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SUPREME COURT NO. 2013520

WASHINGTON STATE BAR ASSOCIATION DISCIPLINARY  
PROCEEDING NO. 12#00072

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re: KATHRYN B. ABELE, WSBA No. 32763

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APPELLANT'S REPLY BRIEF

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ORIGINAL

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## I. INTRODUCTION

Appellant attorney Kathryn Abele files this in reply to the Office of Disciplinary Counsel's Answering Brief ("Answering Br."). In its response, the WSBA consistently confuses circumstantial evidence and permissible inferences that can be drawn therefrom, with the speculation and the impermissible inferences relied upon by the Hearing Officer and the Washington State Disciplinary Board. The WSBA repeatedly cites to *non sequiturs* insisting that the record shows that Ms. Abele knowingly made a false report regarding the attempt of a King County Superior Court Marshal to trip her at the King County Courthouse. The testimony of King County Court Marshals Samuel Copeland and Gregory Webb can permissibly establish only that Marshal Webb did not trip her. It cannot establish that Ms. Abele filed a police report knowing that Marshal Webb had not attempted to trip her. Similarly, the Board's reliance on the security video evidences only events leading up to the incident and does not even reflect on whether the trip occurred, let alone on the question of whether there were circumstances that could have supported a reasonable subjective belief by Ms. Abele that Copeland tried to trip her.

The WSBA and the Board then pursue similarly faulty logic and conclude that Ms. Abele's representation of her client in an emotionally charged and stressful child custody action provided inferences that

Ms. Abele had acted intentionally to disrupt the legal proceedings with a dishonest or selfish motive where the record is devoid of any competent evidence showing what Ms. Abele would gain by her behavior. Finally, the WSBA cites to no legal authority that would impose a one-year suspension of an attorney's license to practice, simply because of disorderly conduct during a trial when the resulting contempt citation was purged to the trial court's satisfaction. There is no evidence in this record that Ms. Abele made any material misrepresentations of fact, only that she interrupted in the proceedings reacted emotionally after what she considered erroneous rulings by the trial court and the judge referring to her behavior as that of an animal. Judge Anita Farris's testimony in fact supports as a mitigating factor what the Board did not consider in recommending its sanction: That the behavior of an attorney in a 13-day arduous, stressful and emotional child custody case had all parties involved upset. The context of Ms. Abele's emotional behavior should be considered as a mitigating factor.

## **II. ARGUMENT**

### **A. Ms. Abele cites to numerous erroneous Findings of Fact and Conclusions of Law rendered by the hearing examiner.**

Ms. Abele challenges multiple findings with regard to both counts 1 and 2. Count 1 alleges that Ms. Abele acted intentionally in disrupting

the courtroom in the Snohomish County child custody case before Judge Anita Farris. With regard to Count 1, Ms. Abele challenges Findings of Fact ¶¶ 6, 11, 28, 29, and Conclusions of Law ¶¶ 47, 48, 55, 56, 59, and 60. With respect to Count 2, Findings of Fact ¶¶ 37, 38, 39, 41, 43, 44, 48 and Conclusion of Law 50. Count 2 involves the May 16, 2011 incident at the King County Court house in which Mr. Abele reported that court house marshal had attempted to trip her. Ms. Abele asserts that in all these related findings, the Board erroneously found that Ms. Abele made a false report to the Seattle Police Department when she accused the courthouse marshals of attempting to trip her. More importantly, these findings and conclusions erroneously find that Ms. Abele called the police knowing that the courtroom marshals had not attempted to trip her. Moreover, as to Count 1, the Board found that Ms. Abele acted intentionally and with a dishonest or selfish motive in the proceedings before Judge Anita Farris where there is no competent evidence that shows any such motive. Second, Findings of Fact ¶ 47 errs in finding that Ms. Abele has refused to acknowledge the wrongful nature of her conduct. Finally, the Board erred in Findings of Fact ¶ 48 by holding that she did not prove with admissible evidence any other basis for mitigation, specifically the stressful nature of the child custody litigation in which the conduct allegedly occurred. Ms. Abele also challenges Findings of Fact and Conclusions of Law ¶ 56,

finding the presumptive sanction in this matter is a suspension as opposed to an admonition for her conduct in Count 1.

**B. No competent evidence establishes by a clear preponderance of the evidence that Ms. Abele knowingly filed a false police report (Count 2).**

At best, the WSBA has established a question of fact as to whether Marshal Webb tripped or intended to trip Ms. Abele in the King County Courthouse on May 16, 2011. This Court has plenary power over and holds the ultimate responsibility for lawyer discipline. *In re Kronenberg*, 155 Wn. 2d 184, 190, 117 P.3d 1134 (2005). While the Findings of Fact of the Hearing Officer are to be afforded great weight, these findings are not conclusive with this Court. *In re Huddleston*, 137 Wn. 2d 560, 568, 974 P.2d 325 (1999); *In re Perez-Pena*, 161 Wn. 2d 820, 829; 168 P.3d 408 (2007). With this in mind, this Court should consider whether the findings made by the hearing examiner in fact support the conclusion that Ms. Abele acted knowingly when she reported the tripping incident to the Seattle Police.

The WSBA asserts that Ms. Abele breached RPC 8.4(b) by violating RCW 9A.76.175, making it a misdemeanor to knowingly make a false report to public officers. Answering Br. p. 19. Because the alleged ethical violation involves violation of a criminal statute, the elements and form of proof required to prove the criminal conduct in another context

should apply in attorney discipline cases. While the ABA standards define “knowledge” as “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 standard 17.—Knowledge as applied in RCW 9A.76.175 is defined differently: A person acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. WPIC 10.02. Knowledge is not established by an objective standard, but a subjective understanding of the defendant. See *State v. Johnson*, 119 Wn. 2d 167, 829 P.2d 1082 (1982).

The WSBA must establish that Ms. Abele had a subjective knowledge that Marshal Webb had not attempted to trip her by a clear preponderance of the evidence. ELC 10.14(b). The fact that Marshall Webb may not have attempted to trip Ms. Abele does not conclusively show that Ms. Abele knew that to be the case. See *Brauner v. Peterson*, 16 Wn. App. 531, 533, 557 P.2d 531 (1976) (fact that defendant’s cow was in the roadway does not provide inference that defendant was negligent in allowing the cow to escape). And the record does not establish by competent evidence that Ms. Abele subjectively knew that she was making a false police report, even giving deference to the hearing examiner’s findings.

This court will uphold the Hearing Officer's findings only where they are supported by "substantial evidence." *In re Disciplinary Proceeding Against Botimer*, 166 Wash.2d 759, 767, 214 P.3d 133 (2009). "Substantial evidence exists if the record contains 'evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.'" *Id.* at 767 n. 3, 214 P.3d 133 (quoting *In re Disciplinary Proceedings Against Bonet*, 144 Wash.2d 502, 511, 29 P.3d 1242 (2001)). A hearing officer inferences of fact must be **reasonable**. *In re Disciplinary Proceeding Against VanDerbeek*, 153 Wash.2d 64, 82, 101 P.3d 88 (2004).

Consider the list of facts cited by the WSBA in support of the hearing examiner's findings. Answering Br. pp. 24-25.

1. Ms. Abele turned counterclockwise according to the security video (Exhibit A-6) when Marshal Webb would have been to her right. However, a review of the video shows that Ms. Abele did a complete 180 degree turn so that she faced both marshals and both Marshal Webb and Marshall Copeland would have been in her line of sight at that point.

2. The fact that she accused Marshal Webb at that very moment of trying to trip her, weighs towards subjective belief that she had been tripped, not the contrary. And finding that Ms. Abele was angry at

Marshal Webb for failing to take actions on her complaints and therefore knew that Marshal Webb had not tripped her, is a *non sequitor*. It is at best speculation which cannot amount to substantial evidence. *Little v. King*, 160 Wn. 2d 696, 705, 161 P.3d 345 (2007).

3. The surveillance video from the courthouse (Exhibit A-6) does not support Ms. Abele's claim that she was tripped, because the video does not show the incident at all. For that matter, the video does not even show Marshal Webb, only his hand. There is no evidence provided by the video of whether a trip actually occurred, let alone that Ms. Abele subjectively knew that she had not been tripped.

4. Soon after the incident, Ms. Abele called 911 to report that Marshal Webb intentionally tripped her. This statement provides yet another *non sequitor*: Because Ms. Abele telephoned the police soon after the incident, therefore her statement was false and misleading, and by extension that Ms. Abele knew it was false and misleading. The conclusion does not follow from the antecedent. *See Brauner*, 16 Wn. App. at 533.

5. Ms. Abele's conduct on May 16, 2011 was intentional and she knowingly gave a false report to law enforcement. Again, the WSBA and the Hearing Officer attempt to use a conclusion rather than a fact as a basis to show Ms. Abele knowingly made the false police report.

6. The surveillance video and testimony of witnesses demonstrate that Ms. Abele deliberately sought multiple exchanges with the marshals (multiple, meaning a total of two) having first encountered ~~Marshal Copeland before reporting the incident to Marshal Webb.~~ Again, this fact does not establish any inference about Ms. Abele's state of mind as to the specific tripping incident.

7. Ms. Abele's conduct on May 16, 2011 wasted law enforcement resources and subjected Marshal Webb to an internal investigation. Again, this particular fact is not an antecedent to the finding that Ms. Abele acted knowingly in reporting the incident.

Other evidence and testimony cited by the WSBA in its brief provides similarly inadequate bases to support findings regarding Ms. Abele's state of mind. In fact, the WSBA cites to her testimony that supports her subjective belief that a trip or an attempted trip occurred. Ms. Abele testified that she "felt a shin against my shin. And I corrected myself from a trip ..." Answering Br. p. 26, TR 46-87. Even Officer Webb acknowledged that Ms. Abele brushed his left knee as she passed by him. TR p. 33.

Moreover, the WSBA repeatedly relies on the surveillance video without establishing that the scope of the security camera included the precise location where the trip occurred, or that any evidence of the trip

(such as a stumble) would have been visible within the camera's view. This Court is left with only speculation as to what the video in fact shows regarding the trip, if anything.

~~The WSBA and the hearing examiner also ignore the clear~~  
contradictions within the testimony of Marshal Webb, wherein he initially reported to the investigating police officer that he had picked up his foot at the time that Ms. Abele passed in front of him from the floor to the bar stool. He acknowledged in his testimony that Ms. Abele could have interpreted this for a tripping motion. TR 47-48. But at hearing, Marshal Webb testified that he did not move his feet from the bar stool. TR p. 33.

When appropriately analyzed, the question of Ms. Abele's state of mind with regard to her police report is controlled by *In re Guarnero*, 152 Wn. 2d 51, 61, 93 P.3d 166 (2004). This Court held in *Guarnero* that the WSBA "must produce facts from which only one reasonable conclusion may be inferred." The evidence does not support an alternative to Ms. Abele's testimony that she believed Marshal Webb had tripped her. While the Hearing Officer strives to rebut her testimony with circumstantial evidence, there is no competent evidence that in fact rebut's Ms. Abele's testimony on the issue.

**C. The record does not support the Hearing Officer's finding that Ms. Abele acted with selfish or dishonest motive in the child custody case (Count 1).**

The Hearing Officer's Findings of Fact and Conclusions of Law contains a material error regarding Ms. Abele's "yelp" of pain in August during the child custody hearing before Judge Farris. The finding states:

Respondent made a loud screaming noise that could be heard in other rooms of the courthouse. *There was conflicting testimony on the case of this and it remains unclear.* Judge Farris herself was not present in her courtroom at the time and did not find the respondent in contempt for this scream. FFCL ¶ 11. (Emphasis added.)

Attorney Janal Rich described the incident as a yelp of pain from Ms. Abele. TR 85. The finding inaccurately summarizes the occurrence and improperly dismisses the importance of Judge Farris' action with regard to the incident. There is no conflicting evidence regarding the nature of the cry of pain. While Judge Farris was not in the courtroom at the time, she assumed that Ms. Abele yelled out in frustration. Judge Farris later admitted in her testimony that because she was not present she did not know the reason for the yelp. TR 175, 186, 192.

Judge Farris, nonetheless, cited to this yelp as a basis for her contempt order during the hearing of September 28, 2011. Exhibit R-103 at 13. She then compared Ms. Abele to a criminally insane defendant. *Id.*

The WSBA and the Hearing Officer ignore that this was a provocation for the confrontation at the September 28, 2011 hearing.

After 13 days of hearing, Mr. Abele, the other attorneys and Judge Farris were at odds regarding the final order. In this setting, Ms. Abele understandably took offense at Judge Farris's statements, which were based on a misunderstanding of the previous incident in August. Ms. Abele took offense at the characterization, given that she had called out in pain at the time and that Judge Farris had not even bothered to obtain the facts before commenting from the bench.

Judge Farris conceded in her testimony that litigation is "stressful" and a hard job. TR 168. Indeed, Ms. Abele was participating in a trial of critical importance to her client, lasting 13 days, involving unusual legal circumstances in determining the custodial rights between a mother, biological father, and the de facto father. TR 58-59. Judge Farris' order of contempt on September 28, 2011 was at the conclusion of a 13-day child custody hearing. TR 58-59; 61.

Judge Farris' comment regarding Ms. Abele's cry of pain on September 28, 2011 must be considered in this context. It was the culmination of events on September 28, 2011 and led to the incident in which Ms. Abele left the courtroom. Ms. Abele was angry at that time, and Judge Farris' comment was the proximate cause of that anger.

**D. The record does not establish that Ms. Abele acted intentionally to achieve an unethical purpose.**

The Hearing Officer's finding that Ms. Abele acted intentionally in her behavior before Judge Farris begs the question as to what Ms. Abele actually intended. FFCL ¶ 28. The WSBA correctly cites to the ABA standard defining "intent": "The conscious objective or purpose to accomplish a particular result." Answering Br. p. 33. But the hearing officer's finding does not tell us what result Ms. Abele was supposedly attempting to achieve. Any objection that a trial attorney interjects is an interruption of the proceedings. Any comment by an attorney made out of turn is a disruption, though such comments occur all the time. Presumably, the Hearing Examiner and the WSBA complain that Ms. Abele's intent was to disrupt the hearing in violation of RPC 8.4(d). But her "intent" in interrupting the court was in fact to assure that her client's interests were adequately represented. Ms. Abele in fact had prepared to file an appeal of Judge Farris's final order on behalf of her client on the final day of the hearing, September 28, 2011. Tr. p. 411. While Ms. Abele readily admits that her actions in court went too far, and she acknowledges her misconduct, she rejects the inference that her intent was simply to disrupt the court proceeding.

**E. The record does not support the Hearing Officer's finding that Ms. Abele acted with selfish or dishonest motive in the child custody case.**

The WSBA cites to no authority supporting findings of a selfish and dishonest motive as an aggravating factor under the ABA standards.

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FFCL ¶¶ 47, 49. With regard to the child custody matter, the WSBA can cite only two bases for supporting the conclusion. Answering Br. p. 40. First, the WSBA cites to the opening statement of disciplinary counsel at the hearing, which is not evidence. TR 3-15; then, cites to Judge Farris' conclusion that Ms. Abele's conduct amounted to "belligerent bullying." TR 168. The WSBA then cites to the May 6, 2011 incident at the King County Courthouse (count 2) as the only other basis for a finding of a selfish or dishonest motive.

The WSBA provides no legal authority that defines dishonest or selfish motive. The WSBA would have the Court expand a finding of dishonest and selfish motives to include attorney actions in court that do not involve making false statements to the court or other parties or the attorney's quest for material gain. The finding expands "selfish motive" to include actions by Ms. Abele that had nothing to do with personal gain but rather were directed entirely at her conduct in court.

Clearly, this Court has authority to reverse or modify findings of the Hearing Officer and the Board with regard to the aggravating factors

such as selfish and dishonest motives. *See In re Perez-Pena*, 161 Wn. 2d 820, 168 P.3d 408 (2007). In *Perez-Pena* this Court specifically held that the record did not support the Board's finding that an attorney had ~~dishonest motive when he failed to return an unearned fee to the client.~~ The attorney had twice attempted to return the fee to the client by check, but on both occasions had cancelled the check before the clients had negotiated it. *Id.* at 834. Because the Court found fewer aggravating factors than imposed by the Board, this Court therefore reduced the suspension to 60 days from the six-month suspension imposed by the Board. *Id.* at 836-837.

This Court's decision in *Perez-Pena* shows that selfish and dishonest motives are not established because the Hearing Officer finds that the attorney somehow gained from the behavior. In this case, the WSBA's theory of how Ms. Abele's motive was to advance her personal interests is unclear. Judge Farris speculates that Ms. Able gained advantages in court due to her behavior but at worst this would be due to an over-zealousness in advocating for her client, not for selfish or dishonest motives.

**F. The record clearly establishes that Ms. Abele acknowledged her misconduct in the child custody case (Count 1).**

Ms. Abele has repeatedly acknowledged her misconduct before

Judge Farris in the child custody case (Count 1). TR 426-427; 428; 447; 453-454. Ms. Abele's statements on the record here are distinguishable from the rationalizations made by the attorney in *In re Kamb*, 177 Wn. 2d 851, 867-868; 305 P.3d 1091 (2013). In *Kamb*, the attorney had altered signatures on a court order but denied that he had done it intentionally. *Id.* at 862. The Hearing Officer in that circumstance was certainly justified in finding that the attorney's insistence that the act was done negligently did not constitute a true statement of remorse. While Ms. Abele denies that her conduct was intended to disrupt the proceeding or personally gain advantage for herself, she does not otherwise attempt to justify her actions. This does not equate with failing to acknowledge that the conduct was wrong.

**G. The Court should also recognize the stress of litigation as a mitigating factor.**

There is no serious dispute that the litigation involved in Count 1, involving a three-way child custody battle, was stressful. Judge Farris acknowledged this in her testimony. TR 168. And Ms. Abele's opposing counsel in the matter, Ms. Rich and Mr. Jones, acknowledged that the court admonished all parties about interrupting during the trial. TR 63, 109. The matter was heard in two stages over a 13 day period.

This Court has considered the emotional state of mind as a mitigating factor, regardless of whether it is diagnosed as a part of an

emotional problem or mental illness. *In re Dornay*, 160 Wn. 2d 671, 687, 161 P.3d 333 (2007). In *Dornay*, the attorney had experienced marital problems and symptoms of post-traumatic stress disorder related to an extra-marital affair. While the WSBA did not challenge the application of “personal or emotional problems” as a mitigating factor in this circumstance, it argued that the mitigator should receive minimal weight. *Id.* This Court rejected that argument agreeing with the Hearing Officer that Dornay’s extra-marital affair was “intense and emotional” and was consistent with a cycle of tension, verbal abuse that characterizes domestic violence. *Id.* at 687. While the nature of Dornay’s relationship does not excuse her actions, “it is a mitigating factor that merits substantial weight.”

This Court should recognize that Ms. Abele’s participation in a trial of critical importance to her client, lasting 13 days, involving unusual legal circumstances in determining the custodial rights between a mother, biological father, and the de facto father, placed extreme stress on her. TR 58-59. And the culminating encounter between Ms. Abele and Judge Farris occurred after Judge Farris had compared Ms. Abele’s actions to that of an animal. This Court should give consider to these circumstances in considering Ms. Abele’s state of mind (whether she acted negligently or intentionally) as well as whether to credit a mitigating factor as well.

**H. The WSBA cites to no case in which an attorney received a one-year suspension on facts similar to those in this case.**

While this Court will not lightly depart from the recommended sanctions by the Board, one or more factors as set forth in *In re Noble*, 100 Wn. 2d 88, 94, 667 P.2d 608 (1983), may persuade this Court that the sanction recommended is inappropriate. One of these factors include: “The proportionality of the sanction to the misconduct (sanction must not depart significantly from sanctions imposed in similar cases.” *See also In re Discipline of Johnson*, 114 Wn. 2d 737, 752, 790 P.2d 1227 (1990). While the WSBA argues that cases cited by Ms. Abele imposing less than a 12-month suspension are all distinguishable, this of course ignores that finding case law records of disciplinary proceedings with precisely the same facts would be nearly impossible, given the many variables involved. WSBA BR 48-49. But more interestingly, the WSBA fails to cite to a single case in which similar facts resulted in discipline involving a one-year suspension or worse.

This disciplinary proceedings against Ms. Abele does not involve material misrepresentations to her clients, the court, or other parties; (2) does not involve violence; (3) does not involve an illegal or unethical quest for financial gain. The case against Ms. Abele principally focuses on alleged knowledge of the falsity of her claims in filing a police report

and her bad behavior as an advocate in a stressful child custody dispute. While Ms. Abele adamantly denies knowingly making a false police report in Count 2, her behavior in Count 1 before Judge Farris did not merit a one-year suspension.

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### III. CONCLUSION

Attorney Kathryn Abele respectfully asks that this Court overturn the disciplinary board sanction of imposing a one-year suspension of her license to practice, ordering her to pay to costs of the administrative proceeding, and that she undergo a fitness evaluation before being reinstated. As to Count 1, the hearing examiner and the Board failed to cite to antecedent facts that establish that Ms. Abele knowingly filed a false police report in violation of RCW 9A.76.175 and RPC 8.4(b); 8.4(c) and/or 8.4(d). The hearing examiner at worst establishes that no marshal at the King County Courthouse tripped Ms. Abele or attempted to trip her. This does not establish that Ms. Abele complained to the police knowing that she had not been tripped. There is no reasonable inference that can be drawn that establishes Ms. Abele's knowledge from the facts established, even after giving due weight to the hearing examiner's findings. Marshal Webb initially stated to the investigating police officer that he moved his feet at the time that Ms. Abele was passing him and he testified that this could have been perceived by her as a tripping motion. Moreover, the record

establishes that their legs touched as she passed him. The fact that he denies having tried to trip her, or that there is evidence that no trip occurred, does not therefore infer that she knew that Marshal Webb had not tried to trip her.

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As to Count 1, the Board erred in finding that Ms. Abele acted with the intention of disrupting the legal proceeding and that she acted with selfish and dishonest motives. The record establishes that Ms. Abele acted overzealously but understandably in an emotionally charged 13-day child custody action. Reprimand in this case is an appropriate sanction where Ms. Abele acted negligently and failed to comply with a court order or rule. Even if the Court were to find that she acted intentionally, she nonetheless did not act with selfish or dishonest motives and did acknowledge the wrongfulness of her conduct. Mitigating factors should outweigh the aggravating factors in this matter, and merit only a minimal suspension, if any at all.

Respectfully submitted this 5 day of January, 2015.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury and the laws of the State of Washington that on January 5, 2015, I caused service of Appellant's Reply Brief via legal messenger to:

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EXECUTED this 5<sup>th</sup>, day of January, 2015, in Seattle, Washington.

  
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