department of Health.

Please note: Mr. Coburn was a salaried employee of CWC, but he NEVER mentioned in his unsigned declaration of February, 2008, whether he himself kept time records as the marketing manager. Why? Because, even though he was requested to keep time records, he did not. End of story. Mr. Coburn is not a credible witness.

Were are the Marketing records of Mr. Coburn, director and/marketing manager of the CWC clinics? CWC does not have them, what about Dr. Ellison?

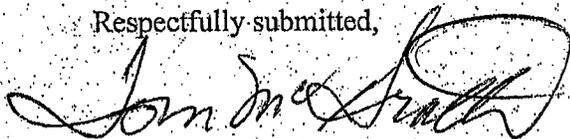
These above statements will be contained in CWC's response and declarations from the appropriate witnesses and parties.

I am scheduled for surgery at the University Hospital in the AM on Monday, February 25, 2007. My co-counsel has been out of town and our clients need additional time to respond to the above matters. At time point, another week or two is not critical in light of the issues and consequences of this case. I respectfully request that your decision is delayed at least for 7 to 14 days.

All my correspondence to the Judges chambers will be attached to my declaration as exhibits and made a part of this record, if needed for appeal or for whatever other purpose.

All correspondence to your chamber have been sent to opposing counsel either by fax and/or email and/or mail, and if my fax, this office has kept transmission reports.

Respectfully submitted,



Thomas F. McGrath, Jr.

TFM/bm

Encl.

cc: Dan L Bridges

John Peick

CWC

Your Decision is going to
Effect American's
How are you going to
Trust + believe - a plan
on a U.S. Citizen.
Frank #1313

APPENDIX F

THE MCGRATH CORPORATION

Attorneys at Law
Avedix Building, Suite #204
13555 Bellevue Redmond Road
Bellevue, WA 98005

425-644-6997 Fax 644-7204
Toll Free: 1-888-644-6997
Cellular: 425-829-6997
e-mail: mcgrathcor@aol.com

2-20-28

Dear Judge Rogers:

How many jobs do we give to Alia's
like Dr. Ellison. She was school here
in the U.S. & refuses to become a
U.S. citizen. She needs to go back
to Canada.

In that regard, I am asking
the Court to freeze all of her assets
pending the outcome of this case.

James R. DeSantis
Attorney JTT
By Amy J. DeSantis

RECEIVED
FEB 25 1998
JUDGE JIM ROGERS
DEPARTMENT 40

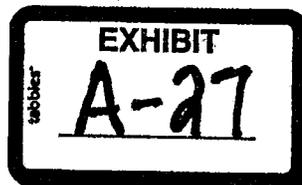


EXHIBIT G

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FILED

SEP 04 2009

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

Mary Ruth Mann,
Lawyer (Bar No. 9343).

Public No. 06#00066

REPRIMAND

Under the Rules for Enforcement of Lawyer Conduct promulgated by the Supreme Court of the State of Washington, you have been directed to receive this **FORMAL REPRIMAND**.

In 1999 and 2001, in representing two separate clients, you willfully and repeatedly violated court scheduling and discovery orders and rules. As a result, these two clients' cases were dismissed with prejudice before trial. Your conduct in failing to comply with court orders and rules violated RPC 1.3, 3.2, 3.4(c) and former RLD 1.1(b) (currently RPC 8.4(j)).

These actions merit a Formal Reprimand. Your actions discredit you and the legal profession and show a disregard for the high traditions of honor expected from a member of the Association.

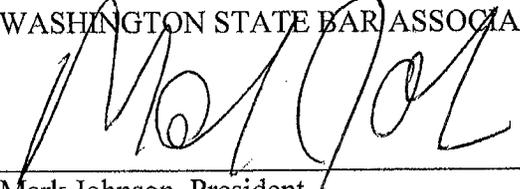
NOW, THEREFORE, YOU ARE HEREBY REPRIMANDED by the Washington State

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1 Bar Association for this misconduct. This Reprimand will be made a part of your permanent
2 record with the Association, and will be considered along with other evidence regarding any
3 future grievances against you.

4 Your privilege to practice law in the State of Washington is based on the finding that
5 you are a person of good moral character, and on your commitment to abide by the rules
6 governing the conduct of members of the Association. The Association expects all your future
7 conduct as a lawyer to be consistent with that finding as to your character, and with a continuing
8 commitment on your part to the letter and spirit of those rules.

9
10 Dated this 3rd day of September, 2009.

11 WASHINGTON STATE BAR ASSOCIATION
12 
13 _____
14 Mark Johnson, President

15
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17
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19 **CERTIFICATE OF SERVICE**

20 I certify that I caused a copy of the Reprimand
21 to be delivered to the Office of Disciplinary Counsel and to be mailed
22 to Phillip Gausberg, 1000 5th Ave Ste 1000 Respondent/Respondent's Counsel
23 at _____ by Certified first class mail
24 postage prepaid on the 4th day of September, 2009

Phillip Gausberg
St. Madge / ATT Patrick
1000 South Center Pkwy
Tukwila, WA 98148-4400
800 5th Ave Ste 1000
Seattle, WA 98101-3190

FILED
JUN 23 2009
DISCIPLINARY BOARD

1
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3 BEFORE THE
DISCIPLINARY BOARD
OF THE
4 WASHINGTON STATE BAR ASSOCIATION

5 In re

6 MARY RUTH MANN,
Lawyer (WSBA No. 9343)

Proceeding No. 06#00066

DISCIPLINARY BOARD ORDER
AMENDING HEARING OFFICER'S
DECISION

7
8 This matter came before the Disciplinary Board at its May 15, 2009 meeting on
9 automatic review of Hearing Officer Margarita V. Latsinova's decision recommending a three-
month suspension and restitution following a hearing.¹

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

12 **IT IS HEREBY ORDERED THAT** the Board adopts the Hearing Officer's Findings
13 of Fact and Conclusions of Law, adds an additional mitigating factor and reduces the
recommended sanction to a reprimand.²

14 The Board adopts the Hearing Officer's Findings of Fact and Conclusions of Law. After
15 a careful sanction analysis, the Board determines that the appropriate sanction is reprimand. The
Board must first determine a presumptive sanction using the *ABA Standards for Imposing
16 Lawyer Sanctions. In re Disciplinary Proceedings against Kronenberg*, 155 Wn.2d 184, 195,

17 ¹ Prior to this hearing, the Board considered Respondent's motion for additional proceedings pursuant to ELC
11.11. The Board unanimously voted to deny Respondent's motion.

² The vote was 9-1. Bahn, Barnes, Carlson, Cena, Fine, Greenwich, Handmacher, Meehan and Stiles voted in the
majority. Urefia voted in the minority and would have approved a suspension.

1 117 P.3d 1134 (2005). The Board analyzes the duty violated, the lawyer's mental state and the
2 extent of actual or potential harm caused by the conduct. *In re Disciplinary Proceedings*
3 *against Trejo*, 163 Wn.2d 701, 721, 185 P.3d 1160 (2008). The Board then determines whether
4 the aggravating and mitigating factors supported by the record increase or decrease the
presumptive sanction. *Kronenberg*, 155 Wn.2d at 195.

5 The Hearing Officer found that, by failing to comply with discovery requests and court
6 orders, Respondent's conduct violated RPCs 1.3, 3.2 and 3.4(c), as well as former RLD 1.1(b)
7 [now RPC 8.4(j)]. The Hearing Officer specifically found that Respondent did not neglect her
8 clients' matters. She dismissed violations of RPCs 3.4(a) and 8.4(d). The Hearing Officer
found the same violations in both Counts 1 and 2. The duty violated appears to be the duty to
promptly and diligently comply with court orders and procedural rules.

9 The analysis of the duty violated points out a difficulty with the *ABA Standards*. The
10 Hearing Officer found that Respondent's conduct violated RPC 1.3. The *ABA Standards*
11 analyze RPC 1.3 violations as violations of a duty owed to the client. The conflicting analysis
12 of the duty to the client or the court caused the hearing officer to find: "neither *ABA Standard*
13 4.42 (suspension) nor 4.43 (reprimand) "is a precise fit because they address violations of duties
14 owed to clients." The comment to *ABA Standard 4.42* states, "Suspension should be imposed
15 when a lawyer knows that he is not performing the services requested by the client, but does
nothing to remedy the situation, or when a lawyer engages in a pattern of neglect with the result
that the lawyer causes injury or potential injury to a client. Most cases involve lawyers who do
not communicate with their clients. *ABA Standard 4.42* at 34 (Commentary).

16 The Board finds that no section of *ABA Standard 4.4* applies precisely to the conduct in
17 this case.

1 Respondent was not charged with neglecting her clients' cases. Respondent's lack of diligence
2 was related to discovery and case scheduling deadlines. Even though *ABA Standard 6.2* does
not explicitly deal with RPC 1.3 violations, it is the appropriate *Standard* to use in this matter.

3 The Hearing Officer found that Respondent's conduct in Counts 1 and 2 was "willful".
4 [Rivers Finding 23 and Mieldon Finding 25] Willful appears to equate to knowledge under the
ABA Standards.

5 Potential and actual injuries appear to be present in both counts. The hearing officer
6 found injury to the clients and to the court system.

7 Based on these conclusions, the presumptive sanction appears to be suspension under
ABA Standard 6.22.³

8 The Board adds the mitigating factor of delay in disciplinary proceedings (ABA
9 Standard 9.32(i)) based on the Hearing Officer's delay in issuing the written decision in this
10 matter. ELC 10.16(a) states; "[W]ithin 20 days after the proceedings are concluded, unless
11 extended by agreement, the hearing officer should file with the Clerk a decision in the form of
12 findings of fact, conclusions of law, and recommendation."⁴ The hearing officer filed her
13 written decision nearly 11 months after the hearing. Neither the decision nor the record contains
14 any explanation of the delay. This type of delay harms the integrity of the lawyer discipline
15 system. Additionally, the 11 month delay seriously undercuts the hearing officer's apparent
decision that suspension is necessary to protect the public. The record supports adding the
mitigating factor of delay in disciplinary proceedings. Respondent's argument that the delay in
issuing the decision requires dismissal has no merit. Respondent's argument that delays in the

16 ³ Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential
injury to a client or a party, or interference or potential interference with a legal proceeding.

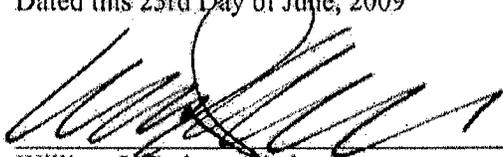
17 ⁴ Respondent argued that the 20-day time in ELC 10.16(a) is mandatory. Respondent provided no authority for this
interpretation of the rule. The plain language of the rule makes clear that the 20-day limit in ELC 10.16(a) is not
mandatory.

1 investigation of this matter should also be considered as a mitigating factor is not supported by
2 the record.

3 The Hearing Officer found three aggravating factors: pattern of misconduct, substantial
4 experience in the practice of law, and indifference to making restitution. (Sanction Analysis
5 Conclusion 9) She also found four mitigating factors: absence of prior disciplinary record,
6 absence of dishonest or selfish motive, personal or emotional problems, and imposition of other
7 penalties or sanctions. (Sanction Analysis Conclusion 10) The Hearing Officer determined that
8 the applicable mitigating factors outweighed the aggravating factors and recommended reducing
9 the presumptive six-month suspension to a three-month suspension. The Board finds that after
10 considering the presumptive sanction and weighing the aggravating and mitigating factors, the
11 appropriate sanction is reprimand. The Commentary to *ABA Standard 6.23* states, "Most Courts
12 impose a reprimand on lawyers who engage in misconduct at trial or who violate a court order
13 or rule that causes injury or potential injury to a client or other party, or who cause interference
14 or potential interference with a legal proceeding. [*ABA Standards* at 44] A reprimand will
15 protect the public and will also educate lawyers that they must comply with court orders,
16 including case scheduling orders. This matter is distinguishable from *In re Disciplinary
17 Proceedings against Lopez*, 106, Wn.2d 570, P.3d (2005). Lopez received a 60 day suspension
for failing to file an opening brief before three deadlines, failing to take reasonably practicable
steps to protect his client's interests upon termination of his representation, and failing to timely
and adequately respond to the Ninth Circuits' Order to Show Cause. *Lopez*, 106 Wn.2d at 597.
In *Lopez*, the hearing officer found three aggravating factors and one mitigating factor. *Lopez* at
594. Both Mann and Lopez start from a presumptive sanction of suspension. Mann, however,
has several mitigating factors that were not present in *Lopez*. The additional mitigating factors

1 justify a lesser sanction in Mann than in *Lopez*.

2 Dated this 23rd Day of June, 2009

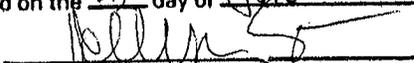
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4 William J. Carlson, Chair
Disciplinary Board

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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 Thomas J. Hertzler Respondent/Respondent's Counsel
at 1000 South Center Dewa Towers by Certified/first class mail
postage prepaid on the 23 day of June, 2009


Clerk/Counsel to the Disciplinary Board

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FILED

OCT 07 2008

DISCIPLINARY BOARD

BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

In re:

MARY RUTH MANN,
Lawyer (Bar No. 9343).

Public No. 06#00066

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
HEARING OFFICER'S
RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), a hearing was held before the undersigned Hearing Officer on September 24 – 26, 2007 and November 5 – 7, 2007, at the offices of the Washington State Bar Association, 6th Floor Hearing Room, Seattle, Washington. Respondent Mary Ruth Mann and her counsel Phillip Ginsberg appeared at the hearing. Disciplinary Counsel Linda B. Eide appeared for the Washington State Bar Association (the Association). The Hearing Officer having heard and considered the testimony of the witnesses offered by counsel for the Association and Mann, subject to the rulings on objections, which are made a part of the record in this action, the Hearing Officer, now, therefore, enters the following Findings of Fact, Conclusions of Law and Recommendations.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 1

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I. THE COMPLAINT

The Respondent was charged by Formal Complaint dated August 31, 2006, with violating the Rules of Professional Conduct, as follows:

Count 1 (*The Rivers Matter*). By failing to comply with discovery deadlines and/or with court orders, Mann violated RPC 1.3 (diligence), and/or RPC 3.2 (duty to expedite litigation), and/or RPC 3.4(a) (unlawfully obstruct another party's access to evidence), and/or RPC 3.4(c) (knowingly disobey an obligation under the rules of a tribunal) and/or RPC 8.4(d) (conduct prejudicial to the administration of justice) and/or former RLD 1.1(b) (currently RPC 8.4(j)) (willfully disobey or violate a court order).

Count 2 (*The Mieldon Matter*). By failing to comply with discovery deadlines and/or with court orders and/or by failing to appear in court on November 2, 2001, Mann violated RPC 1.3 (diligence), and/or RPC 3.2 (duty to expedite litigation), and/or RPC 3.4(a) (unlawfully obstruct another party's access to evidence), and/or RPC 3.4(c) (knowingly disobey an obligation under the rules of a tribunal), and/or RPC 8.4(d) (conduct prejudicial to the administration of justice), and/or former RLD 1.1(b)(currently RPC 8.4(j)) (willfully disobey or violate a court order).

The Hearing Officer dismissed allegations of violations of RPC 3.4(a) as to both *Rivers* and *Mieldon* matters at the close of the Association's case.

II. FINDINGS OF FACT

Based on the pleadings in the case, the testimony and exhibits at the hearing, the Hearing Officer makes the following findings of fact.

A. The Rivers Matter

Background. Mann represented Kathy Rivers, a journeyman bricklayer, in a gender discrimination claim against an association of bricklayer employers and several of the association's members that formerly employed her, including Fairweather Masonry Company ("Fair-weather"). The Complaint in *Rivers v. Conf. of Mason Contractors, et al*, King County

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 2

1 Superior Court Cause No. 98-2-08235-6, was filed on March 31, 1998. Fairweather appeared,
2 other defendants did not appear and Mann obtained default judgments against them. On May 6,
3 1999, Judge Donald D. Haley dismissed the action against Fairweather with prejudice for the
4 plaintiff's failure to comply with a discovery order and case schedule deadlines and, on
5 December 2, 1999, denied plaintiff's motion for reconsideration and to vacate the dismissal
6 order. The Court of Appeals affirmed the orders in an unpublished decision noted at 104 Wn.
7 App. 1037 (2001) (EX. 38). The Washington Supreme Court granted review. It reversed the
8 Court of Appeals with respect to its failure to require that the trial court consider less severe
9 sanctions before resorting to the drastic remedy of dismissal, but did not disturb the trial court's
10 findings regarding plaintiff's non-compliance with discovery orders or case schedule deadlines.
11 145 Wn.2d 674, 700, 41 P.3d 1175 (2002), EX. 38.

12 The Supreme Court's opinion contains a chronology of relevant dates and events:

13	<i>March 31, 1998</i>	Summons and complaint issued and filed by Petitioner Kathy Rivers.
14		Order setting case scheduling.
15	<i>February 9, 1999</i>	Respondent Fairweather Masonry Company served first interrogatories and request for production of documents.
16		
17	<i>March 8, 1999</i>	Respondent reminded Petitioner of deadlines and asked to schedule a KCLR 37 conference if discovery responses not served by March 11, 1999.
18		
19	<i>March 9, 1999</i>	Petitioner by letter asked Respondent to agree to extension of two weeks for service of her discovery responses.
20	<i>March 10, 1999</i>	Respondent agreed to grant Petitioner extension until March 25, 1999 for service of discovery answers on condition that the primary witness list be served by April 5, 1999.
21		
22	<i>March 11, 1999</i>	Original deadline for discovery responses. Judge Donald D. Haley signed order extending deadline for disclosure of primary witness list.
23		
24	<i>March 15, 1999</i>	Original deadline for disclosure of primary witness list extended by court order on March 11, 1999.
25		
26	<i>March 25, 1999</i>	Petitioner failed to serve discovery responses on agreed date.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 3

1 Counsel for Petitioner and Respondent conducted a KCLR 37
2 conference at which Petitioner asked for additional time until
3 April 12, 1999 to serve her discovery responses.

4 *March 31, 1999* Respondent filed motion to compel discovery noted for April 8,
5 1999 without oral argument and submitted proposed order
6 granting motion.

7 *April 5, 1999* Petitioner's counsel submitted declaration certifying reasons for
8 delay indicating she would submit discovery responses by April
9 12, 1999.

10 *April 8, 1999* Parties did not appear on motion noted for this date.

11 *April 12, 1999* Respondent submitted proposed order directing compliance by
12 April 12, 1999.

13 *April 16, 1999* Judge Donald D. Haley signed proposed order directing
14 compliance with discovery by "April 12, 1999."

15 *April 19, 1999* Date joint status report was due.

16 *April 20, 1999* Petitioner's counsel received in the mail the order signed by
17 Judge Haley directing compliance with discovery by "April 12,
18 1999".

19 *April 21, 1999* Petitioner served initial response to discovery.
20 Respondent claimed Petitioner's answers were inadequate.

21 *April 22, 1999* Petitioner's counsel submitted supplemental responses with
22 signature of Petitioner.
23 Petitioner submitted a draft status report to Respondent.

24 *April 26, 1999* Counsel for Respondent objected to signing draft status report
25 submitted by petitioner because of its inadequacy.

26 *April 27, 1999* Respondent filed motion to dismiss, without oral argument,
before Judge Haley.

May 4, 1999 Petitioner filed a memorandum in opposition to Respondent's
motion to dismiss.

May 6, 1999 Judge Haley signed order of dismissal.

May 11, 1999 Petitioner filed motion for reconsideration and an alternate
motion to vacate dismissal order under CR 60.

July 1999 Petitioner and Respondent argued Petitioner's motions before
Judge Haley.

December 2, 1999 Judge Haley issued a letter ruling denying Petitioner's motion for
reconsideration and motion to vacate dismissal order.

December 30, 1999 Petitioner appealed trial court's decision to Court of Appeals,

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 4

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Division One.

February 5, 2001 Court of Appeals, Division One, affirmed the trial court's order of dismissal and order denying reconsideration and CR 60 relief.

September 7, 2001 This court granted petition for review.

See *id.* at 687-89.

The Supreme Court did not disturb the Court of Appeals' conclusion that Mann's discovery non-compliance was willful under the Civil Rules:

The Court of Appeals . . . concluded that Petitioner's "willful disregard of the order to compel is evidenced less by her failure to respond by April 12 than by her failure to respond fully and without objection." The trial court's order to compel compliance required Petitioner to *fully answer* Respondent's first interrogatories and request for documents without objections. Despite that order, she continued to object to interrogatories instead of providing complete answers. Many of her answers were evasive and incomplete. She did not provide full answers to standard interrogatories concerning expert witnesses. For example, interrogatory number 3 asked Petitioner to identify all expert witnesses expected to testify and the substance of their opinions. Petitioner answered in general terms, stating that she expected to call vocational and employment experts regarding women in the trades, and reserved the right to call unnamed health professionals, including a psychiatrist. None of the experts, except one she specifically identified by name, had formed an opinion about the case.

Id. at 690-691 (footnotes omitted).

On remand, the trial court performed the required balancing of lesser sanctions, concluding that Mann "has a history of ignoring monetary sanctions imposed by [the] Court," that the discovery violations were "willful and deliberate" and caused "substantial prejudice" to the plaintiff, Kathy Rivers. EX. 46 at ¶¶ 28-31. The trial court again dismissed the claims against Fairweather with prejudice, and awarded Fairweather attorney's fees in the amount of \$10,138.50. Final judgment was entered on October 25, 2002. EX. 52. Plaintiff appealed. EX. 53. By stipulation of the parties, the judgment was vacated and the appeal dismissed. EXs. 54-55.

This disciplinary action involves proof by a clear preponderance of the evidence, a higher standard than was required in the *Rivers* case. ELC 10.14(b). The Association has met this

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 5

1 burden of proof as to the following facts, which are consistent with the findings approved by
2 the Supreme Court in the *Rivers* case:

3 1. Mann was admitted to the practice of law in Washington State on October 30,
4 1979.

5 2. The Case Scheduling Order in the *Rivers* case, EX. 4, required Mann to file a
6 Confirmation of Service by April 28, 1998. Mann failed to meet the deadline set by the Case
7 Schedule Order, as required by KCLR 4 at 4.1(b) and 4.2(a)(2). EX. 2.

8 3. Mann failed to file a Confirmation of Joinder by the September 8, 1998 deadline
9 set by the Case Schedule Order, and on October 1, 1998, the Court ordered the parties to appear
10 on November 12, 1998. EX. 6. On October 14, 1998, Mann filed a Confirmation of Joinder, but
11 noted that a mandatory pleading had not been filed. On November 12, 1998, Mann and
12 Fairweather's counsel appeared as ordered, and the Court required Mann to appear again on
13 January 7, 1999 unless a new Confirmation was filed by December 31, 1998. Fairweather was
14 excused from the January 7, 1999 hearing. Mann did not file a complete Confirmation of Joinder
15 by December 31, 1998, or at all, and she did not appear on January 7, 1999. EX. 2.

16 4. By stipulated order, the deadline for disclosing primary witnesses was changed
17 from March 15, 1999 to April 5, 1999. EX. 12. Mann failed to disclose her client's primary
18 witnesses by April 5, 1999. EX. 2.

19 5. On April 13, 1999, Mann forwarded a Confirmation of Joinder dated January 11,
20 1999 to Fairweather's counsel, but he refused to sign it unless and until Mann corrected it to note
21 that it was not a joint submission, that Mann had not provided answers to outstanding discovery
22 requests and that she had not disclosed her possible primary witnesses by the ordered deadline.
23 He also requested a status conference date. EXs. 19A, B, C. Mann never filed a completed
24 Confirmation of Joinder. EX. 2.

25 6. Mann failed to file the joint status report by April 1999, as required by the Case
26 Scheduling Order. EX. 2, RP 66-67, 88-89 (Skalbania testimony).

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 6

1 7. Mann proposed a joint status report on April 22, 1999. When Fairweather did not
2 cooperate in completing the report form, Mann failed to file any status report contrary to KCLR
3 4.2(a)(3). EXs. 22A, 22B, 25.

4 8. On February 9, 1999, Fairweather served upon Mann its first discovery requests,
5 interrogatories and request for production of documents, asking for calculation of specific
6 damages, the identity of expert witnesses expected to be called at trial and the substance of their
7 opinions. Mann failed to respond or serve objections within 30 days.

8 9. On March 9, 1999, the parties agreed to extend the deadline for Mann's responses
9 until March 25, 1999. EX. 11B, EX. 11C. Mann failed to respond by March 25, 1999. EX. 13.

10 10. On March 25, 1999, Mann requested a further extension to April 12, 1999. On
11 March 31, 1999, Fairweather filed a motion to compel discovery, noted for April 8, 1999.
12 EX. 14.

13 11. Mann promised to submit discovery responses by April 12, 1999, and asked the
14 Court to extend the witness disclosure date from April 5, 1999 to April 19, 1999. EX. 16. Mann
15 failed to serve discovery responses by April 12, 1999. Mann failed to disclose plaintiff's witness
16 disclosure by April 19, 1999.

17 12. Judge Haley granted Fairweather's motion to compel on April 16, 1999. EXs. 20,
18 29. His order required that plaintiff "fully answer" the discovery requests and warned that the
19 Court would "dismiss plaintiff's case with prejudice if plaintiff misses another discovery
20 deadline or case event deadline." The order imposed sanctions in the amount of \$495.

21 13. Mann served initial responses to the discovery requests on April 21, 1999, and
22 supplemental responses on April 22, 1999. EXs. 21, 24. The responses included objections.

23 14. Fairweather moved to dismiss the case with prejudice for failure to "fully answer"
24 discovery requests as required in the April 16, 1999. EX. 23.

25 15. In opposition to the motion, Mann submitted a declaration seeking more time to
26 respond given her busy schedule. EX. 27 at 00155.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 7

1 16. On May 6, 1999, Judge Haley granted defendant's motion to dismiss the Rivers
2 Complaint against Fairweather. EX. 32.

3 17. On June 19, 2000 while the case against Fairweather was pending in the Court of
4 Appeals, but before the decision was issued, Judge Haley granted the motion by the other
5 defendants to set aside the default judgments against them, finding that they appeared but "failed
6 to answer solely due to plaintiff's counsel's misrepresentations as to the status of the lawsuit and
7 the ambiguous and inconsistent communications served with the summons." EX. 132.
8 Judge Haley further found that "Plaintiff . . . failed to provide Defendants with notice of
9 plaintiff's motion for default in violation of CR 55(a)(3)," and "Ms. Mann's inaccurate
10 representations in her Declarations in support of the Orders of Default and the entry of default
11 judgments were a violation of CR 11, in that she signed pleadings that represented to [the] Court
12 that said pleadings were, after a reasonable inquiry, well grounded in fact, where that was not the
13 case." *Id.* at 2-3. Judge Haley awarded defendants \$7,883.80 in costs and attorney fees and
14 imposed "additional sanctions, to be determined later against Ms. Mann for violation of CR 11."
15 *Id.* at 3.

16 18. Rivers has not prosecuted her gender discrimination case against the defendants
17 whose default judgments were set aside, and they have not pursued CR 11 sanctions against
18 Mann.

19 19. Mann disregarded court orders and rules regarding the case scheduling order and
20 discovery in the *Rivers* matter without reasonable excuse or justification. Her disregard of court
21 orders was willful.

22 20. Mann's repeated disregard of court orders and rules caused potential injury to
23 Kathy Rivers. Absent fraud, the "sins of the lawyer" are visited upon the client. *Rivers*, 145
24 P.3d at 679. Dismissal is an extraordinary sanction that Washington courts do not use lightly.
25 *Id.* at 686. Ms. River's case against Fairweather was dismissed with prejudice as a sanction for
26 Mann's repeated and egregious discovery violations and Ms. Rivers lost forever an opportunity

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 8

1 to have a jury evaluate the merits of her claims. It is impossible to tell at this juncture whether
2 Rivers' gender discrimination claims against Fairweather had merit. If they did, the injury to
3 Ms. Rivers is hard to overestimate. If the claims lacked merit, the interests of the client and the
4 court system were best served by uncovering their deficiencies through orderly discovery and
5 motion practice. Mann's systematic disregard of court orders and rules imposed an unnecessary
6 burden on the court system by requiring the court to police Mann's compliance with discovery
7 and other deadlines.

8 **B. Count 2/Mieldon Matter**

9 **Background.** Mann represented Willie Mieldon, former director of environmental
10 services at Harborview Medical Center, in his race discrimination and harassment claims against
11 Harborview. King County Superior Court Cause No. 97-2-24393-9 (hereinafter, *Mieldon I*).
12 EX. 78, at 2. The Complaint was filed on September 26, 1997. EX. 133.

13 Ms. Mann took "at least *54 depositions*" in *Mieldon I*. RP 279-280 (testimony
14 Harborview's counsel Darren A. Feider) (emphasis added); EX. 78, at 2. Harborview moved for
15 summary judgment based on the statute of limitations and the merits of Mieldon's claims.
16 Judge Richard Jones set the hearing on Harborview's motion for September 17, 1999. At
17 4:30 p.m. on September 16, 1999, Mann filed a motion for voluntary dismissal under CR
18 41(a)(1)(B), without prejudice. EX. 79 at 56. Judge Jones dismissed the case and reserved the
19 issue of sanctions if Mieldon refiled his claims. RP 314 (Feider testimony).

20 On July 25, 2000, Mann filed a new discrimination case, King County Superior Court
21 Cause No. 00-2-19797-7, alleging that Harborview discriminated against Mieldon based on
22 disability and that his termination violated his free speech rights (hereinafter, *Mieldon II*). EXs.
23 63, 64, 65. On November 2, 2001, Judge Glenna S. Hall dismissed *Mieldon II* for repeated and
24 willful violations of court orders and discovery rules by Mann. On appeal, *Mieldon v.*
25 *Harborview Medical Center, et al.*, No. 49763-4-I (Wash.Ct.App.Div.I, Nov. 25, 2002), the
26 Court of Appeals held that the record supported the trial court's decision to dismiss this lawsuit

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 9

1 for repeated and willful violations of court orders and discovery rules, but that the trial court had
2 failed to enter the findings addressing lesser sanctions required by *Rivers v. Wash. State Conf. of*
3 *Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002). The Court of Appeals therefore
4 reversed and remanded. 114 Wn. App. 1046, 2002 WL 31648782 (Nov. 25, 2002).

5 On remand, Judge Glenna S. Hall entered explicit findings that the repeated violations of
6 court orders and discovery rules were willful, defendants' ability to prepare for trial was
7 prejudiced, and less severe sanctions were inadequate. The court again dismissed the lawsuit as a
8 sanction for violation of court orders. The Court of Appeals affirmed, 2005 WL 1691504
9 (July 11, 2005), *rev. denied*, 156 Wn.2d 1023 (2006) (EX. 124).

10 The Court of Appeals' decision referenced the trial court Order dated June 20, 2003
11 (EX. 122), that described Mann's repeated violations of the case schedule order and failure to
12 attend a court-ordered discovery conference and deposition:

- 13 1.1 Plaintiff failed to comply with the civil case schedule order when he did
14 not file a Confirmation of Service on or by January 2, 2001 court deadline.
- 15 1.2 Plaintiff failed to comply with the civil case schedule order when he did
16 not submit a Primary Witness Disclosure List on or by July 16, 2001 court
17 deadline.
- 18 1.3 Plaintiff failed to comply with the civil case schedule order when he did
19 not file a Joint Status Report on or by August 20, 2001 court deadline.
- 20 1.4 Plaintiff failed to comply with the civil case schedule order when he did
21 not begin or complete discovery on or by the October 29, 2001 discovery
22 cutoff date.
- 23 1.13 Plaintiff failed to attend the Court mandated discovery conference on
24 November 2, 2001.
- 25 1.16 Plaintiff walked out on the court ordered deposition of Mieldon, scheduled
26 a continuation deposition for November 1, 2001, then unilaterally
cancelled the November 1st deposition on the morning thereof.

27 The June 20 order also describes Mieldon's failure to comply with the February 20 and
28 October 15 orders granting Harborview's motions to compel:

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 10

- 1 1.6 Plaintiff failed to comply with this Court's February 20, 2001 order to
2 answer Defendant's Initial Set of Interrogatories and Requests for
 Production.
- 3 1.7 Plaintiff failed to comply with the Court's February 20, 2001 order to pay
4 monetary sanctions for his discovery violations until this Court's Order
 Granting Defendants' Second Motion to Compel approximately nine (9)
5 months later.
- 6 1.8 Plaintiff engaged in an abusive and repetitive practice of constantly
7 scheduling, canceling, and then rescheduling necessary document reviews
 and CR 37 conferences.
- 8 1.9 Plaintiff failed to comply with this Court's October 15, 2001 order to cure
9 the discovery deficiencies in his Answers and Responses to Defendants'
 Initial Set of Interrogatories and Requests for Production.

10 *The accuracy of the trial court's findings of repeated violations of court orders
 is not controverted.*

11 2005 WL 1691504 at * 4-5 (emphasis added, footnotes omitted).

12 This disciplinary action involves proof by a clear preponderance of the evidence, a higher
13 standard than was required in *Mieldon II*. ELC 10.14(b). The Association has met this burden of
14 proof as to the following facts:

15 1. The case scheduling order was issued on July 25, 2000. EX. 64. The deadline for
16 Confirmation of Service was August 22, 2000. Mann failed to file a Confirmation of Service by
17 August 22, 2000. EX. 62. On February 9, 2001, Mann filed a Confirmation of Service, which
18 noted that one of the defendants still had not been served. EX. 68. On February 15, 2001, Mann
19 filed a Supplemental Confirmation of Service reporting that all defendants had been served.
20 EX. 72.

21 2. Mann failed to appear for the January 18, 2001 status conference set by the
22 scheduling order. EX. 66.

23 3. On November 6, 2000, Harborview served on Mieldon an initial set of
24 interrogatories and requests for production seeking information concerning the facts and
25 documents supporting Mieldon's allegations and identification of persons with knowledge of
26

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 11

1 Mieldon's claims. Mieldon's responses were due December 6. Mann forwarded the discovery to
2 Mieldon on November 22. EX. 268.

3 4. Mann requested, and Harborview agreed to, two extensions, first to January 15
4 and then to February 6, 2000. Mann did not respond to discovery requests by February 6, 200.
5 EXs. 69B, EX. 69A, 69C, 71, RP 275-278 (Feider testimony).

6 5. Harborview filed its first motion to compel on February 13. EXs. 70, 71. Mann
7 cited her paralegal's wrist injury and heavy workload in other cases as reasons for failure to meet
8 the deadlines despite the two extensions, but did not oppose Harborview's motion to compel and
9 agreed to pay sanctions of \$200 and to respond by February 20. EX. 73. On February 20, the
10 trial court entered an order granting Harborview's motion to compel. The order required Mieldon
11 to answer the interrogatories and requests for production by February 21 and pay terms of \$350.
12 EX. 76. Mann provided discovery responses on February 20, 2001. She did not pay the court-
13 ordered sanction.

14 6. On July 27, 2001, the trial court granted Harborview's motion for partial
15 summary judgment on time-barred claims. EXs. 88, 101. On August 17, 2001, Harborview sent
16 Mann a five-page letter that described the deficiencies in plaintiff's responses to the
17 interrogatories and requests for production in light of Mieldon's remaining claims, and proposed
18 dates to review documents and for a discovery conference. EX. 91, at 9-13.

19 7. After unsuccessful attempts to schedule a document review, an independent
20 medical examination (IME) of Mieldon, and to obtain executed stipulations authorizing release
21 of employment, tax, workers compensation, and medical records, Harborview filed a second
22 motion to compel on October 5, 2001. EX. 90. Harborview argued that Mann failed to fully
23 answer the initial discovery requests as ordered on February 20, and failed to pay the court-
24 ordered sanction. EX. 92 at 2.

25 8. Mann repeatedly rescheduled Harborview's attempts to review documents in her
26 office, each time on short notice. EX. 91 at 2; EX. 105 at 2.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 12

1 9. A discovery conference set for September 14, 2001, was rescheduled repeatedly
2 at Mann's request to accommodate her schedule. EX. 91 at 63, 65. Later, Mann unilaterally
3 canceled that discovery conference and suggested a conference sometime after her Grays Harbor
4 County trial concluded later that month. EX. 91 at 67. RP 299. Harborview's counsel requested
5 a date certain for the discovery conference, EX. 91 at 69, but received no response. EX. 91 at 3.

6 10. The trial court entered an order granting Harborview's second motion to compel
7 on October 15, 2001. EX. 94. The order required Mieldon to "cure the discovery deficiencies in
8 his answers and responses to Defendant's Initial Set of Interrogatories and Requests for
9 Production" by October 22, submit to an independent medical examination by the last day of the
10 discovery cutoff, October 29, and pay \$500 in terms for failing to comply with the court's
11 February 20 order. Mann provided supplemental responses.

12 11. On October 23, 2001, Harborview filed a motion for sanctions and asked the
13 Court to dismiss the case or strike portions of the pleadings. EX. 95. It cited continuing
14 deficiencies in discovery, despite supplemental responses, with trial less than two months away:

- 15 • Stipulations to obtain Mieldon's employment, earnings, and medical records had
16 been outstanding since September 10, 2001. EX. 95 at 3;
- 17 • Mann had twice canceled Mieldon's deposition, which had been reset for
18 October 27, 2001. EX. 95 at 8;
- 19 • Harborview still did not have a supplement to Interrogatory No. 8 to explain
20 Harborview's alleged failure to accommodate a claimed disability, and it
21 received no information to substantiate claimed damages. EX. 95 at 5.

22 12. Mann responded on October 25, 2001, stating, *inter alia*, that Plaintiff had paid
23 the sanction imposed by the February 21, 2001 order. EX. 98 at 1-2.

24 13. Mieldon wrote a check for \$350 to satisfy the sanction outstanding from the
25 February 20, 2001 order, and Mann forwarded the payment to Harborview on October 12, 2001.
26 EX. 300. Mieldon testified that he had "no recollection" having been shown Judge Hall's

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 13

1 February 20, 2001, Order that imposed the \$350 sanction, EX. 76, and that Mann's office told
2 him he owed \$350 "for some kind of paperwork or something." RP 475.

3 14. Mieldon also paid the \$500 as required by Judge Hall's October 15, 2001 Order
4 Granting Second Motion to Compel. As to that amount, he understood that "it was like a penalty
5 or fine or something." RP 476-77.

6 15. Discovery cutoff in the *Mieldon* case was October 29, 2001. Mann did not
7 conduct any discovery before the cutoff. EX. 93 at 4. She never filed a motion for continuance.
8 EX. 62.

9 16. Harborview noted the depositions of Mieldon and his wife for the 18th and 19th of
10 September, 2001. Mann cancelled the depositions based on trial conflicts. Harborview agreed to
11 reschedule, but Mann canceled again citing trial preparation needs. Mann suggested depositions
12 in November or December 2001, after the discovery cutoff. The court ordered that the
13 depositions be taken before the October 29, 2001 discovery cut-off even if that meant evening or
14 weekend depositions. Mann terminated the rescheduled Mieldon deposition early citing "client
15 appointments." Harborview agreed to continue that deposition to November 1, 2001. However,
16 on November 1, 2001, Mann's staff left a voice mail message for Harborview's counsel that she
17 was canceling the deposition because she had to write something for the Supreme Court that was
18 due the next day. EX. 104.

19 17. Mann did not attend the November 2, 2001 hearing on Harborview's motion to
20 dismiss as a sanction due to a conflict with post-trial motions hearing in Grays Harbor County.
21 EX. 105 at 2. Mann arranged for an associate to cover the hearing. The court required Mann to
22 appear. By the time she called in from her vehicle en route to Grays Harbor County, she was
23 advised that the court had already ruled on the motion. The Court granted the motion for
24 sanctions under CR 37(b)(2)(C) and dismissed Mieldon's case. EX. 100, RP 784 - 787.

25 18. The Hearing Officer finds that Mann knowingly failed to comply with the
26 Mieldon case schedule order and court rules by :

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 14

- 1 • Failing to file a Confirmation of Service, a Primary Witness Disclosure List, or a
2 Joint Status Report within the deadlines mandated by the case schedule order,
3 EX. 64;
- 4 • Failing to begin or complete discovery by the October 29, 2001 discovery cut-off
5 date;
- 6 • Failing to respond to Harborview's discovery requests within the time allowed by
7 court rules, despite being granted two extensions of the deadlines;
- 8 • Failing to provide full answers and discovery even after the court's February 20,
9 2001 Order Granting Defendant's Motion to Compel Discovery Answers.
- 10 • Failing to provide full answers and discovery even after Harborview wrote to her
11 on August 17, 2001 to outline alleged deficiencies and even after the court's
12 October 16, 2001 Order Granting Defendant's Second Motion to Compel;
- 13 • Unilaterally leaving the court-ordered deposition of Mieldon for "client
14 appointments" and cancelling Mieldon's continued deposition to meet a deadline
15 in another case;
- 16 • Repeatedly resetting the date for Harborview's review of Mieldon's documents;
- 17 • Rescheduling the required discovery conference and unilaterally cancelling the
18 last such scheduled conference;
- 19 • Failing to produce requested discovery concerning Mieldon's claims regarding
20 disproportionate pay, adverse treatment, disability, failure to accommodate,
21 retaliation, free speech and hostile work environment. Failing to provide his wage
22 loss expert opinion or complete documents supporting his monetary damages'
23 claim;
- 24 • Hampering Harborview's efforts to obtain documents by records stipulations.

25 The Hearing Officer's findings are consistent with many of the trial court's findings. EX. 122 at
26 3-5, Findings 1:1-1:12 and 1:16.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 15

1 Our interpretation of RLD 1.1(a) speaks to the standards governing discipline in
2 order to encourage obedience to the law. We decline to interpret this rule as
3 speaking to conduct tending to embarrass the bar. Instead, *we hold that this rule*
4 *only extends to violations of practice norms and physical interference with the*
5 *administration of justice.* Because the findings of fact support the hearing
6 examiner's conclusion that Curran's conduct did not violate this rule, we affirm
7 this conclusion. See *In re Felice*, 112 Wash.2d 520, 772 P.2d 505 (1989).

8 (Emphasis added).

9 The Association did not allege that Mann's conduct physically interfered with the
10 administration of justice. Instead, the Association relied on the "normative" alternative allowed
11 by *Curran*, but offered no authority that would support applying RPC 8.4(d) in a case such as
12 this.

13 4. **Count 2.** In the *Mieldon* matter, by failing to comply with discovery
14 requirements and with court orders, Mann violated RPC 1.3, RPC 3.2, RPC 3.4(c), and former
15 RLD 1.1(b)(currently RPC 8.4(j)). Count 2 is proven by a clear preponderance of the evidence as
16 to these violations.

17 5. The Hearing Officer finds that the Association failed to prove that Mann violated
18 RPC 8.4(d) in the *Mieldon* matter. Count I is dismissed as to alleged violations of RPC 8.4(d).
19 See discussion of *Curran* above.

20 IV. SANCTION ANALYSIS

21 1. A presumptive sanction must be determined for each ethical violation. *In re*
22 *Arschell*, 149 Wn.2d 484, 501, 69 P.2d 844 (2003). The following standards of the American
23 Bar Association's *Standards for Imposing Lawyer Sanctions* ("ABA Standards") (1991 ed. &
24 Feb. 1992 Supp.) are presumptively applicable in this case.

25 2. For the RPC 1.3 (diligence) and RPC 3.2 (failure to expedite litigation) violations,
26 the applicable ABA Standard is 4.4 Lack of Diligence, which provides as follows:

4.4 Lack of Diligence

4.41 Disbarment is generally appropriate when:

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 18

1 (a) a lawyer abandons the practice and causes serious or potentially
2 serious injury to a client; or

3 (b) a lawyer knowingly fails to perform services for a client and
4 causes serious or potentially serious injury to a client; or

5 (c) a lawyer engages in a pattern of neglect with respect to client
6 matters and causes serious or potentially serious injury to a client.

7 **4.42 Suspension is generally appropriate when:**

8 (a) *a lawyer knowingly fails to perform services for a client and
9 causes injury or potential injury to a client, or*

10 (b) *a lawyer engages in a pattern of neglect and causes injury or
11 potential injury to a client.*

12 **4.43 Reprimand is generally appropriate when a lawyer is negligent
13 and does not act with reasonable diligence in representing a client, and
14 causes injury or potential injury to a client.**

15 **4.44 Admonition is generally appropriate when a lawyer is negligent
16 and does not act with reasonable diligence in representing a client, and
17 causes little or no actual or potential injury to a client.**

18 (Emphasis added).

19 3. Neither ABA Standard 4.42 nor ABA Standard 4.43 is a precise fit because they
20 address violations of duties owed to clients. ABA Standard 4.42(a) addresses *knowing failure to
21 perform services for a client*. ABA Standard 4.42(b) similarly connotes neglect of client's case.
22 The Association did not allege that Mann neglected her clients' cases or failed to represent them
23 competently. Rather, it alleged – and proved by clear preponderance of the evidence – that
24 Mann failed to prosecute these cases as required by the court rules and case schedules. ABA
25 Standard 4.43 is more on point because it mentions, more generally, failure to act with
26 reasonable diligence “in representing a client.”

4. The presumptive sanction for violations of RPC 1.3 (diligence) and RPC 3.2
(failure to expedite litigation) in *Rivers* and *Mieldon* is reprimand.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND HEARING OFFICER'S RECOMMENDATION - 19

1 5.. For the RPC 3.4(c) (knowingly disobey an obligation), and RPC
2 8.4(j)(former RC 1.1(b)) (willfully disobey or violate a court order), the applicable ABA
3 Standard is 6.2 Abuse of the Legal Process, which provides as follows:

4 6.2 Abuse of the Legal Process

5 6.21 Disbarment is generally appropriate when a lawyer knowingly
6 violates a court order or rule with the intent to obtain a benefit for the
7 lawyer or another, and causes serious injury or potentially serious injury to
8 a party or causes serious or potentially serious interference with a legal
9 proceeding.

10 6.22 *Suspension is generally appropriate when a lawyer knows that he
11 or she is violating a court order or rule, and causes injury or potential
12 injury to a client or a party, or causes interference or potential
13 interference with a legal proceeding.*

14 6.23 Reprimand is generally appropriate when a lawyer negligently fails
15 to comply with a court order or rule, and causes injury or potential injury
16 to a client or other party, or causes interference or potential interference
17 with a legal proceeding.

18 6.24 Admonition is generally appropriate when a lawyer engages in an
19 isolated instance of negligence in complying with a court order or rule,
20 and causes little or no actual or potential injury to a party, or causes little
21 or no actual or potential interference with a legal proceeding.

22 (Emphasis added).

23 6. The presumptive sanction for violations of RPC 3.4(c) (knowingly disobey an
24 obligation), and RPC 8.4(j)(former RC 1.1(b)) (willfully disobey or violate a court order), in the
25 *Rivers* and *Mieldon* matters is suspension.

26 7. When multiple ethical violations are found, the "ultimate sanction imposed should
at least be consistent with the sanction for the most serious instance of misconduct among a
number of violations." *In re Petersen*, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).

 8. Based on the Findings of Fact, Conclusions of Law and *ABA Standards* sections
4.4 and 6.2, the presumptive sanction for each RPC violated, i.e., RPC 1.3, RPC 3.2, RPC 3.4(c),
and former RLD 1.1(b) (currently RPC 8.4(j)) [Counts 1 and 2] is suspension.²

² *In re Cohen*, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003) ("A period of six months is generally the
accepted minimum term of suspension.").

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOI, COL + HO's recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Phillip H. Ginsburg Respondent/Respondent's Counsel
at 200 5th Ave. Ste. 4000, Seattle
WA 98101 by Certified/first class mail,
postage prepaid on the 7 day of October, 2004

Booley C. C. C.
Clerk/Counsel to the Disciplinary Board

FILED

JAN 02 2009

DISCIPLINARY BOARD

RECEIVED

DEC 26 2008
WSBA OFFICE OF
DISCIPLINARY COUNSEL

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

MARY RUTH MANN,

Lawyer (Bar No. 9343).

Public No. 06#00066

ORDER ON MOTION TO AMEND
HEARING EXAMINER'S FINDINGS OF
FACT & CONCLUSIONS OF LAW AND
MOTION FOR RECONSIDERATION

This matter came before the Hearing Officer on Respondent's Motion to Amend Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendations, and Motion for Reconsideration. The Hearing Officer has reviewed the records and files herein, including:

- (1) Respondent's Motion to Amend Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendations, and Motion for Reconsideration (Oct. 16, 2008);
- (2) Association's Response to Respondent's Motion to Amend Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendations, and Motion for Reconsideration (Oct. 31, 2008);
- (3) Mary Ruth Mann's Reply on Motion to Amend Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendations (Nov. 10, 2008); and
- (4) Association's Letter Motion to Strike Respondent's Reply on Motion to Amend (Nov. 11, 2008).

Based on the foregoing, it is hereby ORDERED that:

ORDER - 1

1 (1) The undersigned's Findings of Fact and Conclusions of Law and
2 Recommendation ("FFCL") include facts which have been proven by a clear preponderance of
3 the evidence and were necessary under the applicable rules to reach a decision. It is not the
4 purpose of the FFCL to address every allegation and argument presented by the parties at the
5 hearing.
6

7 (2) The decisions of the trial and appellate courts in the *Rivers* and *Mieldon* cases
8 were admitted as exhibits in the hearing, for the most part without objection by Respondent.
9 FFCL reflect the Hearing Officer's independent judgment and weighing of all the evidence
10 introduced at the hearing, under the standard of proof required by ELC 10.14(b). This includes
11 the findings of fact in the Background sections of FFCL addressing the *Rivers* and *Mieldon*
12 cases.
13

14 (3) In the abundance of clarity, Respondent's motion to amend the FFCL (and the
15 association's parallel request) is GRANTED in part. The amended FFCL separately enumerate
16 the findings of fact previously grouped together in the Background sections.
17

18 (4) Respondent's hearsay objections were raised for the first time in reply brief, and
19 are disregarded.

20 (5) Respondent's motion is DENIED in all other respects.

21 DATED: December ^{23rd} 2008.

22 Rita V. Latsinova
23 CERTIFICATE OF SERVICE Rita V. Latsinova, Hearing Officer

24 I have caused a copy of the Order on Motion to Amend Findings
25 of the Office of Disciplinary Counsel and to be mailed to
26 Phillip Giashere, Respondent/Respondent's Counsel
800 5th Ave. Ste. 1000, by Certified/first class mail,
WA 98104, Seattle, by Certified/first class mail,
on the 2 day of Jan, 2009.

Bobby Coon
Clerk/Counsel to the Disciplinary Board

ORDER - 2

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Certificate of Service

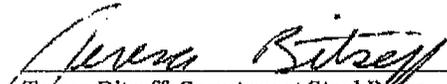
I hereby certify the foregoing document was served with the following counsel by pdf/email and U. S. Mail:

Phillip H. Ginsberg
Attorney for Respondent
Stokes Lawrence
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Seattle, WA 98104-3179

email: phil.ginsberg@stokeslaw.com

Joanne S. Abelson
Senior Disciplinary Counsel
WSBA
1325 -- 4th Avenue, Suite 500
Seattle, WA 98101-2539

email: joannea@wsba.org



Teresa Bitseff, Secretary at Stoel Rives
DATED at Seattle, WA this December 23, 2008

ORDER - 3

THE SUPREME COURT OF WASHINGTON

IN RE:

JOHN P. MELE,

ATTORNEY AT LAW.

RECEIVED)
MAY 14 2008)

ORDER

BAR NO. 16381

Supreme Court No.
200,603-5

This matter came before the Supreme Court on the Washington State Bar Association (WSBA) Disciplinary Board's order in the matter of John P. Mele, wherein the Disciplinary Board adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation of disbarment. The Court having reviewed the Disciplinary Board's Recommendation and the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation and the Court having unanimously determined that the Recommendation should be approved. Now, therefore, it is hereby

ORDERED:

John P. Mele is disbarred from the practice of law. Pursuant to ELC 13.2 the effective date of disbarment is May 21, 2008. Costs and expenses as approved by the disciplinary board will be paid pursuant to ELC 13.9.

DATED at Olympia, Washington, this 14th day of May, 2008.

FILED
SUPREME COURT
STATE OF WASHINGTON
2008 MAY 14 A 11:5
BY [Signature]
CLERK

For the Court

[Signature]
CHIEF JUSTICE

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FILED

APR 10 2008

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

John P. Mele,
Lawyer (WSBA No. 16381).

Proceeding No. 05#00201

DISCIPLINARY BOARD ORDER
ADOPTING HEARING OFFICER'S
DECISION

This matter came before the Disciplinary Board at its March 28, 2008 meeting on automatic review of Hearing Officer Catherine Moore's decision recommending disbarment following a hearing.

Having reviewed the briefs, documents designated by the parties, and the applicable case law and rules,

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is adopted¹.

¹ The vote on this matter was 10-0 with 1 abstention. The following board members voted in this matter: Kuznetz, Anderson, Madden, Darst, Carlson, Cena, Meyers, Hazelton, Meehan and Andrews. Board member Ureña abstained.

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Dated this 2nd day of April, 2008

Lawrence J. Kuznetz
Lawrence J. Kuznetz, Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Order Adopting HO Decision
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Kurt Bulmer, Respondent's Counsel
at 740 Belmont St #3 Seattle WA, by Certified first class mail,
postage prepaid on the 15 day of April, 2008.

Raley Cooney
Clerk/Counsel to the Disciplinary Board

FILED

NOV 21 2007

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re:)	Public No.: 05#00201
)	
JOHN P. MELE,)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW AND HEARING OFFICER'S
Lawyer (WSBA No. 16381).)	RECOMMENDATION
)	

Pursuant to ELC 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC) this matter came on for hearing in Seattle, Washington on May 7, 8, 9, 10 and 11, 2007, before the below signing hearing officer. Respondent attorney John P. Mele appeared in person with his attorney Kurt M. Bulmer. Disciplinary Counsel Kathleen A. T. Dassel represented the Washington State Bar Association (WSBA).

I. FORMAL COMPLAINT

The First Amended Formal Complaint filed by the WSBA charged the following five counts of misconduct:

Count 1 By preparing for his clients a generic declaration knowing they would use it to communicate with class members about the subject of the litigation without the consent of class counsel, and/or by preparing for his clients a generic declaration knowing they would use it to obtain evidence from class members contrary to class members' interests in the litigation without the knowledge of class counsel, Respondent violated former RPC 4.2(a) (prohibiting

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND RECOMMENDATION

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Attorney at Law
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0551

1 communication with represented parties about the subject matter of the litigation) and/or
2 former RPC 8.4(a) (prohibiting violation of the RPC through the acts of another) and/or former
3 RPC 8.4(d) (conduct prejudicial to the administration of justice.)

4 **Count 2** By speaking with Mr. Storrs about the class litigation without the consent of
5 class counsel, Respondent violated former RPC 4.2(a)

6 **Count 3** By misrepresenting to the court the date, timing duration and/or extent of his
7 contact with Mr. Storrs, and/or by misrepresenting the nature and extent of knowledge and/or
8 participation of Respondent and Respondent's clients in implementing, and/or preparing and
9 presenting the declarations to the clients' employees and former employees, where such
10 misrepresentations in the pending litigation resulted in the delay of the litigation and harm to
11 the Respondent's client, the judicial system, opposing parties and their counsel and/or
12 Respondent's own law firm, Respondent violated former RPC 3.3(a)(1) (false statement to the
13 tribunal, and/or former RPC 3.3(a)(4) (offering false evidence), and/or former RPC 8.4(a)
14 (violation of the RPC through the acts of another), and/or former RPC 8.4(b) (criminal conduct,
15 through violations of RCW 9A.72.020 (first degree perjury) and/or RCW 9A.72.040 (false
16 swearing), and/or former RPC 8.4(c) (dishonest conduct) and/or former RPC 8.4(d) (conduct
17 prejudicial to the administration of justice).

18 **Count 4** By misrepresenting to opposing counsel the date, timing and/or duration
19 and/or extent of his contact with Mr. Storrs, Respondent violated former RPC 4.1 (false
20 statement to a third person) and/or former RPC 8.4(c).

21 **Count 5** By making a false representation to the court regarding why the telephone
22 lists had not been turned over to class counsel, Respondent violated former RPC 3.3(a)(1)
23 and/or former 8.4(c).

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II. FINDINGS OF FACT

To the extent that any Discussion, Conclusions of Law, Sanctions Analysis or Recommendation constitute Findings of Fact, they are incorporated herein. After having considered the testimony of the witnesses, the exhibits admitted into evidence, and hearing arguments of counsel and being fully advised, the Hearing Officer finds the following facts were proven by a clear preponderance of evidence (ELC 10.14):

1. Respondent John P. Mele was admitted to the practice of law in the State of Washington in 1986 and has been employed full-time as an attorney since admission to the Bar.

2. Respondent is a seasoned employment/labor law attorney and class action litigator.

Count 1: Former RPC 4.2(a), 8.4(a), 8.4(d)

3. Respondent represented Watson Asphalt Paving Company (Watson) and its owners, Peter and Clifford Schroeder (Schroeder), in a class action lawsuit, *Bedford v. Watson Asphalt Paving Company* filed in April 2002. The lawsuit alleged that Watson failed to provide its employees with meal periods or pay them for missed meal periods.

4. The class was officially certified under CR 23(b)(2) on December 18, 2002. The class contained all employees of Watson from April 1999 to those currently employed. Bradford Moore (Moore) and Robert Jackson (Jackson) were certified as class counsel.

5. Respondent was duly aware of the Court's December 18, 2002 order.

6. Soon after entry of the certification order, Respondent crafted a uniform declaration to be used to further his client's position in the lawsuit. The declaration format was Respondent's idea. Respondent also chose to create the declaration rather than have his

1 client prepare a statement because he wanted to ensure the document would be admissible in
2 court.

3 7. The declaration dealt exclusively with the legal defense of "waiver" of meal
4 periods, recited facts about the claims made by the class, attested to the class member's
5 knowledge of Washington law, and concluded with an affirmative statement of "waiver" of
6 meal periods by the class member.

7 8. In late January 2003 Respondent emailed the template declaration to Schroeder
8 on his firm's letterhead. Schroeder needed only to insert the name and employment dates of
9 the class member.

10 9. By agreement, Schroeder was to present the declarations to all class members
11 for their review and signature, and then return all signed declarations to Respondent to be
12 used as evidence in support of the legal defense of "waiver".

13 10. On February 6, 2003, Schroeder notified respondent they had begun collecting
14 signatures from class members. These signatures were obtained without class counsel's
15 knowledge or consent, and without notification to class members that counsel represented
16 them.

17 11. On February 28, 2003, Respondent received a checklist prepared by Schroeder
18 containing the name of each class member and the status of each member's declaration. The
19 purpose of the checklist was to notify Respondent of "who basically supported our (Waston)
20 position and who was not."

21 12. Schroeder procured approximately sixty signed declarations.

22 13. The class member declarations and Peter and Clifford Schroeder's declarations
23 formed the sole factual basis for Respondent's Motion to Decertify Class filed on March 5,
24 2003.

1 14. Respondent's actions in advising his client to obtain declarations rather than
2 statements from employees and then executing his advice by crafting such declaration to
3 ensure its admissibility in court, in crafting a declaration that required his client only to insert
4 the name and employment dates of the class member and forwarding such declaration on his
5 firm's letterhead for the client's use, in directing his client to return all signed declarations to
6 him, in being kept apprised by his client of which class members had signed the declaration,
7 and in using the signed declarations in his attempt to have the class decertified and the
8 lawsuit dismissed, these actions in their totality far exceeded the contemplated parameters of
9 permissible strategic advice concerning direct client-to-client communication.

10 15. As such, Respondent was not a passive dispenser of advice, but an active
11 participant in a process that resulted in his client serving as the conduit for Respondent's
12 improper communication with class members.

13 16. Respondent acted in an advocacy capacity while participating in the execution
14 of the "waiver" defense case strategy.

15 17. Respondent's actions in this advocacy role violated practice norms as his
16 execution of the "waiver" defense strategy, culminating in the procurement of signed
17 "waiver" declarations, occurred post class certification without class counsels' knowledge or
18 consent, or without the court's knowledge or consent.

19 **Count 2: Former RPC 4.2(a)**

20 18. On February 25, 2003, Lynn Storrs (Storrs) a former Watson employee and
21 class member contacted Respondent to discuss the declaration he received in the mail from
22 Schroeder.

23 19. At the critical point during their phone conversation when Respondent realized
24 he was speaking with a represented class member, he did not immediately terminate the
25 phone call. Instead Respondent continued the conversation about the subject matter of the

1 litigation, advising Storrs he was not required to sign the declaration and that Respondent
2 would inform Schroeder that Storrs would *not* be signing the “waiver” declaration.

3 **Count 3: Former RPC 3.3(a)(1), (a)(4), RPC 8.4(a), (b), (c), (d)**

4 20. On March 14, 2003, Respondent submitted a personal declaration made under
5 penalty of perjury to the Court for its consideration in a sanctions hearing. Respondent’s
6 declaration was in response to a March 10, 2003 declaration filed by class member Lynn
7 Storrs attesting to his phone conversation with Respondent.

8 21. Affidavits or declarations made under penalty of perjury must be made by one
9 with personal knowledge of the facts attested to within the declaration. See, 14A Wash.
10 Prac., Civil Procedure, 22.11 (3d ed. 2007)

11 22. At the time of making his declaration, Respondent knowingly misrepresented
12 the material facts of the date and timing or sequence of his conversation with Storrs, and then
13 knowingly submitted these misrepresentations to the Court as competent evidence of these
14 “facts”.

15 23. In his declaration, Respondent attested without qualification or reservation that
16 his phone conversation with Storrs occurred on February 26, 2003. In his testimony during
17 these proceedings he testified under oath that, in fact at the time of swearing out his
18 declaration, he had no independent recollection of the date of his conversation with Storrs,
19 and instead relied upon the date given by Storrs in his March 10th declaration. Respondent’s
20 blank assertion to the Court in March 2003 that he had personal knowledge of the date of his
21 phone conversation with Storrs was, therefore, a knowing misrepresentation of a material
22 fact.

23 24. Respondent also attested in his declaration that he spoke with Storrs, a class
24 member, *after* his phone conversations with opposing counsel Moore during which he denied
25

1 having direct contact with any class members. In fact, Respondent spoke with Storrs
2 sometime between 4:42pm and 5:04pm the day *before* his conversation with Moore.

3 25. While there is independent proof of the date of Respondent and Storrs' phone
4 conversation in the form of a T-Mobile phone bill, there is no independent evidence, such as
5 a time sheet, or legal file note, establishing Respondent's knowing misrepresentation of the
6 sequence of his phone calls with Storrs and Moore. This fact-finder must therefore decide
7 whether Respondent's version of events is believable.

8 26. As to the issue of the sequence of Respondent's phone calls with Storrs and
9 Moore, this fact-finder finds Respondent's testimony not credible for the following reasons:
10 1) Respondent's assertion at this hearing that portions of his March 14, 2003 declaration were
11 not based on personal knowledge of the facts attested to therein, in contravention of law and
12 practice, and contrary to Respondent's written and oral representations to the Court in March
13 2003, call into question the veracity of Respondent's rendition of all events contained therein,
14 2) Respondent's hearing testimony that he knew from his records that he spoke with Moore
15 on February 26th and that he "knew" he spoke with Storrs four hours later that same day,
16 raises the question of why with this personal knowledge he chose to rely on Storrs declaration
17 for the date of their conversation, 3) Respondent's ability able to recall in precise detail the
18 exact particulars of his conversation with Storrs, a conversation which he described as not
19 particularly important to him, and that covered a fair amount of ground regardless of its exact
20 duration, as well as remembering within fifteen minutes the exact time of the phone call, and
21 remembering in detail his two conversations with Moore, while simultaneously unable to
22 correctly recall the critical detail of the sequence of the calls between him, Storrs, and Moore,
23 is suspiciously self-serving and stretches credibility 4) Respondent's, if truly "subsequent",
24 commitment to Storrs that he would inform Schroeder of his unwillingness to sign the
25 declaration, directly contradicted Respondent's "earlier" offer to Moore to suspend all

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND RECOMMENDATION

Page 7

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1 declaration activity pending Respondent's further investigation into the ethical propriety of
2 his actions. Making such a commitment to Storrs would have jeopardized his efforts to have
3 Moore hold off on court action, thereby losing the race to the court house Respondent viewed
4 as so important 5) despite being a seasoned and methodical practitioner, and in spite of
5 Respondent's awareness of his obligations under RPC 4.2, and the contentiousness of the
6 issue of communication with class members, at no time after his allegedly "subsequent"
7 phone call with Storrs, and with several easy opportunities to do so, did Respondent inform
8 opposing counsel of his contact with Storrs, or offer any explanation to the Court at the
9 sanctions hearing or to this tribunal for his failure to do so.

10 27. As to the exact duration of Respondent's and Storrs phone conversation, the
11 parties share the same incorrect memory as to its time-span. As such, the Bar Association did
12 not prove a knowing misrepresentation of this fact by Respondent.

13 28. The Bar Association elicited testimony on the issue of the content of
14 Respondent and Storrs' phone conversation. The Complaint, however, does not specifically
15 allege misrepresentation of content thus rendering this tribunal unable to make findings on
16 the issue.

17 29. In the same March 14, 2003 declaration, Respondent knowingly misrepresented
18 the material fact of the character of his involvement in client-to-client contact. Contrary to his
19 assertions to the Court, Respondent 1) was in fact the architect of the "waiver" declaration,
20 specifically to ensure its admissibility in court, 2) was fully aware that Schroeder was
21 presenting declarations only to those employees encompassed within the class certification,
22 3) knew the declarations would be modified only to include the employee's name and dates
23 of employment, 4) understood the employees would be asked upon being called back to
24 work, to review and sign the declaration "only" if they agreed they had waived their meal
25 periods, and 5) had specifically directed his clients to return the signed declarations to him

1 for use in his efforts to have the lawsuit dismissed, preferably by a pre-trial motion to
2 decertify the class.

3 30. Respondent acted in an advocatory role in presenting his declaration to the
4 Court at a sanctions hearing in the Watson matter.

5 31. Respondent's knowing misrepresentation of material facts to the Court violated
6 practice norms dictating truthfulness to the tribunal at all times.

7 **Count 4: Former RPC 4.1, RPC 8.4(c)**

8 32. Respondent knowingly misrepresented to opposing counsel Moore on February
9 26, 2003 that he had not had any direct contact with class members.

10 33. In fact, Respondent spoke with class member Lynn Storrs on February 25, 2003.

11 34. As with count 3, there is no independent evidence of Respondent's knowing
12 misrepresentation to opposing counsel, requiring this fact-finder to assess the credibility of
13 Respondent's explanation of events. Respondent's explanation that his conversation with
14 Storrs did not come to mind when speaking with Moore because their discussion was only
15 within the context of the declarations is not credible for the following reasons: 1) his
16 explanation begs the question that if Moore had asked the question differently, Respondent
17 would have answered affirmatively, 2) by Respondent's own admission, he, in fact, discussed
18 the declaration with Storrs, assuring him he would tell Storrs' employer he would not be
19 signing the "waiver" declaration, and 3) he never notified Moore of his allegedly
20 "subsequent" contact with Storrs and provided no explanation for his failure to do so.

21 **Count 5: Former RPC 3.3(a)(1), RPC 8.4(c)**

22 35. At the March 18, 2003 motion to compel/sanctions hearing, Respondent
23 knowingly misrepresented to the court why the telephone lists of class members had not been
24 turned over to class counsel.

1 contact with represented class members thereby prejudicing the administration of justice.
2 Respondent is subject to discipline under ELC 1.1.

3 **Count 2.** Respondent violated former RPC 4.2 by speaking about the subject matter of
4 the class litigation with Lynn Storrs, a class member he knew was represented by counsel.
5 Respondent is subject to discipline under ELC 1.1.

6 **Count 3.** Respondent violated former RPC 3.3(a)(1), (4), former RPC 8.4(b) (false
7 swearing), and former RPC 8.4(c), (d) by representing to the Court the timing of his phone
8 conversation with class member Lynn Storrs as after his phone conversation with opposing
9 counsel, as well as denying his role as the architect of his clients' "waiver" defense strategy,
10 both material facts he knew to be false. Respondent violated former RPC 8.4(d) by knowingly
11 misrepresenting material facts to the Court thereby prejudicing the administration of justice.
12 Respondent is subject to discipline under ELC 1.1. Respondent did not violate former RPC
13 8.4(a) or (b) (first-degree perjury) and those grounds are dismissed.

14 **Count 4.** Respondent violated former RPC 4.1 and former RPC 8.4(c) by representing
15 to opposing counsel that he had not had direct contact with any class members, a material fact
16 he knew to be false. Respondent is subject to discipline under ELC 1.1.

17 **Count 5.** Respondent violated former RPC 3.3(a)(1) and former RPC 8.4(c) by
18 representing to the Court that he had recently instructed his clients to produce a complete
19 phone list of all Watson employees, a material fact he knew to be false. Respondent is subject
20 to discipline under ELC 1.1.

21 **IV. Presumptive Sanction Analysis**

22 **Findings:** After having considered the testimony of the witnesses, the exhibits admitted
23 into evidence, and hearing arguments of counsel and being fully advised, the Hearing Officer
24 finds the following Presumptive Sanction Facts were proven by a clear preponderance of

25 evidence (ELC 10.14):
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND RECOMMENDATION
Page 11

CATHERINE MOORE
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1 **Count 1.**

2 1. Respondent's improper communication with represented class members about
3 the subject matter of the litigation violated the duties he owed to the legal system.

4 2. Respondent knew based on his research in the contemporaneous class action
5 lawsuit *Holland America*, that post class certification, any communication between himself and
6 represented class members about the subject matter of the litigation was improper; the no-
7 contact rule. Respondent was well versed in the public policy reasons supporting the "no-
8 contact" rule.

9 3. Respondent knew based on his research in the contemporaneous class action
10 lawsuit *Holland America*, that it was impermissible for him to circumvent the "no-contact" rule
11 through the artifice of permissible client-to-client contact.

12 -----
13 4. Respondent effectively engaged in improper communication with represented
14 class members through the device of "waiver" declarations submitted by his client to employee
15 class members.

16 5. Respondents' improper communication with class members injured his client
17 because it provided one of the bases for Respondent's and his law firm's disqualification from
18 the lawsuit, necessitating the hiring of new counsel and the incursion of "catch-up" legal fees.

19 6. Respondent's behavior injured his client because Schroeder was court ordered to
20 disclose to all Watson employees that he and his counsel had been sanctioned by the Court for
21 improperly collecting declaration signatures.

22 7. The Court's public shaming of Respondent before class members described
23 above, injured the reputation of the legal profession for integrity and professionalism.

24 8. Respondent's communication with represented class members about the subject
25

1 matter of the litigation without their counsels' consent potentially interfered with a just and fair
2 resolution of the lawsuit.

3 9. Respondent's behavior is aggravated by his substantial legal experience, and his
4 refusal to concede that his behavior vis-à-vis the "waiver" defense warranted, at a minimum, a
5 call to the Washington State Bar Association Ethics Hotline for an informal opinion from a
6 practicing WSBA disciplinary counsel, or a courtesy call to opposing counsel.

7
8 10. Respondent's behavior is mitigated by his lack of a prior disciplinary record and
9 the three-year time span between the alleged unethical behavior and the Bar Association's
10 filing of a formal complaint. During this period, Schroeder pursued a malpractice action
11 against Respondent, necessitating a honing of his testimony in a particular manner.
12 Respondent did not have the same opportunity to refine his testimony and, as such, the delay in
13 the Bar Association's filing of the compliant prejudiced the Respondent.

14 **Count 2.**

15 11. Respondent's improper communication with represented class member Lynn
16 Storrs about the subject matter of the litigation violated the duties he owed to the legal system.

17 12. Respondent knew from his previous class action litigation that post class
18 certification communication between counsel and represented class members was not
19 permissible. Respondent knew from previous litigation in which he made the same argument
20 vis-à-vis opposing counsel, that he was ethically required to immediately terminate his phone
21 conversation with Storrs upon realizing his class membership. Respondent knew his advice
22 and pledge to Storrs regarding the declaration was improper communication.

23
24 13. Respondents' improper communication with Storrs injured his clients because it
25 provided one of the bases for respondent's and his law firm's disqualification from the lawsuit,

1 necessitating the hiring of new counsel and the incursion of “catch-up” legal fees.

2 14. Respondent’s communication with represented class member Storrs about the
3 subject matter of the litigation without counsel’s consent potentially interfered with a just and
4 fair resolution of the lawsuit.

5 15. Respondent behavior is aggravated by his substantial legal experience, and his
6 portrayal of his behavior in discussing the declaration with Storrs as beyond reproach in spite
7 of his own acknowledged failure to immediately terminate his phone call upon realizing Storrs
8 was a class member.

9 16. Respondent’s behavior is mitigated by the lack of a prior disciplinary record.

10 **Count 3.**

11 17. Respondent’s written and oral misrepresentations to the Court about his phone
12 conversation with Lynn Storrs and the nature of his involvement in the “waiver” defense
13 strategy violated his duties owed to the public and his duties owed to the legal system.

14 18. Respondent knew he was violating the law by swearing out a declaration made
15 under the penalty of perjury attesting to a number of false facts.

16 19. Respondent’s willingness to misrepresent the truth to the Court under oath
17 seriously adversely reflects on his fitness to practice law as his behavior violates the most basic
18 tenet of legal practice – truthfulness before the court.

19 20. Respondent intended to deceive the Court when he made his false statements
20 about the sequence of his phone conversation with Lynn Storrs and when he mischaracterized
21 the nature of his role in the “waiver” defense strategy.

22 21. Respondent’s intent to deceive the Court regarding his conversation with Storrs is
23 evidenced by his unequivocal assertions regarding these “facts” absent any records of his own
24

1 documenting such "facts" (an oddity in itself given counsel's habitual documentation of
2 communications in the case), coupled with the coincidence that piggybacking onto Storrs
3 declaration enabled him to maintain his lie to opposing counsel.

4 22. Respondent's intent to deceive the Court regarding his active role in scripting his
5 clients' communication with class members is evidenced by the disingenuousness of his
6 description of his client's activities. Respondent knew the declarations were not going to be
7 "distributed in the streets as leaflets", and that Schroeder in presenting the declarations to class
8 members were not going "to talk about the Mariners and the weather. "
9

10 23. Respondent's premeditated lying to the Court about facts material to a just
11 outcome of the proceeding ipso facto caused serious injury to the legal system and the legal
12 profession. Truthfulness before the Court is the sine qua non of each entity's ability to
13 effectively operate as a guardian of justice. Respondent's lies undetected would have
14 compromised the ability of legal counsel and the Court to reach a just outcome in the Watson
15 case.

16 24. Respondent's behavior is aggravated by his substantial legal experience, his
17 dishonest motive to mislead the Court to cover his earlier misrepresentation to opposing
18 counsel, and his refusal to acknowledge, at a minimum, swearing out a personal declaration
19 without personal knowledge of the attested facts, is improper.
20

21 25. Respondent's behavior is mitigated by his lack of prior disciplinary record

22 **Count 4.**

23 26. Respondent's misrepresentation to opposing counsel regarding his phone
24 conversation with Lynn Storrs violated his duties owed to the public.

25 27. Respondent knowingly misrepresented to opposing counsel that he had not spoken

1 with Lynn Storrs.

2 28. Respondent's dishonest conduct adversely reflects on his fitness to practice law as
3 lawyers are expected to act with integrity and honesty in all their affairs, and Respondent
4 demonstrated a calculated disregard of this minimum standard of behavior.

5 29. Respondent's behavior is aggravated by his substantial legal experience, his
6 dishonest motive to mislead opposing counsel to conceal his improper communication with a
7 class member.

8 30. Respondent's behavior is mitigated by a lack of a prior disciplinary record.

9
10 **Count 5.**

11 31. Respondent's misrepresentation to the Court that he had instructed his client to
12 produce a phone list of all class members violated his duties owed to the legal system.

13 32. Respondent knew his statement to the Court that he had instructed his clients to
14 produce a list of all class members was untrue to the extent that once he realized the list not had
15 been provided on February 26, 2003, he did not *reinstruct* his clients to produce the list.
16 Respondent made no effort to clarify for the Court the timing of his production instructions to
17 his client.

18 33. Respondent's failure to amend his false statement to the court ipso facto caused
19 injury to the legal system and the legal profession. Truthfulness before the Court is the sine qua
20 non of each entity's ability to effectively operate as a guardian of justice. Respondent's failure
21 to correct the record undetected would have hampered the ability of legal counsel and the Court
22 to reach a just outcome in the Watson case.

23 34. Respondent's behavior is aggravated by his substantial legal experience, and his
24 dishonest motive in lying to the Court in an attempt to appear blameless in his client's efforts to

1 frustrate the discovery process

2 35. Respondent's behavior is mitigated by a lack of a prior disciplinary record.

3 **Conclusions:**

4 Based on the foregoing Presumptive Sanction Facts, the Hearing Officer finds the
5 following ABA Standards for Imposing Lawyer Sanctions applicable to Respondent's conduct:

6 **Count 1:** 6.32 provides:

7 Suspension is generally appropriate when a lawyer engages in communication with an
8 individual in the legal system when the lawyer knows that such communication is
9 improper, and causes injury or potential injury to a party or causes interference or
potential interference with the outcome of the legal proceeding.

10 Applying the aggravating and mitigating factors, the Hearing Officer concludes that the
11 presumptive standard is sufficient to protect the public.

12 **Count 2:** 6.32 provides:

13 Suspension is generally appropriate when a lawyer engages in communication with an
14 individual in the legal system when the lawyer knows that such communication is
15 improper, and causes injury or potential injury to a party or causes interference or
potential interference with the outcome of the legal proceeding.

16 Applying the aggravating and mitigating factors, the Hearing Officer concludes that the
17 presumptive standard is sufficient to protect the public.

18 **Count 3:** 5.12 provides:

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

21 Applying the aggravating and mitigating factors, the Hearing Officer concludes that the
22 presumptive standard is sufficient to protect the public.

23 **Count 3:** 6.11 provides:

24 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court,
25 makes a false statement, submits a false document, or improperly withholds material

1 information, and causes serious or potentially serious injury to a party, or causes a
2 significant or potentially significant adverse effect on the legal proceeding.

3 Applying the aggravating and mitigating factors, the Hearing Officer concludes that the
4 presumptive standard is sufficient to protect the public.

5 **Count 4:** 5.13 provides:

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

9 Applying the aggravating and mitigating factors, the Hearing Officer concludes that the
10 presumptive standard is sufficient to protect the public.

11 **Count 5:** 6.12 provides:

12 Suspension is generally appropriate when a lawyer knows that false statements or
13 documents are being submitted to the court or that material information is improperly
14 being withheld, and takes no remedial action, and causes injury or potential injury to a
15 party to the legal proceeding, or causes an adverse or potentially adverse effect on the
16 legal proceeding.

17 Applying the aggravating and mitigating factors, the Hearing Officer concludes that the
18 presumptive standard is sufficient to protect the public.

19 **V. Recommendation**

20 The ultimate recommended sanction must be at least consistent with the sanction for the
21 most serious misconduct. In re Discipline of Petersen, 120 Wn.2d 833, 846 E2d 1330 (1993).
22 The Hearing Officer therefore recommends that Respondent be disbarred.

23 DATED this _____ day of _____, 2007.

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Catherine Moore
Hearing Officer, WSBA# 18410

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Findings of Fact
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Kurt Bulmer, Respondent/Respondent's Counsel
at 740 Belmont P. Et 3, Seattle, WA 98107, by Certified/first class mail,
postage prepaid on the 21 day of October, 2007.

Becky Ceeley
Clerk/Counsel to the Disciplinary Board

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

FILED

APR 07 2005

In re

DAVID A. AMBROSE

Lawyer (Bar No. 21764).

Public No. 04-00059

DISCIPLINARY BOARD
ORDER ON STIPULATION TO TWO-
YEAR SUSPENSION

This matter came before the Disciplinary Board at its April 1, 2005 meeting.

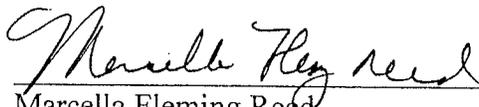
On review of the January 6, 2005 Stipulation to Two-Year Suspension,

IT IS ORDERED that the January 6, 2005 Stipulation to Two-Year Suspension is approved.

The vote on this matter was unanimous.

Those voting were Friedman, Spencer, Lee, Fancher, Romas, Fleming Reed, Madden, Hollingsworth, Kurtz, Montez, Beale, Bothwell, Mosner and McMonagle.

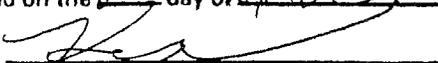
Dated this 5th day of April, 2005.



Marcella Fleming Reed
Chair, Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Order of Stipulation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to David Ambrose, Respondent/Respondent's Counsel
at 2604 Meridian Ave E, by Certified/first class mail,
postage prepaid on the 8th day of April, 2005


Clerk/Counsel to the Disciplinary Board

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FILED

APR 13 2005

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

DAVID A. AMBROSE,
Lawyer
WSBA # 21764

Public No. 04#00059

STIPULATION TO TWO YEAR
SUSPENSION

Pursuant to Rule 9.1 of the Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation for Discipline is entered into by the Washington State Bar Association, through disciplinary counsel, Linda B. Eide, and by respondent lawyer, David A. Ambrose.

I. ADMISSION TO PRACTICE

Ambrose was admitted to the practice of law in the State of Washington on August 13, 1992. At all times material to this complaint, he practiced in Pierce County, Washington.

II. STIPULATED FACTS

Regarding Kathy Elam

1. Kathy Elam hired Ambrose to promptly evict a tenant and to foreclose a delinquent mobile home loan.

1 2. On December 4, 2003, she gave Ambrose \$500 and both signed a "Contract
2 for Legal Services."

3 3. When Elam had not heard from Ambrose by December 16, 2003, she
4 telephoned him. Ambrose said he was preparing the necessary documents and would mail
5 her a copy. She received nothing.

6 4. On February 20, 2004, Elam telephoned Ambrose from a friend's telephone
7 because he had not answered numerous calls placed from her telephone. Ambrose told her
8 he spoke with the mobile home park manager and that he planned to allow the park to
9 evict the tenant.

10 5. On February 24, 2004, Elam stopped by Ambrose's office. Ambrose said
11 he could not see her then. On February 25, 2004, Elam stopped by again. After Elam had
12 waited over two hours, Ambrose opened the door and gave her a copy of a Notice of
13 Default for the tenant, dated February 11, 2004. Ambrose did not send the February 11th
14 notice.

15 6. On February 25, 2004, Elam fired Ambrose and requested a \$500 refund.
16 Ambrose has not refunded Elam's money.

17 **Regarding Matthew Toal**

18 7. Matthew Toal hired Ambrose to prepare a parenting plan. His daughter's
19 mother, whom Toal had never married, had stopped allowing visitation. On August 15,
20 2003, Toal and Ambrose signed a "Contract for Legal Services," which provided that for
21 \$1,800 Ambrose would prepare a "paternity-visitation agreement-voluntary or court." On
22 August 20, 2004, Toal delivered \$1,800 to Ambrose, which he had borrowed from his
23 mother, Jeannine Collins. Ambrose cashed the \$1,800 check the next day.

24 8. On August 23, 2003, Toal and his wife met with Ambrose, who promised
25 to have the initial paperwork done in two weeks. At the end of two weeks, Toal
26 telephoned Ambrose, who requested an additional week to prepare the paperwork. A
27

1 week later, when they met to review what Ambrose had drafted, Toal found the document
2 incomplete and inaccurate, containing spelling errors and incorrect names.

3 9. In October, Toal's daughter made some comments at school that caused the
4 school to report the mother to Child Protective Services. When Toal told Ambrose about
5 this, he suggested Toal sue for full custody.

6 10. Toal explained to Ambrose why he discounted his daughter's allegations
7 and believed that her mother remained the best custodial parent. Toal reiterated his desire
8 to Ambrose to complete the parenting plan as initially requested.

9 11. Between November 2003 and January 2004, Toal repeatedly telephoned
10 Ambrose, who failed to respond. On December 9, 2003, Toal wrote to Ambrose
11 demanding that he finish the work as contracted or refund the \$1,800. Ambrose never
12 finished the paperwork, nor did he make a refund. In February 2004, Ambrose gave Toal
13 his client file.

14 **Regarding Delbert Bradley**

15 12. Delbert Bradley hired Ambrose on January 24, 2003 to recover records
16 allegedly taken by his business partner, Mick Robertson, after dissolving their used car
17 business partnership. On February 11, 2003, Ambrose wrote to Robertson telling him to
18 return all documents and/or articles belonging to Plateau Used Car Sales.

19 13. On February 21, 2003, Ambrose filed a Complaint for Damages and
20 Injunctive Relief in Pierce County, Plateau Used Car Sales v. Mick Robertson, Cause No.
21 03-2-05037-2. Robertson filed an Answer and Counterclaim and a Request for Statement
22 of Damages. The court issued a scheduling order. Ambrose failed to comply with the
23 initial scheduling order.

24 14. In April 2003, Ambrose failed to show up for his client's deposition and the
25 continued deposition of another witness in the case. Ambrose failed to comply with the
26 court's subsequent scheduling order dated April 25, 2003.

27

1 15. In July or August 2003, Bradley gave Ambrose a 1987 Chrysler Labaron
2 convertible valued at \$2,500 for legal fees. Bradley thought Ambrose was diligently
3 working on his case. In August or September 2003, Ambrose told Bradley to come up
4 with an additional \$3,000 cash or a car to pay for his legal services. Bradley gave
5 Ambrose a 1994 Ford Taurus Wagon valued at \$3,000.

6 16. On September 12, 2003, the court set discovery deadlines and reserved the
7 issue of possible attorneys' fees to be assessed. On October 31, 2003, the court denied
8 defendant's motion to dismiss for failure to make discovery. However, the court noted
9 that Ambrose appeared late for the hearing, required him to deliver the documents he said
10 were in his car to defendant's counsel by 10:30 a.m. that morning, and ordered Ambrose
11 to pay \$1,500 as sanctions. Ambrose did not deliver the documents by 10:30 a.m. as
12 ordered. He did not pay the sanctions within five days as ordered.

13 17. On January 2, 2004, after finding plaintiff's refusal to comply with the
14 October 31, 2003 order was willful or deliberate, and "substantially prejudiced the
15 defendant's ability to prepare for trial," the court dismissed Bradley's complaint without
16 prejudice. On January 7, 2004, a Pierce County Commissioner found Ambrose in
17 contempt of court for his failure to comply with the October 31, 2003 order, and fined him
18 "\$150 per day, beginning January 7, 2004, until documents in his possession are produced
19 to defendant's counsel."

20 18. Bradley hired a new lawyer. When Bradley's new lawyer reviewed the
21 file, Bradley learned for the first time that Robertson's lawyer had offered to settle their
22 claims in May 2003 if both parties walked away from the litigation and paid their own
23 attorney's fees. Ambrose never communicated the settlement proposal to Bradley.
24 Ambrose's failure to convey Robertson's May 2003 offer of judgment cost his client over
25 \$12,000 in attorney's fees assessed against Bradley.

26 19. On March 16, 2004, Judge Hogan entered findings that Ambrose
27 "intentionally failed to comply with a lawful order of the court dated January 7, 2004."

1 As a result of Ambrose's failure to produce materials to opposing counsel as ordered by
2 the Court on October 31, 2003 and January 7, 2004, the Court awarded judgment to John
3 Groseclose, defendant's attorney, for \$10,500 for sanctions, plus \$750 in attorney's fees
4 and \$25 in costs.

5 20. Bradley paid Ambrose over \$8,000 in 2003 in cash and/or cars. Bradley
6 never received any billing statements from Ambrose. Bradley asked for an accounting,
7 but was never given one by Ambrose. Bradley had to make repeated requests for his file.

8 **Regarding Joel Stevens & WSBA**

9 21. In June 1997, Lauralee Tallent loaned Joel Stevens \$17,000. Stevens
10 planned to make repairs on his West Seattle home, sell it and then repay Tallent. In
11 January 2003, Stevens listed the house for sale with John L. Scott.

12 22. In January and/or February 2003, Tallent met with Ambrose about
13 collecting the delinquent Stevens loan. Tallent hired Ambrose to begin foreclosure
14 proceedings. Ambrose did not file a foreclosure action. Instead, he drafted a durable
15 power of attorney and a trust, naming himself Stevens' attorney-in-fact and trustee over all
16 Stevens' property.

17 23. Stevens' only significant asset was the West Seattle house where he had
18 lived for over 30 years. The trust made Ambrose a potential trust beneficiary. Stevens
19 signed the trust documents on March 26, 2003, when Ambrose visited him at his West
20 Seattle home accompanied by Tallent and two witnesses. Stevens believed that if
21 Ambrose located a buyer, Stevens could approve the offer. He did not understand that the
22 trust documents would be recorded.

23 24. On April 28, 2003, Peter and Jenifer Lightbody signed a Purchase and Sale
24 Agreement through John L. Scott for the Stevens property for \$255,000 "as is" to be paid
25 in all cash at closing.

26 25. On May 14, 2003, Ambrose recorded the trust documents. Ambrose also
27 recorded an Option to Purchase the Stevens property dated May 13, 2003, given by

1 Ambrose, as trustee, to Richard and Delia Cramer. The Cramers are former and/or current
2 clients of Ambrose and his former and/or current landlord. Under the terms of the option,
3 the Cramers paid Ambrose \$1,000 in legal fees. The recorded option did not include a
4 referenced attachment with price and sale terms.

5 26. During a title search for the Lightbody closing, the title company
6 discovered the recorded trust, the quit claim deed from Stevens to the trust and the Cramer
7 option. As a result of the title search, on or about May 20, 2003, Stevens first learned that
8 Ambrose had recorded the quit claim deed and that, as trustee, Ambrose had sold an
9 option to purchase his property to the Cramers.

10 27. Stevens' lawyer informed Ambrose of the Lightbody offer and asked him
11 to revoke the trust. Ambrose refused to respond. Tallent instructed Ambrose to conclude
12 the Lightbody sale. Ambrose refused, and the closing date was postponed.

13 28. On July 7, 2003, Ambrose sued Stevens, Cramer and the Lightbodys for
14 declaratory relief in King County Superior Court. He signed the complaint as David
15 Ambrose, trustee, pro se.

16 29. Although Ambrose knew lawyer William C. Budigan represented Stevens,
17 he contacted Stevens directly by telephone to convince him the Cramer deal would be
18 better than the Lightbody offer. In August or September 2003, the Lightbodys abandoned
19 their offer. They were dismissed from the lawsuit with prejudice.

20 30. In February 2004, Tallent fired Ambrose. In the summer of 2004, Budigan
21 obtained Ambrose's removal as trustee.

22 31. On September 2, 2004, the court signed a stipulated order dismissing
23 Ambrose v. Stevens, with prejudice and without costs or attorney's fees to either party.
24 Once the title company received the order dismissing the case, it closed a new sale of the
25 Stevens property, which was recorded on September 2, 2004.

26 ///

27 ///

1 Regarding William and Rhonda Miskar

2 32. In August 2002, William and Rhonda Miskar hired Ambrose to resolve a
3 family real estate dispute. The Miskars paid \$2,900 in fees and costs between August 9,
4 2002 and December 1, 2003.

5 33. After filing suit in March 2003, under Pierce County Cause No. 03-2-
6 05708-3, Miskar v. Watkins, Ambrose did little or no further work. He did not respond to
7 defendant's discovery requests until they moved for sanctions. He canceled scheduled
8 depositions. In April 2004, he appeared on the trial date and moved for a new judge,
9 asserting bias. Although the motion was untimely, the judge decided not to proceed.
10 Ambrose agreed to arbitrate the claim, but then he did not take steps to do so.

11 34. Ambrose did not keep his client adequately informed about the status of the
12 matter. He did not work on the matter after December 1, 2003. However, between
13 December 13, 2003 and September 17, 2004, Ambrose collected an additional \$2,200 in
14 fees. He failed to refund any of the \$2,200 after the Miskars terminated him.

15 **III. STIPULATION TO MISCONDUCT**

16 35. By failing to complete requested work in the Elam matter and failing to
17 complete the requested parenting plan for Toal, Ambrose violated RPC 1.2(a) (lawyer
18 shall abide by client's decisions concerning the objectives of representation) and RPC 1.3
19 (diligence). By failing to communicate with Elam and by failing to return Toal's
20 telephone calls, Ambrose violated RPC 1.4 (communication). By failing, upon
21 termination, to refund some, or all, of the \$500 fee to Elam and the \$1,800 fee to Toal,
22 Ambrose violated RPC 1.5 (unreasonable fees) and RPC 1.15(d) (duties on withdrawal).

23 36. By failing to apprise Bradley of the settlement offer by Robertson in May
24 2003, Ambrose violated RPC 1.2(a) and RPC 1.4. By charging thousands of dollars in
25 legal fees to Bradley while missing important deadlines in the Plateau Used Car Sales v.
26 Mick Robertson matter, Ambrose violated RPC 1.3. By failing, upon termination, to
27 refund unearned fees to Bradley, Ambrose violated RPC 1.5 and RPC 1.15(d).

1 4.4 *Lack of Diligence*

2 4.42 Suspension is generally appropriate when:

3 (a) a lawyer knowingly fails to perform services for a client and
4 causes injury or potential injury to a client, or

5 (b) a lawyer engages in a pattern of neglect and causes injury or
6 potential injury to a client.

7 42. For violations of RPC 1.5 and RPC 1.15(d), Standard 4.1 applies.

8 4.1 *Failure to Preserve the Client's Property*

9 4.12 Suspension is generally appropriate when a
10 lawyer knows or should know that he is dealing improperly with
11 client property and causes injury or potential injury to a client.

12 43. For violations of RPC 1.7(b), RPC 1.8(a) and RPC 1.8(j), Standard 4.3
13 applies.

14 4.3 *Failure to Avoid Conflicts of Interest*

15 4.32 Suspension is generally appropriate when a lawyer
16 knows of a conflict of interest and does not fully disclose to a
17 client the possible effect of that conflict, and causes injury or
18 potential injury to a client.

19 44. For violations of RPC 3.2, RPC 3.4(a), RPC 3.4(c), RPC 3.4(d), RPC
20 8.4(d) and RPC 8.4(j), Standard 6.2 applies

21 6.2 *Abuse of the Legal Process*

22 6.22 Suspension is generally appropriate when a
23 lawyer knows that he or she is violating a court order or rule, and
24 causes injury or potential injury to a client or a party, or causes
25 interference or potential interference with a legal proceeding.

26 45. For violations of RPC 4.2(a), Standard 6.3 applies.

27 6.3 *Improper Communications with Individuals in the Legal
System*

 6.32 Suspension is generally appropriate when a
 lawyer engages in communication with an individual in the legal
 system when the lawyer knows that such communication is
 improper, and causes injury or potential injury to a party or
 causes interference or potential interference with the outcome of
 the legal proceeding.

 46. The presumptive sanction is suspension.

 47. The following aggravating factors apply under ABA Standards section
9.22:

- 1 (b) dishonest or selfish motive [Ambrose received compensation from
2 Elam, Toal, Bradley and Miskar without completing the requested
3 work, and made himself a residuary beneficiary of the Stevens'
4 trust];
5 (c) a pattern of misconduct;
6 (d) multiple offenses;
7 (i) substantial experience in the practice of law (admitted 8/13/92);
8 (j) indifference to making restitution.

9 48. The following mitigating factors apply under ABA Standards section 9.32:

- 10 (a) absence of a prior disciplinary record.

11 49. In addition, Ambrose's agreement to stipulate as part of the Early
12 Settlement Program developed by the Office of Disciplinary Counsel is given great weight
13 as a mitigating factor, due to the contribution the timing of the stipulation makes to the
14 efficient and effective operation of the lawyer discipline system.

15 50. Given the number of aggravating and mitigating factors, the presumptive
16 sanction is suspension.

17 VI. STIPULATED DISCIPLINE

18 51. Based upon the stipulated facts, the stipulated misconduct, the ABA
19 Standards, and In re Johnson, 114 Wn.2d 737 (1990) (directing consideration and
20 application of the ABA Standards), the Washington State Bar Association, thorough
21 Disciplinary Counsel Linda Eide and Respondent David Ambrose, stipulate and agree that
22 he shall be suspended for two years.

23 52. It is further stipulated and agreed that as a condition to Ambrose's
24 reinstatement to the practice of law when the suspension period ends, before a request for
25 reinstatement, that Ambrose will, at his own expense, undergo an independent mental
26 health evaluation by a licensed clinical psychologist or psychiatrist to be selected by
27 Disciplinary Counsel. Ambrose will execute all the necessary releases to permit this

1 evaluator to obtain all necessary treatment records, and make a report to the Washington
2 State Bar Association, Office of Disciplinary Counsel addressing whether Ambrose can
3 return to the practice of law and if so, under what conditions, if any.

4 53. If the evaluator concludes that Ambrose has not demonstrated adequate
5 recovery, then Ambrose and Disciplinary Counsel shall meet to discuss the evaluator's
6 report and determine what steps can be taken to address the evaluator's concerns. If
7 Ambrose and Disciplinary Counsel cannot reach an agreement, both parties shall present
8 written materials and arguments to the Disciplinary Board. The Disciplinary Board shall
9 decide whether and under what conditions Ambrose may return to the active practice of
10 law.
11

12 54. Following his reinstatement to the active practice of law, Ambrose shall be
13 on probation pursuant to ELC 13.8 for a period of two years. In addition to any conditions
14 imposed as a result of the two preceding paragraphs, such as demonstrated compliance
15 with any recommended treatment plan, Ambrose shall execute any necessary releases so
16 that any treatment provider can report Ambrose's compliance with the evaluator's and/or
17 treatment provider's recommendations no less than quarterly during his probation period.
18

19 55. It is further stipulated that, if Ambrose fails to comply with any of the
20 terms or conditions of this stipulation, the Washington State Bar Association, Office of
21 Disciplinary Counsel may seek appropriate relief under the relevant disciplinary rules.
22

23 56. It is further stipulated that Ambrose will bear all the costs of compliance
24 with the terms and conditions of the stipulated discipline and subsequent probation.

25 57. While the facts of this stipulation shall be public if approved, both the
26 Association and Ambrose request that any medical or counseling records, including the
27 report of the independent evaluator, be the subject of a protective order pursuant to ELC

1 3.2(e), and not released to the general public. Such records shall be available to the
2 Disciplinary Board and the Washington Supreme Court.

3 VII. RESTITUTION

4 58. It is also stipulated and agreed that Ambrose shall pay restitution of \$500 to
5 Kathy Elam, \$1,800 to Matthew Toal's mother Jeannine Collins, \$2,200 to William and
6 Rhonda Miskar and \$12,000 to Delbert Bradley as a condition to reinstatement. If the
7 Lawyers' Fund for Client Protection makes gifts to any of these individuals, than Ambrose
8 shall reimburse the fund to the extent of any such gift as a condition to reinstatement.
9

10 VIII. COSTS AND EXPENSES

11 57. It is stipulated and agreed that Ambrose shall pay attorney's fees and
12 administrative costs of \$1,500 in accordance with ELC 13.9(i). The Association will seek
13 a money judgment under ELC 13.9(l) if these costs are not paid within 30 days of
14 approval of this stipulation. Reinstatement from suspension is conditioned on payment of
15 costs and expenses.
16

17 IX. VOLUNTARY AGREEMENT

18 58. Ambrose states that prior to entering into this Stipulation he has either
19 consulted, or had an opportunity to consult, independent legal counsel regarding this
20 Stipulation, that he is entering into this Stipulation voluntarily, and that no promises or
21 threats have been made by the Association, nor by any representative thereof, to induce
22 him to enter into this Stipulation except as provided herein.
23

24 X. LIMITATIONS

25 59. This Stipulation is a compromise agreement intended to resolve this
26 matter in accordance with the purposes of lawyer discipline while avoiding further
27 proceedings and the expenditure of additional resources. Both Ambrose and the

1 Association acknowledge that the result after further proceedings in this matter might
2 differ from the result agreed to herein.

3 60. This Stipulation is not binding upon the Bar Association or Ambrose as a
4 statement of all existing facts relating to the professional conduct of Ambrose, and any
5 additional existing facts may be proven in any subsequent disciplinary proceedings.

6 61. This Stipulation is part of the Early Settlement Program, designed to
7 preserve the limited time and resources of the Office of Disciplinary Counsel, the panel of
8 Hearing Officers, and the Disciplinary Board, by promptly resolving matters without the
9 time and expense of hearings, Disciplinary Board appeals, and Supreme Court appeals or
10 petitions for review. As such, the resolution stipulated to herein may be different from
11 what would be sought or obtained as part of a stipulation outside of this Early Settlement
12 Program or at a hearing in this matter. Approval of this stipulation will not constitute
13 precedent in determining the appropriate sanction to be imposed in other cases; but, if
14 approved, this stipulation will be admissible in subsequent proceedings against
15 Respondent to the same extent as any other approved stipulation.
16
17

18 62. Under Disciplinary Board policy, in addition to the Stipulation, the
19 Disciplinary Board shall have available to it for consideration all documents that the
20 parties agree to submit to the Disciplinary Board, and all public documents. Under ELC
21 3.1(b), all documents that form the record before the Board for its review become public
22 information on approval of the Stipulation by the Board, unless disclosure is restricted by
23 order or rule of law.
24

25 63. If this Stipulation is approved by the Disciplinary Board and Supreme
26 Court, it shall be followed by the disciplinary action agreed to within this Stipulation. All
27 notices required in the Rules for Enforcement of Lawyer Conduct shall be made.

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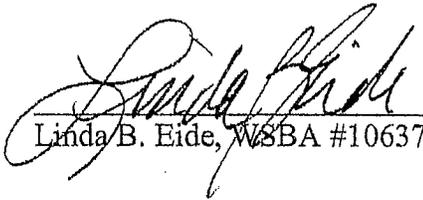
64. If this Stipulation is not approved by the Disciplinary Board and Supreme Court, this Stipulation shall be of no force or effect, and neither it nor the fact of its execution shall be admissible as evidence in the pending disciplinary proceedings, in any subsequent disciplinary proceedings, or in any civil or criminal action.

WHEREFORE the undersigned being fully advised, adopt and agree to the facts and terms of this Stipulation to Discipline as set forth above.



David A. Ambrose, WSBA #21764

1-5-05
Dated



Linda B. Eide, WSBA #10637

January 6, 2005
Dated

FILED

SEP 19 2001

DISCIPLINARY BOARD

**BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION**

In re

RICHARD LLEWELYN JONES,

Lawyer.

Bar No. 12904

Public No. 00#00176

REPRIMAND

You have been directed to appear before the Board of Governors of the Washington State Bar Association, pursuant to the Rules for Lawyer Discipline promulgated by the Supreme Court of the State of Washington, to receive this FORMAL REPRIMAND.

In January 1996 you represented a client in a civil lawsuit who was accused of stealing an exotic sports car. During your client's deposition, you instructed your client not to answer questions and left the room to confer with your client while a question was pending. You did not produce, or have your client produce, all discovery documents until 4 days before the scheduled trial date. You served answers to discovery requests with boilerplate objections only 3 days before the scheduled trial date.

You filed a Third Party Complaint against opposing counsel, his wife and his law firm for "abuse of process." The Court dismissed the Third Party Complaint and sanctioned you for filing it and for violating the discovery rules. You appealed the sanction award. The Court of Appeals affirmed, and further sanctioned you an additional \$500 for a frivolous appeal.

1 Your instructions to your client to not answer questions at his deposition violated
2 RPC 3.4(a) (unlawfully obstruct another party's access to evidence). Your failure to take
3 adequate steps to obtain documents requested by the opposing party and your conduct in
4 making boilerplate objections to discovery requests, violated RPC 3.4(a) (unlawfully
5 obstruct another party's access to evidence) and RPC 3.4(d) (failure to make reasonably
6 diligent effort to comply with a legally proper discovery request). Your conduct in filing a
7 frivolous third-party complaint against opposing counsel, his wife and law firm violated
8 Rule of Professional Conduct ("RPC") 3.1 (asserting frivolous issue) and RPC 4.4 (using
9 means with no substantial purpose other than to embarrass or burden a third person).

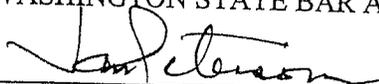
10 These actions merit a Formal Reprimand. Your actions bring discredit upon
11 yourself and the legal profession and show a disregard for the high traditions of honor
12 expected from a member of this profession.

13 NOW, THEREFORE, YOU ARE HEREBY REPRIMANDED by the Board of
14 Governors of the Washington State Bar Association for this misconduct. This Reprimand
15 will be made a part of your permanent record with the Washington State Bar Association,
16 and will be considered along with other evidence in regard to any future complaints
17 against you.

18 Your privilege to practice law in the State of Washington is based upon the finding
19 that you are a person of good moral character, and upon your commitment to abide by the
20 rules governing the conduct of members of the Bar. The Board of Governors expects all
21 of your future conduct as a lawyer to be consistent with that finding as to your character,
22 and with a continuing commitment on your part to the letter and spirit of those rules.

23 DATED this 14th day of September, 2001.

24
25 WASHINGTON STATE BAR ASSOCIATION

26 

27 Jan Eric Peterson, President

FILED

MAR 29 2001

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY BOARD

In re

Public No. 9801555

RICHARD L. JONES,

ORDER ON STIPULATION
TO DISCIPLINE

Lawyer

WSBA # 12904

This matter came before the Disciplinary Board at its March 16, 2001 meeting.

Upon review of the February 15, 2001 Stipulation to Reprimand,

IT IS ORDERED that the February 15, 2001 Stipulation to Reprimand is approved.

The vote on this matter was unanimous.

Those voting were Bonnell, Sturwold, Dullanty, Brandon, Weatherhead, S. Smith, Cullen, Horne, Klein

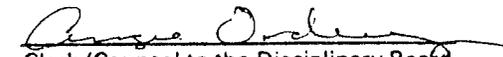
DATED this 29th day of March, 2001.



Stephen Smith, Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the ORDER ON STIPULATION TO DISCIPLINE to be delivered to the Office of Disciplinary Counsel and to be mailed to KURT BULMER, Respondent/Respondent's Counsel at 201 WESTLAKE AVENUE, SEATTLE WA 98109, by Certified/first class mail, postage prepaid on the 29th day of MARCH, 2001


Asst. to Clerk/Counsel to the Disciplinary Board

FILED

APR 19 2001

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY BOARD

In re

RICHARD LLEWELYN JONES

Lawyer.

Bar No. 12904

PUBLIC NO. _____

STIPULATION TO
REPRIMAND

Pursuant to Rule 4.14 of the Rules for Lawyer Discipline (RLD), the following Stipulation for Discipline is entered into by the Washington State Bar Association, through Disciplinary Counsel, Linda B. Eide; Respondent lawyer, Richard Llewelyn Jones; and his counsel, Kurt M. Bulmer.

ADMISSION TO PRACTICE

Respondent was admitted to the practice of law in the State of Washington on November 3, 1982. At all times material to this complaint, he practiced in Bellevue, King County, Washington.

STIPULATED FACTS

1. Mr. Jones represented John Mermis in a King County Superior Court lawsuit brought against him by Terry Johnson. The suit alleged in part that Mr. Mermis had stolen a Dodge Viper, an exotic sports car, from Mr. Johnson. William K. McInerney, Jr. represented Mr. Johnson. Upon filing the lawsuit on January 25, 1996, Mr. McInerney sought and obtained a temporary restraining order ("TRO") prohibiting Mr. Mermis inter alia from moving or selling the Viper and ordering him to show cause why a preliminary injunction should not be issued.

2. In response to Mr. Johnson's request for a preliminary injunction, Mr. Jones argued that because Mr. Johnson had another lawsuit pending against Mr. Mermis in Lane County, Oregon, the court should deny the plaintiff's request for an injunction under the doctrines of

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1 comity and res judicata. Mr. Johnson filed the Lane County case in early December 1995. The
2 Oregon court issued a TRO but later dissolved it because Mr. Johnson could not show irreparable
3 harm. In his Memorandum and at oral argument, Mr. Jones also asked for terms under RCW
4 4.84.185 (which provides for expenses after final order on frivolous action) and CR 11, arguing
5 that "this action is nothing more than inter-state forum shopping."

6 3. On February 16, 1996, the Court granted the plaintiff's motion in part.

7 4. Trial on the issue of ownership of the Viper was set for April 29, 1996.

8 5. At Mr. Mermis's request, Mr. Jones asked that Mr. Mermis's deposition be postponed
9 from March 20, 1996 until April 1, 1996 because Mr. Mermis was out of the country. The Bar
10 Association contends that Mr. Jones agreed to provide Mr. McInerney with documents
11 responsive to a set of requests for production prior to this deposition. Mr. Jones contests this
12 assertion.

13 6. On Friday, March 29, 1996, Mr. Jones received a fax from Mr. Mermis stating that he
14 had been "injured do [sic] to a severe fall" and that his doctor "suggested that [he] not fly for at
15 least a week." The fax was received at 7:25 pm, after business hours. Mr. Jones did not inform
16 Mr. McInerney that his client was unavailable until Mr. Jones showed up for the deposition as
17 scheduled. He did not bring any documents to the deposition.

18 7. The next day, Mr. McInerney filed a motion to compel discovery and for sanctions.
19 The Court's Order, dated April 10, 1996, stated that Mr. Mermis "shall make himself
20 immediately available for his deposition . . . and shall produce documents at a date and time
21 convenient for Plaintiffs and Plaintiff's counsel . . ."

22 8. Mr. McInerney then re-noted Mr. Mermis' deposition for April 15, 1996. Although
23 Mr. Jones brought some documents to that deposition, Mr. Mermis testified that he had
24 additional documents in the possession of Greg Veralrud, the Oregon attorney who represented
25 him in the Lane County lawsuit. Although, Mr. McInerney asked Mr. Jones to have Mr. Veralrud
26 send the documents by overnight mail, Mr. Jones merely requested that they be sent "the soonest
27 way." Mr. McInerney did not receive Mr. Veralrud's documents until April 25, 1996.

1 9. During Mr. Mermis' deposition, Mr. Jones instructed Mr. Mermis not to answer
2 questions on several occasions. However, during the course of the deposition some of the
3 questions were ultimately answered. Mr. Jones left the room to confer with his client while a
4 question was pending. Mr. Jones asserts that his client became agitated at the questions and left
5 the room. Mr. Mermis elaborated on his prior answer when he returned to the room.

6 10. Instructions not to answer and private conferences with deponents while questions are
7 pending are prohibited by Civil Rules 30(h)(3) and 30(h)(5).

8 11. On April 15, 1996, at Mr. Mermis' request Mr. Jones filed an "Answer, Affirmative
9 Defenses, Counter-Claims and Third Party Complaint." The Third Party Complaint asserted a
10 cause of action against Mr. McInerney, his wife and his law firm for "abuse of process" and
11 Consumer Protection Act violations. The only factual allegations about Mr. McInerney's or his
12 wife's conduct was the filing of the King County lawsuit while the Lane County action was
13 pending.

14 12. The Association asserts that Mr. Jones did not research the abuse of process claim
15 prior to filing the Third Party Complaint. Mr. Jones asserts that he did research on the issue and
16 filed the claim with a belief that he was asking for a reasonable extension of existing case law.

17 13. The claims asserted against Mr. McInerney, his law firm and his wife were found to be
18 frivolous.

19 14. The Court dismissed the Third Party Complaint on a motion for failure to state a
20 claim.

21 15. On April 26, 1996, Mr. Jones served answers to discovery requests with boilerplate
22 objections.

23 16. Mr. Jones was sanctioned by the court for filing the third party complaint, for
24 instructing Mr. Mermis not to answer questions at his deposition, for leaving the room with Mr.
25 Mermis during the deposition when a question was pending, and for boilerplate objections to
26 written discovery and ordered to pay \$2,310 for filing the third party complaint and \$2,000 for
27 discovery rule violations. Mr. Mermis was also sanctioned.

1 17. Mr. Jones appealed the sanction award. The Court of Appeals affirmed, and further
2 sanctioned him an additional \$500, payable to the court, for a frivolous appeal.

3 18. Mr. Jones has not paid any of these sanctions and reports that he is presently in
4 Chapter 7 bankruptcy proceedings.

5 **STIPULATED MISCONDUCT**

6 19. By filing the third party complaint against Mr. McInerney, his law firm and his wife,
7 Mr. Jones violated Rules 3.1 (asserting frivolous issue) and 4.4 (using means with no substantial
8 purpose other than to embarrass or burden a third person) of the Rules of Professional Conduct
9 ("RPC") and is subject to discipline pursuant to RLD 1.1(i).

10 20. By instructing Mr. Mermis not to answer questions at his deposition, Mr. Jones
11 violated RPC 3.4(a) (unlawfully obstruct another party's access to evidence) and is subject to
12 discipline pursuant to RLD 1.1(i).

13 21. By not taking adequate steps to obtain documents requested by the opposing party and
14 required to be produced by the court's April 10, 2000 order and by making boilerplate objections
15 to discovery requests, Mr. Jones violated RPC 3.4(a) (unlawfully obstruct another party's access
16 to evidence) and RPC 3.4(d) (failure to make reasonably diligent effort to comply with a legally
17 proper discovery request) and is subject to discipline pursuant to RLD 1.1(i).

18 **PRIOR DISCIPLINE**

19 22. Mr. Jones has no prior discipline.

20 **APPLICATION OF ABA STANDARDS**

21 23. The following standard from the *ABA Standards for Imposing Lawyer Discipline*
22 (1986) ("*the ABA Standards*") is applicable to this case:

23 6.23 Reprimand is generally appropriate when a lawyer negligently fails to
24 comply with a court order or rule, and causes injury or potential injury to a
25 client or other party, or causes interference or potential interference with a
26 legal proceeding.

27 24. Under ABA Standard 9.22, the following aggravating factors are present:

- 1 (i) substantial experience in the practice of law;
2 (j) indifference to making restitution.

3 25. Under ABA Standard 9.32, the following mitigating factors are present:

- 4 (a) absence of a prior disciplinary record;
5 (k) imposition of other penalties or sanctions (sanctions by trial court and court of
6 (l) remorse.

7 **STIPULATED DISCIPLINE**

8 26. It is stipulated and agreed that respondent will receive a reprimand.

9 **RESTITUTION**

10 27. Mr. Jones will pay the outstanding sanctions against him if the Bankruptcy Court
11 determines they are not dischargeable. Mr. Jones will advise Mr. McInerney of the bankruptcy
12 filing and advise him of *Berg v. Good Samaritan Hospital, (In re Berg)*, 230 F.3d 1165 (2000, 9th
13 Circuit) (apparently holding that attorney fee sanctions are not dischargeable in bankruptcy).
14 These amounts will be paid pursuant to RLD 5.3(b).

15 **COSTS AND EXPENSES**

16 28. It is stipulated and agreed that Mr. Jones shall pay attorney's fees and administrative
17 costs of \$750. These costs and expenses shall be paid pursuant to RLD 5.7(h).

18 **VOLUNTARY AGREEMENT**

19 29. Respondent states that prior to entering into this Stipulation he has either consulted, or
20 had an opportunity to consult, independent legal counsel regarding this Stipulation, that
21 Respondent is entering into this Stipulation voluntarily, and that no promises or threats have
22 been made by the Association, nor by any representative thereof, to induce the Respondent to
23 enter into this Stipulation except as provided herein.

24 **LIMITATIONS**

25 30. This Stipulation is a compromise agreement intended to resolve this matter in
26 accordance with the purposes of lawyer discipline while avoiding further proceedings and the
27 expenditure of additional resources. Both the respondent lawyer and the Association

1 acknowledge that the result after further proceedings in this matter might differ from the result
2 agreed to herein.

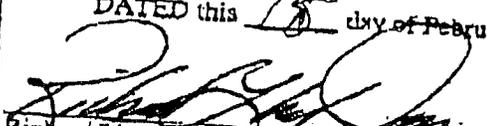
3 31. Pursuant to RLD 4.14(b)(3), this Stipulation is not binding upon the Bar Association
4 as a statement of all existing facts relating to the professional conduct of the respondent lawyer,
5 and any additional existing facts may be proven in any subsequent disciplinary proceedings.

6 32. Pursuant to Disciplinary Board policy, in addition to the Stipulation, the Disciplinary
7 Board shall have all material investigation documents available to it for review, including but not
8 limited to all correspondence from the grievant and all written responses of the respondent
9 lawyer. Pursuant to RLD 11.1(c)(6), all documents that form the record before the Board for its
10 review shall become public information upon approval of the Stipulation by the Board, other
11 than that previously subject to a protective order and unless order or rule of law restricts
12 disclosure. If the Disciplinary Board approves this Stipulation, it shall be followed by the
13 disciplinary action agreed to within this Stipulation. All notices required in the Rules for Lawyer
14 Discipline shall be made

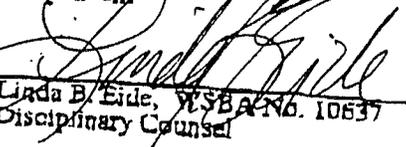
15 33. If this Stipulation is not approved by the Disciplinary Board, this Stipulation shall be
16 of no force or effect and neither it nor the fact of its execution shall be admissible as evidence in
17 the pending disciplinary proceedings, in any subsequent disciplinary proceedings, or in any civil
18 or criminal action

19 WHEREFORE the undersigned being fully advised, adopt and agree to the facts and
20 terms of this Stipulation to Discipline as set forth above.

21 DATED this 15th day of February, 2001

22 
23 Richard Llewelyn Jones, WSBA No. 12904
24 Respondent


25 Kurt M. Bulmer, WSBA No. 5559
26 Respondent's counsel

27 
Linda B. Eide, WSBA No. 10837
Disciplinary Counsel

Stipulation
Page 6 of 6



WASHINGTON STATE BAR ASSOCIATION
2101 Fourth Avenue - Fourth Floor
Seattle, WA 98121-2330
(206) 727-8207

1 acknowledge that the result after further proceedings in this matter might differ from the result
2 agreed to herein.

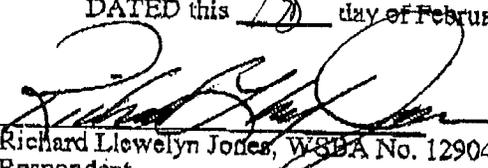
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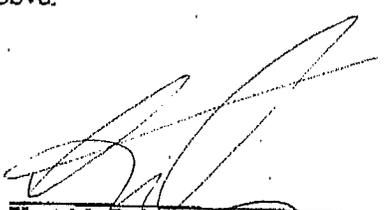
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11 than that previously subject to a protective order and unless order or rule of law restricts
12 disclosure. If the Disciplinary Board approves this Stipulation, it shall be followed by the
13 disciplinary action agreed to within this Stipulation. All notices required in the Rules for Lawyer
14 Discipline shall be made.

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16 of no force or effect, and neither it nor the fact of its execution shall be admissible as evidence in
17 the pending disciplinary proceedings, in any subsequent disciplinary proceedings, or in any civil
18 or criminal action.

19 WHEREFORE the undersigned being fully advised, adopt and agree to the facts and
20 terms of this Stipulation to Discipline as set forth above.

21 DATED this 15th day of February, 2001

22
23 
24 Richard Llewelyn Jones, WSBA No. 12904
25 Respondent


26 Kurt M. Bulmer, WSBA No. 5559
27 Respondent's counsel

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