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**SUPREME COURT OF THE STATE OF WASHINGTON**

Bar No. 32347  
Supreme Ct. Case No. 201,049-1

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**In re**

**FREDRIC SANAI**

**Lawyer (WSBA No. 32347)**

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**PRELIMINARY REPLY BRIEF REGARDING LIMITED LEGAL ISSUES ON  
APPEAL**

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**TABLE OF CONTENTS**

**I. INTRODUCTION ..... 1**

**II. THE UNDERLYING PROCEEDINGS AND THIS PROCEEDING IS RIDDLED WITH FRAUD ..... 2**

**III. RESPONDENT WAS DENIED HIS CONSTITUTIONAL RIGHTS ..... 4**

**IV. THE JUDICIAL OPINIONS AT ISSUE WERE TESTIMONIAL AND THEIR USE A VIOLATION OF THE APPEARANCE OF FAIRNESS DOCTRINE ..... 14**

**V. THE ADMISSION OF JUDICIAL FINDINGS OF FACT AND OTHER HEARSAY LOWERED THE BURDEN OF PROOF TO LESS THAN THE CONSTITUTIONAL MINIMUM..... 19**

**VI. CLASS OF ONE ..... 23**

**VII. PRELIMINARY CONCLUSION ..... 24**

## TABLE OF AUTHORITIES

### CASES

<i>Bang Nguyen v. Dep't. of Health</i> , 144 Wn.2d 516, 29 P.2d 689 (2001) .....	11
<i>Cafeteria &amp; Restaurant Workers v. McElroy</i> , 367 U. S. 886, 896 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) .....	5
<i>Chmela v. Dep't of Motor Vehicles</i> , 88 Wn.2d 385, 561 P.2d 1085 (1977) .....	20
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) .....	14, 18
<i>Engquist v. Or. Dept. Of Agr.</i> , 5 53 U.S. 591, 128 S.Ct. 2146, 2150, 170 L.Ed.2d 975 (2008).....	2, 5
<i>Greycas, Inc. v. Proud</i> , 826 F.2d 1560 (7th Cir. 1987) .....	18
<i>Herrick v. Garvey</i> , 298 F.3d 1184, 1191-92 (10th Cir. 2002) .....	17, 18
<i>In re Disciplinary Proceeding Against Deming</i> , 108 Wn.2d 82, 736 P.2d 639 (1987).....	2, 5, 6, 7, 9, 10, 23
<i>In re Disciplinary Proceeding Against Heard</i> , 136 Wash.2d 405, 432, 963 P.2d 818 (1998) .....	12
<i>In re Disciplinary Proceeding Against Kronenberg</i> , 155 Wn.2d 184, 117 P.3d 1134 (2005) .....	20, 21, 24
<i>In re Disciplinary Proceeding Against Ritchie</i> , 123 Wash.2d 725, 870 P.2d 967 (1994) .....	6, 7, 11
<i>In Re Disciplinary Proceeding Against Unger</i> , Public No. 06#0071, Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation (2007) .....	1, 2, 23, 24
<i>In Re Disciplinary Proceedings Against Sanders</i> , 159 Wn.2d 517, 145 P.3d 1208 (2006) .....	8, 9, 10
<i>In Re Discipline Against Fredric Sanai</i> , 167 Wash.2d 740, 225 P.3d 203 (2009) .....	9, 12
<i>Medical Disc. Bd. v. Johnston</i> , 99 Wn.2d 466, 663 P.2d 457 (1983).....	11, 19
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)...	15, 16, 24, 25
<i>Nipper v. Snipes</i> , 7 F.3d 415 (4th Cir. 1993) .....	17, 18, 22
<i>Sanai v. Saltz</i> , B174924 2005 WL 1515401 (Cal.App. 2 Dist.) .....	13, 17
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012) .....	15, 16
<i>State v. Kirkpatrick</i> , 160 Wn.2d 873, 161 P.3d 990 (2007) .....	15

<i>U.S. v. Ballestros-Selinger</i> , 454 F.3d 973, 975 (9 <sup>th</sup> Cir. 2007)...	15, 16, 24
<i>U.S. v. Boulware</i> , 384 F.3d 794 (9 <sup>th</sup> Cir. 2004).....	16
<i>U.S. v. Jones</i> , 29 F.3d 1549 (11 <sup>th</sup> Cir.1994).....	17, 18, 22
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).....	2

**STATUTES**

RCW 34.05.....	20
RCW 34.05.452 .....	20

**OTHER AUTHORITIES**

Gene Johnson, “Wash. Lawyers cut their bar Association dues \$3.6M”, Seattle Times, April 12, 2012 .....	2
<i>In Re Disciplinary Proceeding Against Sanders</i> , No. 200149-1, “Opposition to Motion for Discretionary Review”, filed July 30, 2004 .	4

**RULES**

ELC 10.14(a).....	4
ELC 10.14(d)(1).....	21, 23

**CONSTITUTIONAL PROVISIONS**

Washington Const. 1, § 22 .....	8
Washington Const. art. 4, § 31 .....	8

## I. INTRODUCTION

In April of 2012 the membership of the Washington State Bar Association voted to reduce the funds paid by its members to the Washington State Association. The Association has placed a series of links and information on its website at <http://www.wsba.org/referendum>. One of the links, entitled “Committee for Fair WSBA Dues Website (Proponent’s Website)” is to <http://www.legalez.com>. That leads in turn to a website with the link [http://www.legalez.com/WSBA\\_RULE11.pdf](http://www.legalez.com/WSBA_RULE11.pdf).

It was by following these links that Respondent Fredric Sanai learned that not only has the Washington State Bar Association been found to have engaged in filing a frivolous and meritless discipline complaint at the same time the instant complaint was pending, but that the critical testimony proffered by the successful respondent, Karen Unger, was from a judge of the United States District Court for the Western District of Washington, who testified about his reasoning and thoughts about the case before him. *See In Re Disciplinary Proceeding Against Unger*, Public No. 06#0071, Hearing Officer’s Findings of Fact, Conclusions of Law and Recommendation (2007) at 3 fn. 25; 21-23 at ¶91, ¶101 (attached as Exhibit to Motion filed October 15, 2012).

Respondent Sanai demanded the same right to call judicial officers to testify as enjoyed by Ms. Unger. The fact that the Association must and has accorded such rights to attorneys facing discipline is known to this Court from the majority decision in *In re Disciplinary Proceeding Against*

*Deming*, 108 Wn.2d 82, 102-104, 736 P.2d 639 (1987) and because Justice Owens participated in the *In Re Unger* proceedings by furnishing a full volume of testimony. The Association now denies that this and other constitutional rights accorded other attorney respondents exist. The hearing process is thus not only flawed under the precedent of this Court, but also fails under the “class of one” due process analysis created by *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam) and reaffirmed in *Engquist v. Or. Dept. Of Agr.*, 553 U.S. 591, 128 S.Ct. 2146, 2150, 170 L.Ed.2d 975 (2008).

But the constitutional infirmities of the proceedings are not the only grounds for reversal. This Court will be receiving, in separate dockets, motions to vacate all of the adverse appellate decisions in state court based on the unrebutted fraud on the courts demonstrated in the disciplinary hearing. This proceeding therefore presents to this Court the issues which motivated attorneys such as Bellevue solo practitioner Julie Fowler to vote for the referendum. See Gene Johnson, “Wash. Lawyers cut their bar Association dues \$3.6M”, Seattle Times, April 12, 2012, found at [http://seattletimes.com/html/localnews/2017969377\\_apwalawyerdues1stldwritethru.html](http://seattletimes.com/html/localnews/2017969377_apwalawyerdues1stldwritethru.html).

## **II. THE UNDERLYING PROCEEDINGS AND THIS PROCEEDING IS RIDDLED WITH FRAUD**

Perhaps the most disturbing aspect of Association’s prosecution of this case is that they are now aware that the William Sullivan and his client committed a fraud on the underlying courts and this Court. Rather than

addressing the evidence showing the fraud, the Association contends that Respondent never raised the fraud before the Snohomish County Superior Court. The Association is thus seeking to protect fraud on the courts with its own fraud on the courts. In doing so, the Association demonstrates precisely the same misconduct that Sullivan committed and multiple courts validated.

At the time this preliminary brief is being filed, a motion to extend the time for filing of this reply brief and either strike the opposition brief of the Association or allow a substantially overlength brief has been filed with this Court and is pending. The Commissioner set a briefing schedule that extends after the due date of this brief. Counsel pro hac vice sought clarification as to whether the reply date has been vacated, and has been told that it has not been vacated.

Accordingly, Respondent has been put in quandary. A proper reply brief cannot be made because of the misconduct of the Association; however, if Respondent files a 25 page brief that attempts to fully address the issues, then the Association will argue that there is no need for an extension. In addition, by failing to file some kind of reply brief now that clarification has been received, counsel could be open to sanctions.

Accordingly, in order to ensure that there is no accusation of waiver by failure to file a brief and no issue of sanctions, Respondent hereby submits 25 pages of argument on certain key legal issues only. This is to demonstrate that Respondent's counsel has been hard at work on the brief, and that 25 pages is not enough to respond even to the Association's

misstatements of law, let alone falsification of the record. Respondent's contentions set forth in the motion filed on October 15, 2012 are hereby incorporated by reference.

### **III. RESPONDENT WAS DENIED HIS CONSTITUTIONAL RIGHTS**

The Association quotes ELC 10.14(a) to argue that the rights of a criminal defendant are not applicable. However, ELC 10.14(a) does not say that the rights are criminal or civil; instead it states that the hearings should be guided by the principle that they are "sui generis hearings to determine if a lawyer's conduct should have an impact on his license to practice law." This is no different than the situation for judicial discipline proceedings, which the counsel for the Commission on Judicial Conduct has likewise characterized as "sui generis" to this Court. *See In Re Disciplinary Proceeding Against Richard Sanders*, No. 200149-1, "Opposition to Motion for Discretionary Review", filed July 30, 2004 at 2. ("the Commission's procedures and goals are to a large extent *sui generis*".) (judicial notice separately requested). The fact that attorney disciplinary procedures and judicial misconduct procedures are "sui generis" as compared to civil and criminal lawsuits does NOT, however, mean that the constitutional issues are in any way sui generis. The constitutional issues are exactly the same, whether the proceeding is to disqualify a lawyer from practicing his profession, a physician from practicing his professions, an individual for holding a job with state government, or a judge from holding his elected position. In each case the individual is entitled to DUE PROCESS

appropriate to cases of the most important property interests, and where the issue a professional license, the due process protections to be afforded are “quasi-criminal”.

Indeed, as between the four categories mentioned—an attorney, a physician, a state government employee, and an elected judge—the least protection is owed to an elected judge, as they are subject to removal and recall by the people and, in the case of Washington State, by the legislature as well. Owed more protection than a judge is a state government employee, who cannot be arbitrarily removed by the voters or legislature, but who are not subject to “class of one” protections. *Engquist, supra*. Entitled to the HIGHEST protections are holders of professional licenses, as they are entitled to “class of one” protection because “there is a crucial difference, with respect to constitutional analysis, between the government exercising “the power to regulate or license, as lawmaker,” and the government acting “as proprietor, to manage [its] internal operation.” *Id.* at 598, quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U. S. 886, 896 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

In *Deming*, this Court wrote that “[w]e **hold** that a judge accused of misconduct is entitled to no less procedural due process than one accused of crime. *See* U.S. Const. amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71).” *Deming, supra* at 103 (bold emphasis added). Faced with this clear holding of this Court, the Association points to a later case which it asserts repudiated this standard and instead adopted the standard of Justice Utter’s concurrence. *In re Disciplinary Proceeding Against Ritchie*,

123 Wash.2d 725, 870 P.2d 967 (1994). However, *Ritchie* does not deal with the issue of the Sixth Amendment rights, is itself a holding unnecessary to the decision, does not address any of the rights discussed in *Deming*, and it does not repudiate *Deming*'s statement that “[w]e **hold** that a judge accused of misconduct is entitled to no less procedural due process than one accused of crime.”

*Ritchie*'s constitutional argument deal solely with the question of whether Ritchie's **due process** rights were violated when he waived his right to oral argument based on a draft decision of the Commission on Judicial Conduct which proposed a less severe sanction than what was ultimately imposed. This Court held that the Commission did in fact violate its own rules:

The judge maintains the Commission failed to provide him the opportunity to argue the sanction of removal from office on the record pursuant to WAC 292-12-120(5)...Under these circumstances, the Commission's contention the judge waived his right to argue the Commission's proposed decision on the record is strained. The right could not be meaningfully exercised without knowledge of the sanction sought. Although the Commission should in the future abide closely with the procedural requirements set out in its regulations, any procedural deficiencies which may have occurred below are moot on this record in view of our de novo review.

The judge's constitutional arguments are not well taken, insofar as they are premised on the notion judges in disciplinary proceedings are entitled to the same rights as criminal defendants. The applicable standard is civil in nature. *See In re Deming*, 108 Wn.2d 82, 103, 736 P.2d 639 (1987). Previous suggestions to the contrary in *In re Deming, supra*, were unnecessary to its holding. *See In re Deming, supra* at 99 n. 4, 103.<sup>1</sup>

*Ritchie, supra*

Footnote 4 of *Deming* mentioned in *Ritchie* solely concerns the issue of notice:

....

Though not challenged in these proceedings, since Judge Deming was fully informed as to the persons bringing the charges, it is improper to place within the discretion of the Commission the decision as to whether the judge complained against should be informed as to the identity of the individuals making the verified statement...The consideration given a judge should not be less than that given a criminal accused. *See* U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10).

*See Deming, supra* at 99 n. 4, 103

The *Ritchie* Court is correct that the statement in Deming’s footnote 4 is dicta, because the issue of notice was “not challenged” in *Deming*. However, the statement in the main text of *Deming* was not repudiated or challenged by *Ritchie*, and that was explicitly identified as a holding:

[w]e **hold** that a judge accused of misconduct is entitled to no less procedural due process than one accused of crime. *See* U.S. Const. amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71).

*Deming, supra* at 102-103 (bold emphasis added).

In *Ritchie*, the discussion of a constitutional violation by the Commission was unnecessary because this Court found that the Commission violated its own rules and procedures, but the error was harmless. Thus in *Ritchie*, the statement addressing *Deming* is nothing more than dicta and does not reverse *Deming’s* explicit and clear holding. Perhaps more important, the contention in *Ritchie* that *Deming* holds that “judges in disciplinary proceedings are entitled to the same rights as criminal defendants” is quite wrong. *Deming* does not hold that “judges in

disciplinary proceedings are entitled to the same rights as criminal defendants”. What *Deming* holds is that the rights of judges, like attorneys, to certain specific constitutional guarantees are NOT LESS THAN the rights of criminal defendants in the following respects: “U.S. Const. amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71).”

These rights guaranteed are the rights under the fifth, sixth and fourteenth amendments to the United States Constitution. In addition, a judge and an attorney are both entitled to the same protection under Washington Const. 1, § 22 except to the extent modified by Washington Const. art. 4, § 31 (namely the trier of fact).

Likewise, the case of *In Re Disciplinary Proceedings Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006) does not support the Association’s position. In *Sanders*, this Court wrote as follows:

Justice Sanders also raises the issue of whether he was denied due process because of the failure to grant his discovery requests. He bases this claim on his characterization of the proceedings as criminal in nature. However, this court has consistently held that judicial disciplinary proceedings are civil in nature.<sup>18</sup>

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Fn18. *Deming*, 108 Wash.2d at 102-03, 736 P.2d 639.

*Sanders, supra*, at 526.

The *Sanders* Court addressed whether the right to *pre-hearing discovery* is the same as in a civil case or a criminal case. The answer, of course, is that the rights to pre-hearing discovery are those in a CIVIL CASE. There is no constitutional right of pre-hearing discovery in criminal cases, which is why Respondent never argued any constitutional issues in *In Re*

*Discipline Against Fredric Sanai*, 167 Wash.2d 740, 225 P.3d 203 (2009).

To the extent Justice Sanders was arguing that criminal procedural due process gave him the right to pre-hearing depositions and subpoenas, that argument is misguided. The only constitutional right to pre-hearing discovery in civil cases is to obtain the non-privileged files and physical evidence of the investigating and prosecuting agencies.

Likewise, the *Sanders* Court is correct that judicial discipline proceedings, like attorney discipline proceedings, follow the contours of a civil case. The issue was discussed in the pages of *Deming* cited by the *Sanders* Court as follows:

We find that Judge Deming had an opportunity to be heard at a meaningful time and in a meaningful manner. The infirmities of the Commission's proceeding were not such that the additional due process protection provided by the de novo review by this court cannot act to cure them. **We add, however, that even though a judicial disciplinary proceeding is not criminal in nature, because of the potentially severe consequences to a judge, certain due process protections are required.** Every judge charged by the Commission is entitled to: (1) notice of the charge and the nature and cause of the accusation in writing; (2) notice, by name, of the person or persons who brought the complaint; (3) appear and defend in person or by counsel; (4) testify in his own behalf; (5) the opportunity to confront witnesses face to face; (6) subpoena witnesses in his own behalf; (7) be apprised of the intention to make the matter public; (8) appear and orally argue the merits of the holding of a public hearing; (9) prepare and present a defense; (10) a hearing within a reasonable time; (11) the right to appeal.

**We hold that a judge accused of misconduct is entitled to no less procedural due process than one accused of crime. See U.S. Const. amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71).** The lawyer charged with

misconduct in a disbarment proceeding is entitled to procedural due process. *In re Ruffalo*, 390 U.S. 544, 550, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968).

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.... He is accordingly entitled to procedural due process, which includes fair notice of the charge.... Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process."

A judge is entitled to the same procedural due process protection when facing disqualification as a lawyer facing disbarment.

*Deming, supra* at 102-103 (bold emphasis added).

The *Sanders* Court did not state that Justice Sanders had no confrontation rights. Instead, it stated the opposite, that Justice Sanders's rights in this regard were fully met by the proceedings:

Justice Sanders also had access to all of the testimony and cross-examined all of the witnesses at the contested hearing. There is no basis to find that Justice Sanders was denied due process.

*Sanders, supra*, at 526.

More important, if the Association's interpretation of the *Ritchie* holding is correct, that the *Ritchie* Court intended to state that the due process rights of an attorney license revocation are at the constitutional "civil standard," then Justice Utter was flat out wrong under United States Supreme Court authority repeatedly recognized by this Court:

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the due process clauses of the fifth and fourteenth amendments to the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974). "[T]he right to be heard before being condemned to suffer grievous

loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168, 95 L.Ed. 817, 71 S.Ct. 624 (1951) (Frankfurter, J., concurring). A professional license revocation proceeding has been determined to be "quasi-criminal" in nature and, accordingly, entitled to the protections of due process. *In re Ruffalo*, 390 U.S. 544, 551, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 1 L.Ed.2d 796, 77 S.Ct. 752 (1957); *In re Kindschi*, 52 Wn.2d 8, 11-12, 319 P.2d 824 (1958).  
*Medical Disc. Bd. v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983);

This Court reaffirmed *Johnston* in 2001, stating as follows:

This court has expressly held medical disciplinary proceedings are indeed "quasi-criminal."

....We recently reiterated medical discipline is quasi-criminal in *Johnston*, 99 Wn.2d 466.

*Johnston* and *Kindschi* are unquestionably the law of this jurisdiction.

These two cases use the term "quasi-criminal" in exactly the same sense the United States Supreme Court used the term when it characterized disbarment proceedings "quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). If disbarment is quasi-criminal, so must be medical de-licensure. There is no distinction in principle. Other jurisdictions are in accord. Because of their quasi-criminal nature "the charges [against an attorney] must be sustained by convincing proof to a reasonable certainty, and any reasonable doubts should be resolved in favor of the accused." *Golden v. State Bar of Cal.*, 213 Cal. 237, 2 P.2d 325, 329 (1931). The same standard applies to professional discipline for judges. CJCRP 7.

*Bang Nguyen v. Dep't. of Health*, 144 Wn.2d 516, 528-529, 29 P.2d 689 (2001),

The Association's argument that the standard of due process protection is the "civil standard" is manifestly false, and repudiated in multiple decisions after *Ritchie*. See, e.g. *In re Disciplinary Proceeding Against*

*Heard*, 136 Wash.2d 405, 432, 963 P.2d 818 (1998) (“attorney disciplinary actions are "adversary proceedings of a quasi-criminal nature" and the attorney subject to discipline “is entitled to due process of law.”).

All this being said, the Association has never come to grips with the fundamental policy issue at stake: if an attorney is going to be disbarred for supposed misconduct found by a judge at a civil level of proof, why should should the judge not be cross-examined? What possible good does it serve to allow an attorney to have his license removed based on the uncorroborated statements of a judge?

Judges are not saints. Judges may lie, commit crimes, accept bribes, or commit fraud. Indeed, in the prior opinion of this Court, Justice Chambers and his dissenting colleagues intentionally misrepresented a California Court of Appeal decision overturning a judgment of Judge Elizabeth Grimes made against pro hac vice counsel as a decision of the Los Angeles County Superior Court against Respondent. Justice Chambers wrote:

But Fredric has an unprecedented record of engaging in abusive and vexatious practices by filing baseless lawsuits and endless motions and appeals (often in direct violation of court orders) in courts up and down the West Coast.... Judge Zilly's comments are echoed by Los Angeles County Superior Court Judge Elizabeth A. Grimes:

"Plaintiff has proliferated needless, baseless pleadings that now occupy about 15 volumes of Superior Court files, not to mention the numerous briefs submitted in the course of the forays into the Court of Appeals and attempts to get before the Supreme Court, and not one pleading appears to have had substantial merit. The genesis of this lawsuit, and the unwarranted grief and expense it has spawned, are an outrage."

Ex. 252, at 2 n.1 (quoting *Sanai v. U.D. Registry, Inc.*, No. BC235671, 2005 WL 361327, at \*15 n.36 (L.A. County Super. Ct. Feb. 16, 2005)).  
*Sanai*, 167 Wn.2d at 756.

The supposed “record of engaging in abusive and vexatious practices by filing baseless lawsuits and endless motions and appeals (often in direct violation of court orders) in courts up and down the West Coast” was of course a figment of the imagination of Justice Chambers and his three colleagues. The Association does not dispute that everything in the above-quoted passage is a falsehood, starting with the citation. The February 16, 2005 opinion cited by Chambers as a decision of “L.A. County Super. Ct.” is in fact an opinion of Division 7 of the California Court of Appeals, Second Appellate District, case no. B170618. Westlaw does not provide decisions of California trial courts. Had the dissenting justices actually bothered to read the February 16, 2005 *Sanai v. Saltz* opinion, they would have discovered that *Sanai v. Saltz* does not demonstrate that Fredric did anything improper “in courts up and down the West Coast” as Fredric is not a party, has not appeared in the case, and not filed anything. Second, this is a case in which the author of the sentiment endorsed by the dissenting justices, Judge Grimes, was REVERSED on every decision she made against the actual litigant, counsel Cyrus Sanai. In the subsequent opinion in that case, the specific words endorsed by Justice Chambers and his three colleagues were so outrageous that they caused the Court of Appeal to remove Judge Grimes from the case at the request of Cyrus. *Sanai v. Saltz* B174924 2005 WL 1515401, \*9 (Cal.App. 2 Dist.). The dissenting justices appear to be citing as their exhibit that same language quoted in an order of Judge Zilly; however, Justice Chambers chose to embellish the misleading citation of Judge Zilly by characterizing as a decision of the Los Angeles

County Superior Court, and by changing its reference from Cyrus to Fredric. *See Sanai*, 167 Wn.2d at 756.

Thus, a judge's statement about what occurred in a judicial proceeding may or may not be true. Where the exceptionally important interests of an attorney's license are at stake, an attorney should have the right to demonstrate that a judge's statement of what occurred is a lie. That is particularly true where the uncontradicted record demonstrates judicial dishonesty. To return to Judge Zilly, there is no question that the same opinion in which he misleadingly cited an overturned and removed Superior Court Judge in support of his findings of misconduct was riddled with multiple examples of intentional dishonesty; however, Respondent needs many more pages to lay out the specific examples.

#### **IV. THE JUDICIAL OPINIONS AT ISSUE WERE TESTIMONIAL AND THEIR USE A VIOLATION OF THE APPEARANCE OF FAIRNESS DOCTRINE**

The Association argues that the judicial opinions at issue were not testimonial under the test of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This is not correct, and the decision cited by the Association supports Respondent's contentions. But even if this is correct, every appellate court to have considered the matter has found the entry of prior judicial opinions in a later trial as unfair and prejudicial, thus violating the appearance of fairness doctrine, which is Respondent's Fifth Assignment of Error.

The Association's sole support for its position is *U.S. v. Ballestros-*

*Selinger*, 454 F.3d 973, 975 (9<sup>th</sup> Cir. 2007) where the Court of Appeal ruled that a memorandum of oral decision by an immigration judge was not testimonial. This Court relied on that case in its decision the same year of *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990, 995 fn. 12 (2007).

However, all of the authority relied upon by this Court was reversed by the United States Supreme Court two years later in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). This Court in turn was forced to reverse its decision in *Kirkpatrick* earlier this year in *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

Indeed, a passage in *Melendez Diaz* affirmatively demonstrates the “testimonial” nature of the judicial opinions. One of the repeated due process violations in the underlying litigation and the proceedings before the Hearing Officer was the repeated refusal to recognize the evidence presented by Respondent. In particular, Judges Alsdorf, Wynne and the Courts of Appeal reviewing their decisions found that there were no documents submitted by Respondent showing the existence of assets in King County. These statements were lies, and such certifications or statements are entitled to be cross-examined:

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition—it was prepared by a public officer in the regular course of his official duties—

and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See *People v. Bromwich*, 200 N.Y. 385, 388-389, 93 N.E. 933, 934 (1911); *People v. Goodrode*, 132 Mich. 542, 547, 94 N.W. 14, 16 (1903); Wigmore, *supra*, § 1678.

*Melendez Diaz*, *supra*, 129 S.Ct. 2539.

As this Court pointed out in *Jasper*, "the federal opinions relied upon in *Kirkpatrick* and *Kronich* have been expressly overruled." *Jasper*, *supra*, 271 P.3d at 886. One of the "federal opinions relied upon" by this Court in *Kirkpatrick* is the sole opinion relied upon by the Association, *Ballestros-Selinger*. The Association thus has no support whatsoever for its contention that judicial opinions are not testimonial, while *Melendez Diaz* clearly states that statements of a governmental official as to the existence or non-existence of a document are testimonial. Given that false judicial statements about what documents and evidence was or was not filed are one of the linchpins of the case, the judicial statements at issue manifestly were testimonial under United States Supreme Court analysis.

While not in the context of the confrontation clause, three federal circuits have directly addressed the question of whether a judge's prior reasoned orders in a civil case are evidentiary or not. A court judgment is hearsay "to the extent that it is offered to prove the truth of the matters asserted in the judgment." *U.S. v. Boulware*, 384 F.3d 794, 806 (9th Cir. 2004). The Fourth, Tenth, and Eleventh Circuits have agreed with the Ninth Circuit that judicial findings of facts are hearsay, and thus may not be admitted to prove the truth of the findings unless a specific hearsay

Clause, namely a “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford, supra*, at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). Judicial opinions making findings of fact are precisely such solemn declarations for establishing a fact to justify a court’s ruling.

Perhaps most important, judicial findings of fact meet the core historical test for determining the ambit of the Sixth Amendment, namely statements that would have been excluded under the common law at the time of the founders. *See U.S. v. Jones, supra*, at 1554, *citing Nipper, supra*, at 417.

Even if the Court rejects the application of *Herrick, Jones*, and *Nipper* as matters of confrontation clause jurisprudence, the federal courts have found that except where admission of a prior judicial opinion or judgment is compelled by collateral estoppel or *res judicata*, admission of prior judicial statements without the opportunity to cross-examine the judge is inherently unfair and prejudicial, whether the case is one under the civil or criminal standards. *See also Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir. 1987).

This level of unfairness, often made in reference to the risks of impressing juries, applies even more when the hearing officer is a practicing attorney with an active litigation practice. Hearing Officer Beles, a sole practitioner who appears in federal and state courts, was simply not going to reject a finding of fact or a conclusion of law of a judge before whom he might later have to appear.

exception exists. *Herrick v. Garvey*, 298 F.3d 1184, 1191-92 (10th Cir. 2002); *U.S. v. Jones*, 29 F.3d 1549, 1554 (11th Cir.1994); *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993).

Since judicial opinions were manifestly inadmissible hearsay, the question is whether they are the kind of hearsay which should be considered “testimonial.” The answer, of course, is that they are precisely the same. A statement of fact made by a trial court or an appellate court is made for one of two reasons—to permit review by a higher court, or in the case of published decisions, in anticipation of future litigation raising the same issues. Thus, when Justice Chambers made his statements about what happened in *Sanai v. Saltz*, he was making it in anticipation of additional litigation. Likewise, when Judge Zilly made his statements about *Sanai v. Saltz* and the other supposed misdeeds of Respondent and his siblings and mother, it was made in anticipation of additional appellate litigation or additional civil litigation. Judge Zilly specifically addressed his orders in acknowledgement of the state court litigation. Likewise, the orders of Judge Alsdorf and Judge Wynne were made in “anticipation of litigation” because they knew their findings would influence the divorce case.

Because the statements of fact were made with the clear anticipation that they statements would be addressed in other proceedings in other courts, and addressed matters that were in other courts, they meet the definition of testimonial.

But perhaps most important, judicial findings of fact meet the core definition of statements that must be excluded under the Confrontation

[T] he appearance of fairness doctrine already provides procedural protections beyond the minimum requirements of the federal due process clauses....

Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.

*Johnston, supra*, at 476.

No reasonably prudent and disinterested observer would believe that introduction of judicial findings of facts and conclusions of law without the opportunity to cross-examine the judge in question would constitute a “fair impartial and neutral hearing.” Instead, such an observer would conclude that the risks that a hearing officer who litigates or whose partners litigate would defer unquestionably to the pronouncements of judicial officers would make use of such opinions without the opportunity to cross-examine the author appear to be unfair.

#### **V. THE ADMISSION OF JUDICIAL FINDINGS OF FACT AND OTHER HEARSAY LOWERED THE BURDEN OF PROOF TO LESS THAN THE CONSTITUTIONAL MINIMUM**

Respondent contends that the admission of hearsay, in particular the hearsay judicial orders, unconstitutionally lowered the burden of proof to less than that of a civil case. Put differently, the relaxed evidentiary rules applicable in disciplinary proceedings means that evidence which never would pass must in CIVIL trials may be key support, or even the sole basis, for an adverse finding against an attorney. In particular, the admission of hearsay judicial opinions were of such prejudicial impact that the minimum requirements of due process were not met.

Contrary to the assertion of the Association, this is not an argument which contends that hearsay evidence is intrinsically unreliable. Nor is it an argument that the relaxed standard applicable under the loosened standards of the Washington Administrative Procedures Act, RCW 34.05 is unconstitutional in civil cases. This is because the Act mandates that “[t]he presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state”. RCW 34.05.452. In comparison, the ELC makes no such requirement.

In *Chmela v. Dep't of Motor Vehicles*, 88 Wn.2d 385, 561 P.2d 1085 (1977), this Court found that the following standard of admissibility met the constitutional burden in a civil proceeding:

Subject to the other provisions of these rules, all relevant evidence is admissible which, in the opinion of the officer conducting the hearing, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness. In passing upon the admissibility of evidence, the officer conducting the hearing shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings, in matters not involving trial by jury, in the superior court of the state of Washington.

However, the standard of admissibility is lower in attorney discipline cases. Accordingly, *Chmela* has no application here.

The only case which the Association contends is close to this case is *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 193, 117 P.3d 1134 (2005). In that case this Court found that the general attack on

inadmissible evidence was not acceptable, but agreed that the Kronenberg's argument about the cumulative effect of the hearsay evidence was potentially meritorious

Kronenberg attempts to buttress his due process claim by arguing that the sheer volume of allegedly erroneously admitted hearsay evidence prevents us from engaging in a harmless error analysis. He contends that the hearing was "swamped" and "riddled" with "torrents" and "tidal waves" of unreliable hearsay. We agree with Kronenberg that the hearing officer tended to allow everything offered to be admitted, often without ruling on its admissibility, a procedure we do not endorse.

The WSBA contends, however, that even if some of the disputed evidence was erroneously admitted, any error was harmless, even under strict rules of evidence, because each of the out-of-court declarants testified and was subject to cross examination. *See State v. Bargas*, 52 Wn. App. 700, 704-05, 763 P.2d 470 (1988) (no prejudicial error in admitting hearsay when declarant testified at trial).

*Kronenberg, supra*, at 193.

Fredric's situation is similar but critically different from Kronenberg's. The sheer volume of hearsay evidence makes it impossible to engage in a harmless error analysis as to each erroneously admitted judicial order. Indeed, there is no objection to make under ELC 10.14(d)(1) as to the prejudicial or unreliability of any particular hearsay evidence, because the rule does not permit such objection. However, Fredric's situation is critically different because unlike *Kronenberg*, Fredric did not have the opportunity to cross-examine the authors of the statements.

The evidence which was admitted over the repeated objection of Fredric, the findings of fact and conclusions of law in other cases, have not

only been repeatedly held to be inadmissible hearsay, they have also been held to be inherently prejudicial. In the case of *Nipper, supra*, the Fourth Circuit's reviewed a civil trial in which "[p]ortions of the findings of fact" from a previous civil lawsuit between the same parties "were read to the jury by plaintiffs' counsel during the direct examination of [a plaintiff]. The portions of [the judge's] order that plaintiffs' counsel read to the jury repeatedly referred to factual findings of misrepresentations made by [the defendant], [his] failure to disclose material information, and [his] participation in a civil conspiracy, as well as findings that [his wife] had knowingly filed false affidavits in the case." *Nipper, supra*, at 416. The Fourth Circuit held the admission of these findings over the defendant's objection erroneous and reversed the jury's verdict based on the prejudice produced by the evidence. *Id.* at 418.

The Eleventh Circuit has followed exactly the same analysis, writing in one civil case that

[t]he district court abused its discretion in admitting Judge Garrett's opinion. The jury, not Judge Garrett, was charged with making factual findings on Appellees' allegations in this case." The leading treatise on evidence concurs that the prejudice rises to the level of potential due process violations in criminal cases. Broun et. al., *McCormick on Evidence* § 298, at 337 (6th ed. 2006) ("Admitting civil judgments rendered against the defendant directly raises constitutional issues. . ."). *U.S. v. Jones*, at 1554

Every court to have reviewed the use of prior reasoned civil judgments or orders as evidence in subsequent civil or criminal cases has found them to be prejudicial, except to prove indisputable facts or for the purpose of

showing that particular judgments or acts were made. Respondent explicitly carved out the use of the orders to show that a particular order or judgment was made, but specifically objected to any “alternative” or “alternate” use of the orders and judgments against him. He also explicitly objected to the use of the declaration of Linda Niemi on the grounds that use of a third party declaration by a person seeking to purchase an asset in a below-market sweet-heart deal did not meet the standard of ELC 10.14(d)(1). *See* TR 201-204. This interchange is extremely important because it set out the core rationale of Respondent’s objections to the hearsay evidence which did not constitute judicial orders. Respondent fully argued the objection and was overruled without any explanation by the hearing officer. Thereafter Respondent’s counsel focused objection on the judicial orders.

## **VI. CLASS OF ONE**

Respondent’s “class of one” argument is simple. He was not treated the same way as other attorneys in the underlying litigation or in the disciplinary proceedings. As to the latter, Respondent was denied the rights of confrontation and to call witnesses, including judges, secured in *Deming* and enjoyed by attorneys such as Karen Unger. *See Unger, supra*.

The Association cannot deny that such rights have been denied, so they simply label the argument “unclear”. It is perfectly clear. The right to confront witnesses was guaranteed in *Deming*; it has been enjoyed by

attorneys in proceedings such as *Unger* and *Kronenberg*; it is mandated by United States Supreme Court decisions such as *Melendez-Diaz*; and it was denied to Respondent.

## VII. PRELIMINARY CONCLUSION

Of the eight assignments of error, the text above addresses certain of the constitutional arguments in respect of the first, second, fourth and fifth assignments of error. The third assignment of error is the primary focus of the motion to strike the Association's brief, and the falsification of the record also implicates the seventh and eighth assignments of error. The fourth and sixth assignments of error have not been touched upon for lack of space.

While this is NOT the final version of the reply brief, Respondent submits this to the Court to show that just a partial address of the Association's legal arguments is not possible within 25 pages and to ensure that he is not found to have waived his right to submit the brief.

It should be noted that Respondent's arguments concerning the law are much longer than necessary due to the Association's violations of the RPC through the citations of authority that THIS COURT held was no longer good law. The most obvious example is where the Association sneaks its sole support for its arguments concerning the non-testimonial nature of judicial opinions in footnote 13 at page 31 of its brief. However, as this Court recognized earlier this year, the *Ballesteros-Selinger* opinion was one of a long series of federal cases which this Court relied upon in *Kirkpatrick*

and which were overturned by *Melendez-Diaz*. *Jasper, supra*, 271 P.3d at 886 (“the federal opinions relied upon in *Kirkpatrick* and *Kronich* have been expressly overruled”). Moreover, *Melendez-Diaz* expressly makes official documents which attest to the existence or non-existence of a document in a file or proceeding to be testimony, and this was one of the primary issues on which Respondent desired to cross-examine the judicial officers.

The misconduct of the Association in its Answering Brief merits either a substantially lengthened Reply with a concomitant extension of time to prepare, OR striking the brief with instructions to comply with the RAP and RPC. This brief demonstrates that Respondent has been diligent in working on a reply and that the misconduct of the Association extends farther than the examples cited in the pending motion filed on October 15, 2012.

Dated this 18<sup>th</sup> day of October, 2012.

  
Cyrus Sanai, counsel to Fredric Sanai  
pro hac vice