

ORIGINAL

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No. 200, 30248

BY J. HENRICH

COE

SUPREME COURT  
OF THE STATE OF WASHINGTON

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IN RE:

BRADLEY R. MARSHALL,

Lawyer

WSBA NO. 15830

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REPLY BRIEF OF APPELLANT MARSHALL

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## I. INTRODUCTION

The Bar failed to sustain its high burden of proof with regard to the charges against Bradley R. Marshall stemming from his successful efforts on behalf of fifteen longshoremen in their racial discrimination action against their union, maritime companies, and maritime trade associations. Marshall negotiated an \$800,000 settlement in favor of all the longshoremen and promotions for some of them. Also, after the case settled, Marshall continued negotiations on behalf of the plaintiffs for six months, for which he was not compensated, and achieved for his clients and other minority longshoremen system-wide changes in the industry that greatly reduced discrimination in the workplace.

The Bar failed to notify Marshall as to allegations that would later become bases for the hearing officer's findings of fact and failed to apprise him that disbarment was among the sanctions that might be imposed. Further, the Board refused to allow Marshall to present, other than for impeachment purposes, evidence that the Bar chose to pursue a complaint against Marshall with regard to his relationship with Perryman, but not against Mark Wheeler, a Bar hearing officer, who had the same relationship with Perryman.

The Board's findings as to Marshall's alleged misconduct are not supported by a clear preponderance of the evidence. The Board based its

finding that Marshall shared fees with a nonlawyer on false and conflicting testimony of Wayne Perryman, an individual who held animosity towards Marshall stemming from a prior lawsuit he filed against Marshall and who was unable to differentiate among the several cases involving longshoremen in which he had been involved. The Board found Marshall failed to obtain conflict waivers from the clients despite explicit testimony from one client that he signed a conflict waiver. It is illogical to assume Marshall obtained waivers from some but not all of the clients. Similarly, the Board found Marshall filed a Ninth Circuit appeal without his clients' knowledge or consent despite testimony from the clients about a meeting during which the appeal was discussed and despite several letters to the clients in the record in which the appeal is clearly discussed. The Board found Marshall did not properly account for costs and disbursements of the settlement proceeds despite the admission during the hearing by one client's spouse that she received a cost breakdown and testimony of the Bar's auditor that Marshall's settlement accounting was an accurate representation of his disbursements.

By a 7 to 6 vote, the Board voted in favor of disbarment. Given the record, disbarment is not the appropriate sanction. There is no evidence that Marshall acted with an intent to defraud the clients or to recover money to which he was not entitled. In fact, Marshall agreed to

reduce his fee and worked for six months without compensation, negotiating major system-wide changes benefiting all the clients. The most that can be concluded from the evidence is that Marshall was negligent. Disbarment is not proper under the facts of this case.

## II. REPLY TO COUNTERSTATEMENT OF THE CASE

In its counterstatement of the facts, the Bar, not surprisingly, portrays Marshall in the most negative light possible. In so doing, the Bar fails to acknowledge the extraordinary amount of time, money, and energy Marshall invested in the longshoremen's case, including undertaking extensive discovery and representing fifteen longshoremen in a ten-day trial. The Bar also fails to mention Marshall's successful negotiations, extending for six months after the case settled, to obtain for the longshoremen a wealth of nonmonetary benefits. Marshall received no compensation for these efforts. *See* Marshall Ex. 67. These nonmonetary issues rectified conduct occurring on the waterfront to which the plaintiffs rightfully objected, such as racism, apathy, conspiracy, favoritism, and a quest for profits at the expense of the longshoremen. *Id.* After six months of negotiations, Marshall secured training for the longshoremen to qualify them to pick up work up and down the West Coast. TR 1652. A new registration system was implemented and the dispatch system was changed from subjective to rotational, so it could no longer be based on

racism or nepotism. TR 1652; Marshall Ex. 67. Marshall also negotiated changes in the grievance system that significantly expedited the processing of grievances and required all grievances, whether verbal or in writing, to be processed. A special grievance committee was also formed to investigate and hear grievances concerning racial discrimination. *Id.*

The settlement agreement, Marshall Ex. 58, specifically provided that the longshoremen or the union could seek relief from the court if the parties were unable to resolve the non-monetary issues to their satisfaction. None of the longshoremen sought judicial relief.

### III. ARGUMENT IN REPLY

#### A. Standard of Review

At a disciplinary hearing, the Bar “has the burden of establishing an act of misconduct by a clear preponderance of the evidence.” ELC 10.14(b). The clear preponderance standard is an intermediate standard between a simple preponderance of the evidence in a civil suit and reasonable doubt in criminal cases. *In re Disciplinary Proceeding Against Dynan*, 152 Wn.2d 601, 608, 98 P.3d 444 (2004).

Although, as the Bar asserts, this Court reviews the hearing officer’s findings of fact for substantial evidence, *see In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 125 P.3d 954 (2006), review is not merely to determine whether substantial evidence supports the

findings of fact, but rather review is to determine whether there is substantial evidence to support the findings of fact *in light of the Bar's "clear preponderance of the evidence" burden of proof.* See *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (in appellate review of a parental termination case, where the State's burden of proof is clear, cogent, and convincing evidence, the question to be resolved on appeal is not merely whether there is substantial evidence to support the trial court's ultimate determination of the factual issue, but whether there is substantial evidence to support such findings in light of the clear, cogent, and convincing evidence burden of proof); *In re Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983) (although, in a parental termination case, the appellate court reviews the trial court's findings for substantial evidence, "since the State must prove its case by clear, cogent, and convincing evidence, the evidence must be more substantial than in the ordinary civil case in which proof need only be by a preponderance of the evidence.").

As these cases show, the substantiality of the evidence, for purposes of appellate review of findings of fact, is a flexible concept. The degree of evidence that will be deemed "substantial" on appeal varies with the amount of evidence the party with the burden of proof was required to present below. Here, the Bar was required to prove its allegations by a clear preponderance of the evidence. Accordingly, this Court's review of

the board's findings of fact must be to determine whether they are supported by substantial evidence such that a reasonable trier of fact could find the necessary facts by a clear preponderance of the evidence. *See In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). As discussed below, such evidence does not exist.

This Court should take this opportunity to clarify its standard of review of findings of fact in lawyer discipline case and to clearly articulate that, although review of the hearing officer's findings of fact is for substantial evidence, the substantiality of the evidence necessary to support the findings of fact is greater than in cases where the burden of proof below is a mere preponderance of the evidence. Because the Bar in a lawyer discipline case has the burden of proving its allegations to the hearing officer by a clear preponderance of the evidence, a higher burden than a mere preponderance of the evidence, the "substantial evidence" this Court must find on appellate review in order to sustain the hearing officer's findings of fact is likewise greater. The absence of a clear articulation of the standard of review has led to confusion and seemingly inconsistent statements by this Court as to the standard of review. For example, in *Poole*, this Court states it will uphold the hearing officer's findings of fact if they are supported by substantial evidence. *Poole*, 156 Wn.2d at 208. The Court did not, however, point out that review for

substantial evidence must be in light of the Bar's burden of proof before the hearing examiner, which is the clear preponderance of the evidence standard. The dissent in *Poole* takes issue with the majority's application of the substantial evidence standard of appellate review and argues, citing 26 prior opinions in lawyer discipline cases, that the Court can uphold the hearing officer's findings of fact only if they are supported by a clear preponderance of the evidence. *Id.*, 156 Wn.2d at 234 (Madsen, J., dissenting). This case presents the Court with the opportunity to clarify the proper standard of review in lawyer discipline cases.

B. The Board Violated Marshall's Right to Due Process By Failing to Notify Him of the Charges Against Him and Failing to Afford Him an Opportunity to Anticipate and Prepare a Defense

"An attorney has a cognizable due process right to be notified of the clear and specific charges and to be afforded an opportunity to anticipate, prepare, and present a defense." *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 136-37, 94 P.3d 939 (2004). The Bar's complaint against Marshall did not contain allegations as to matters on which the Board issued findings of fact, which findings of fact the Board then used as bases for its decision to disbar Marshall. Further, the complaint failed to sufficiently apprise Marshall that disbarment was a

sanction to which he would possibly be subject. As a result, Marshall was deprived of his right to due process of law.

Specifically, the Bar did not allege Marshall used claims of the Tacoma plaintiffs to bolster claims of the Seattle plaintiffs, failed to meet separately with the plaintiffs to discuss their individual claims, and advised Ruben Chavez not to discuss the “tainted hours” issue in his deposition.<sup>1</sup> Nonetheless, these allegations became bases of the Board’s determinations. *See* Findings of Fact 22-24. This is a textbook example of a violation of the right to due process.

In arguing there was no due process violation, the Bar entirely ignores Marshall’s argument as to these bases for the Board’s determinations, and instead arbitrarily focuses on the allegations in Count V of the statement of charges, claiming that because the allegations with respect to this count are adequate, there is no due process violation. Whether these allegations are adequate does not rectify the fact that, as to the findings of fact discussed above regarding other counts in the statement of charges, the complaint fails to allege the conduct forming the

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<sup>1</sup> Marshall moved to reopen the record before the hearing officer to introduce the trial transcript and deposition transcripts from the *Jefferies* litigation in order to prove that tainted hours were discussed in detail during the litigation. BF 228-29. The Bar opposed Marshall’s motion to reopen. BF 297. The hearing officer denied the motion. BF 310. It was anomalous for the Board to address this issue when it prohibited Marshall from making a record.

basis of the findings. The Bar's argument fails to address the Board's findings of fact that are not supported by any allegations in the complaint.

With respect to the adequacy of the notice to Marshall of the possibility of disbarment, the Bar points to the statement in the complaint: "Possible dispositions include disciplinary action . . . ." BF 9. The Bar claims that because the possible dispositions enumerated in ELC 13.1 include disbarment, *see* ELC 13.1(a)(1), this statement was sufficient to put Marshall on notice of the possibility of disbarment and to afford him an opportunity to prepare and present a defense to possible disbarment. Because, however, the complaint fails to allege that Marshall acted "knowingly" with respect to the alleged misconduct, Marshall was not put on notice that disbarment was one of the possible "disciplinary actions" to which he might be subjected. Without allegations as to Marshall's acting "knowingly," the range of potential disciplinary action could not have included disbarment.<sup>2</sup> Accordingly, Marshall had no reason to anticipate disbarment and was denied the opportunity to prepare and present a defense to disbarment as a potential sanction. This was a violation of Marshall's right to due process of law.

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<sup>2</sup> The Bar's argument is analogous to arguing that because the Criminal Code provides for death as one of the punishments to which a criminal defendant may be sentenced, every criminal defendant should know he or she could be subject to the death penalty in a particular case, notwithstanding the absence of the necessary allegations to charge an offense that is punishable by death.

C. Evidence of Perryman's Bar Complaint Against Wheeler Was Relevant to the Issues Before the Board

The Bar has abandoned its argument, made to the hearing officer, that evidence of the Bar complaint Perryman filed against Marshall and Wheeler was confidential under ELC 3.2. Here, the Bar argues the evidence was not relevant for any purpose but, as the hearing officer concluded, to impeach Wheeler's credibility. The Bar and the hearing officer are incorrect.

In the *Collins* case, which also involved longshoremen, Perryman had an agreement with Marshall and Wheeler that was substantially identical to the agreement in this case.<sup>3</sup> Perryman filed a Bar complaint against Marshall and Wheeler in *Collins*. Wheeler is a Bar hearing officer. TR 1092. The Bar dismissed the complaint against Marshall and Wheeler. In this case, the Bar filed a complaint against only Marshall, even though Wheeler was also centrally involved in the case and even though, according to Perryman, Wheeler as well as Marshall agreed to pay his 10 percent share of the recovery out of their fee which was to be 40 percent

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<sup>3</sup> Perryman testified about a letter he wrote to Marshall regarding *Collins* in which he stated: "For my services to your firm Marshall and Wheeler *you proposed to pay me the same as you did in the Jefferies case*, \$200 an hour for all work specifically ordered by your firm such as preparation for depositions as an expert witness, filing new EEOC claims and reviewing transcripts. For my past and continued services on behalf of the plaintiffs, *they agree to pay me 5% of their recovery if there is any.*" (Emphasis added.) TR 1345.

of the overall recovery. TR 1341.<sup>4</sup> Evidence of the Bar's dismissal of Perryman's complaint against Wheeler in *Collins* is further evidence (along with the Bar's choice to file against only Marshall in this case) of the Bar's selectivity in whom it chose to discipline for engaging in essentially the same behavior and allegedly entering into the same improper contracts.<sup>5</sup> While seeking no discipline against Wheeler for allegedly entering into a fee-sharing agreement with a nonlawyer, the Bar seeks to disbar Marshall for the same alleged conduct.

Evidence of the dismissal of Perryman's complaint against Wheeler could have been the basis for a compelling selective prosecution argument in Marshall's defense. It was error for the Board to deprive Marshall of the opportunity to present this defense. The Bar's argument that refusal to admit the evidence for any purpose other than impeachment did not affect the outcome of the disciplinary proceeding is pure speculation.

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<sup>4</sup> In addition to Wheeler, Justin Zaug and William LaBorde, both attorneys, were also heavily involved in the case, but the Bar did not file a complaint against either of them.

<sup>5</sup> The Bar's citation to *State v. Judge*, 100 Wn.2d 706, 675 P.2d 219 (1984) and *State v. Terrovonia*, 64 Wn. App. 417, 824 P.2d 537, review denied, 119 Wn.2d 1015 (1992), and its assertion that a selective prosecution argument can be made only on the bases of race, religion, or other arbitrary classification, is of no relevance. Those cases, and the rule articulated, pertain to constitutional selective prosecution claims brought under the equal protection clause. Marshall is not raising an equal protection argument with respect to the dismissal of Perryman's complaint against Wheeler.

D. The Hearing Officer's Findings of Fact Are Not Supported By a Clear Preponderance of the Evidence

1. Introduction

As discussed, to uphold the hearing officer's findings of fact, the Court must find they are supported by a clear preponderance of the evidence. Those findings lacking in such evidentiary support cannot stand. Further, although the findings of fact are entitled to weight, they are by no means conclusive. *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 593-94, 48 P.3d 311 (2002). Indeed, it is well settled that this Court "has plenary power over, and holds the ultimate responsibility for, determining the nature of lawyer discipline." *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 132, 94 P.3d 939 (2004). Further, although it is not sufficient on appeal merely to reargue one's version of the facts, a "true challenge" to the evidentiary support for findings is sufficient to establish error with regard to the finding. *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 861, 64 P.3d 1226 (2003).

2. Fee Sharing With a Nonlawyer

The Board found the longshoremen "agreed to pay Consultants Confidential [Perryman's company] ten percent of the total final settlement as a fee for the consultant's services plus pre-approved travel

expenses associated with the case.” Finding of Fact 2.<sup>6</sup> Ten percent of the plaintiffs’ total recovery equaled \$80,000. Before agreeing to a \$10,000 reduction, that was exactly the amount Perryman was paid after the case settled. TR 1169.<sup>7</sup>

Given that Perryman recovered exactly the amount he was entitled to recover under his agreement with the longshoreman, it defies logic to assume Marshall tortured his fee agreement with the plaintiffs and ordered Perryman to manipulate his invoice, thereby subjecting himself to possible discipline for fee sharing.<sup>8</sup> It makes no sense that Marshall would undertake such machinations and change a legitimate agreement between Perryman and the longshoremen into a potentially improper fee sharing agreement between Perryman and Marshall’s firm, merely to see that Perryman recovered the same amount of fees he was entitled to recover under his agreement with the longshoremen. For the same reasons, it makes no sense that Marshall would have instructed Perryman to create a

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<sup>6</sup> The Bar makes much of the fact that not every plaintiff in the *Jefferies* case signed the agreement with Perryman. Perryman testified that only those plaintiffs who “came on after the case was filed” did not sign the agreement. TR 1371. Three longshoremen do not appear on the original complaint as plaintiffs, but do appear on the amended complaint: Allison Walker, Bruce Walker, and Myron Woods. See Marshall Ex. 4 (complaint); Marshall Ex. 20 (first amended complaint). There is no evidence that these plaintiffs objected to paying Perryman 10 percent of the total recovery. Indeed, Perryman testified the plaintiffs’ utmost concern was that he be paid. TR 1355, 1366.

<sup>7</sup> Perryman also recovered \$1,459 in expenses. TR 1170.

<sup>8</sup> Perryman testified he, himself, manipulated his hours to come up with 1000 hours and arbitrarily chose his \$80 hourly rate to support his \$80,000 demand. TR 1168.

fictitious hourly invoice showing a balance due of \$80,000, when Perryman was entitled to \$80,000 pursuant to his valid and binding agreement with the longshoremen.<sup>9</sup>

Moreover, Perryman was hardly a credible witness. Perryman sued Marshall's firm for fees under his contract in the *Collins* case. Although the court awarded Perryman fees under that agreement, it reduced the fees from the amount Perryman requested. Given Perryman's angry responses during the hearing, *see, e.g.*, TR 1337-40, it is not unreasonable to believe Perryman harbored resentment and ill-will towards Marshall. Further, Perryman testified falsely and contradicted himself during his testimony. For example, Perryman testified he was deposed in the *Jefferies* case and, during that deposition, Marshall cautioned him not to talk about the fee arrangement. TR 1163-65. However, Perryman eventually admitted he was *not* deposed in the *Jefferies* case, but not until the Bar's counsel reminded him he had not been deposed. TR 1299, 1312. Perryman also exhibited confusion during his testimony and was unable to distinguish between events occurring in the *Jefferies* case and in other similar cases in which he was involved, at one point stating "this is a long time. It's four different cases." TR 1316.

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<sup>9</sup> Neither Mark Wheeler, nor Justin Zaug, Marshall's colleagues in the case, recalled any "fee-sharing arrangement" with Perryman. TR 781-82, 1049-50.

Also, Perryman first testified nobody told him not to testify about his fee, but then said he had been told not to testify. TR 1313, 1370-71. He was confronted at other points in his testimony as well with conflicting testimony he had previously given in a deposition. *See, e.g.*, TR 1329.

The evidentiary support for the Board's findings on the fee sharing issue is far from sufficient to meet the clear preponderance standard. The longshoremen agreed to pay Perryman ten percent of their total recovery. Before Marshall prevailed upon him to accept a \$10,000 reduction in his fee, Perryman was entitled to recover precisely that amount -- \$80,000. There was no logical reason for Marshall to have engaged in the manipulations the Bar alleged with respect to Perryman's fee to obtain for Perryman what he was already entitled to receive by his agreement with the longshoremen. Marshall did not engage in fee sharing with a nonlawyer.

3. Representation of Multiple Clients; Conflict Waivers

The evidence the Bar cites in support of its argument that Marshall did not obtain conflict waivers from the plaintiffs did not amount to a clear preponderance. For example, the Bar claims Michael Chambers testified Marshall did not talk to him about potential problems with representing multiple plaintiffs. However, Chambers also testified he had no objection

to having all the plaintiffs represented in one lawsuit. TR 245. Chambers testified: “It was a minority [case]. We asked minorities of all colors wanted [sic] to be involved in this case.” *Id.*

The Bar also relies on the testimony of Ruben Chavez and Rodney Rhymes to support its argument that Marshall did not obtain conflict waivers. But, Chavez could not recall whether he signed a conflict waiver and testified: “I signed so many documents. I’d have to see it to know it.” TR 574. Similarly, Rhymes testified he did not recall all the documents he received from Marshall’s office. TR 730. Neither Chavez nor Rhymes testified they did not sign conflict waivers; both of them simply were unable to recall one way or the other.

Finally, Bruce Walker admitted he and Myron Woods signed conflict waiver forms. TR 832, 879. Further, in a declaration submitted in his lawsuit against Marshall and Wheeler in opposition to the defendants’ motion for summary judgment, Walker stated, under penalty of perjury: “Just before trial Mr. Marshall had *the whole group* sign a set of ‘waiver’ forms.” Marshall Ex. 101 at 10 (emphasis added). During his testimony in this case, taken two years after he made the declaration, Walker decided that his earlier statement that the entire group of plaintiffs signed a waiver form was a mistake. TR 882.

Further, the plaintiffs initially intended the action to be filed as a class action, thereby indicating a commonality of interests. TR 189. None of the attorney's who represented the plaintiffs perceived a conflict of interest in representing the plaintiffs as a group. TR 483-99, 625-29, 761-74, 1034-39. Each of the plaintiffs acknowledged entering the settlement agreement knowingly and without coercion. Bar Ex. 77. None of the plaintiffs voiced any objection when Judge Burgess read the settlement into the record. TR 278, 592.<sup>10</sup> Finally, the longshoremen themselves decided at the outset of the litigation to adopt an "all for one and one for all" mentality. TR 786. Chambers testified the Seattle and Tacoma longshoremen decided to stick together as one group because there was "strength in numbers." TR 208. Chavez testified all the plaintiffs agreed to decide matters on the basis of majority vote. TR 592. Their testimony that each of the plaintiffs had different goals and expectations and that they did not consent to their representation as a group is directly contrary to this testimony and does not prove the Bar's allegation by a clear preponderance of the evidence.

In sum, the evidence on which the Board and the Bar rely in finding Marshall violated RPC 1.7(b) does not amount to a clear preponderance of the evidence, particularly given Marshall's unequivocal

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<sup>10</sup> Magistrate Judge Arnold also read the settlement into the record. TR 1647.

testimony that he did obtain signed conflict waivers from the clients. TR 194-95, 1554. The witnesses on whose testimony the Board and Bar rely contradicted themselves in testimony and never explicitly stated they did not sign a conflict waiver. At most, they claimed to be unable to recall whether they signed a waiver or not. This evidence does not prove the Bar's allegations.

#### 4. Filing the Appeal

In order to uphold the Board's finding that Marshall filed the Ninth Circuit appeal without his clients' permission, the finding must be supported by a clear preponderance of the evidence. Contrary to the Bar's assertion, the testimony of Chambers, Chavez, Rhymes, and Walker does not meet this standard.

At one point during the hearing, Chambers testified he did not read a quarter of the documents he received from Marshall's office. TR 261. At another point, he testified he "trashed" all letters he received from Marshall's office. TR 269-70. He also testified he simply did not know whether he read a notice of appeal. TR 262. Chambers' testimony does not establish that he did not receive the notice of appeal, as the Bar asserts. He either disregarded or threw away written communications received from Marshall, one of which could very well have been a copy of the notice of appeal. Chambers also admitted that at one of the client

meetings, Marshall and the other attorneys present discussed Judge Burgess's ruling dismissing Local 98 and used the word "appeal." TR 310-11. Chambers also admitted receiving a copy of a letter from Marshall which stated the appeal of the dismissal of Local 98 was pending before the Ninth Circuit. TR 295-96 (referring to Marshall Ex. 52). Chambers also testified he recalled Marshall telling the clients during trial that if Judge Burgess continued to dismiss claims, Marshall intended to file an appeal. TR 391. When asked if Judge Burgess continued to dismiss claims, Chambers testified that yes, he did. *Id.*

Further, the record contains other letters Marshall sent to all the plaintiffs that clearly informed them the appeal had been filed. *See, e.g.*, Bar Ex. 61; Bar Ex. 83; Marshall Ex. 79. Examples of letters in which Marshall informed the clients of the appeal are attached as Appendix A. The Bar fails to acknowledge the existence of these letters. Also, Bruce Walker, who was not directly involved in the appeal, testified he received a copy of the notice of appeal. TR 844-45, 848-49. Whether, as the Bar asserts, Rhymes did not receive the notice of appeal is of no relevance because, as the Bar acknowledges, Rhymes was also not involved in the appeal.<sup>11</sup>

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<sup>11</sup> This acknowledgement means the finding of the hearing officer and the Board that Marshall violated RPC 1.3(a), 1.2(f), or 1.4(b) by taking an appeal on Rhymes' behalf is obviously erroneous.

In light of this evidence, the witnesses' testimony does not establish, by a clear preponderance of the evidence, they were not notified of the filing of the notice of appeal. In light of the letters in the record, Walker's testimony that he received a copy of the notice of appeal, and Chambers' testimony attesting to the discussion of the appeal at a client meeting, it is not logical to conclude that Marshall failed to notify all the plaintiffs of the filing of the notice of appeal or otherwise violated RPC 1.2(a), 1.2(f), or 1.4(b).

5. Accounting for Settlement Proceeds and Costs

The Board's finding that Marshall did not provide the plaintiffs with a cost breakdown is not supported by a clear preponderance of the evidence. Tracy Chavez, Ruben Chavez's wife, testified that she obtained a cost breakdown when she went to Marshall's office. TR 427-28. She admitted this only after Marshall asked her to explain how, if she never received a cost breakdown, she was able to express in a letter to Marshall, Marshall Ex. 71, "major concerns" with respect to the cost breakdown she previously obtained.<sup>12</sup> TR 427. The Board's finding that Marshall did not provide a cost breakdown is simply wrong. Tracy Chavez unequivocally testified that she received a cost breakdown from Marshall.

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<sup>12</sup> Although Tracy Chavez wrote the letter, Ruben Chavez signed it. A copy of this letter is attached as Appendix B.

In arguing Marshall failed to properly account for the disbursement of the settlement proceeds, the Bar entirely ignores the testimony of its auditor, Julie Mass. Mass reviewed the settlement accountings Marshall sent to the plaintiffs, Bar Ex. 30. Mass testified that whatever Marshall represented in the settlement accountings as having been paid to the plaintiffs was an accurate representation of what was, in fact, paid. TR 1223-24.

With regard to the \$41,000 Marshall charged the clients as expenses, the Bar cites no evidence to refute the testimony of Marshall's expert, Dennis Wintch, that Marshall's handling of the \$41,000 was done in anything but good faith. *See* TR 1406. There is no evidence that Marshall acted knowingly or with an intent to defraud the clients with respect to his accounting for the \$41,000.

Further, the plaintiffs were not damaged by the accounting error and, in fact, ended up paying Marshall less than what they agreed to pay as attorney fees under the original fee agreement. Under the original fee agreement, the clients agreed to pay Marshall's firm 40% of their total recovery. *See, e.g.*, Bar. Ex. 19, attached as Appendix C. As the plaintiffs recovered \$800,000, Marshall's firm was entitled to \$320,000 in fees under the original agreement. As evidenced in the settlement accounting, Marshall Ex. 66, however, the firm recovered only \$234,000 in fees, thus

allowing the clients to recover more than they had originally been entitled to recover.<sup>13</sup> Marshall agreed to this reduced fee at a meeting attended by Marshall, Wheeler, Perryman, Justin Zaug and the clients at which the disbursement of the settlement proceeds was discussed. *See* TR 1685-1704. At the meeting, the clients agreed to a disbursement of approximately \$27,000 per plaintiff out of the total settlement amount. TR 1700, 1703. To ensure the clients received this amount, Marshall had to reduce his fee from the original 40%. This new agreement under which Marshall agreed to accept \$234,000 in fees, or approximately 29% of the clients' recovery, and the clients agreed to receive approximately \$27,000 apiece, constituted a novation, or a substitution of this new obligation for the prior one between the same parties as evidenced in the original fee agreement. *See MacPherson v. Franco*, 34 Wn.2d 179, 182, 208 P. 641 (1949) (a novation is "a mutual agreement among all parties concerned for the discharge of a valid existing obligation by the substitution of a new

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<sup>13</sup> A copy of the settlement accounting is attached as Appendix D. Even if the \$41,000 is subtracted from the total costs, Marshall's fee reduction would have been to \$275,000, which is also substantially less than the fee to which Marshall was entitled under the original fee agreement. Further, if the \$9,473.75 payment to the contract attorneys is also subtracted from the total costs, the fees Marshall recovered would still be less than \$320,000.

valid obligation on the part of the debtor or another”). This new agreement is enforceable in lieu of the original fee agreement.<sup>14</sup>

E. Disbarment is Not an Appropriate Sanction

It is well-settled that where, as here, the Board splits on the recommended sanction, this Court gives less deference to the Board’s recommendation. *See, e.g., In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 723, 72 P.3d 173 (2003). Here, the Board split 7 to 6 on whether to disbar Marshall. This Court will also give less deference to the recommended sanction where, as here, the sanction departs significantly from sanctions imposed in other cases. *Dynan*, 152 Wn.2d at 611-12.

The Bar fails to acknowledge that, in its formal complaint, it *did not allege Marshall acted knowingly or intentionally*. BF 1-9. Despite this, the Board found Marshall acted intentionally with respect to the allegations of fee-sharing. As discussed above, because of the absence of an allegation that he acted knowingly, Marshall was denied notice that disbarment was a potential sanction for this alleged misconduct. He was, therefore, deprived of the opportunity to prepare a defense to disbarment.

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<sup>14</sup> Arguably, if as the Bar contends, the subsequent agreement as evidenced by the settlement accounting is not deemed enforceable, and the original fee agreement is deemed still in effect, then Marshall would be entitled to 40% of the client’s recovery as fees, or \$320,000.

Further, the Bar alleges Marshall acted with the intent to obtain a benefit for himself, in that he concocted the fee-sharing arrangement with Perryman so that Perryman would bring him the case. But, as discussed at length, Perryman had a contract with the longshoremen under which they agreed to pay him 10 percent of their final recovery. At the end of the case, Perryman recovered that amount, less the discount Marshall proposed Perryman take (substantially less than the discount Marshall himself took) in order to maximize the amount each individual plaintiff recovered. The alleged fee-sharing agreement between Marshall and Perryman could not have induced Perryman to bring the case to Marshall because Perryman recovered exactly the amount of fees his contract with the longshoremen entitled him to recover. That is, Perryman's referral to Marshall did not result in Perryman recovering anything more than he would have recovered had any other attorney filed the complaint. Accordingly, there was nothing to induce Perryman to refer the case to Marshall as opposed to another attorney. Further, the Bar claims the alleged fee-sharing agreement caused "serious injury" to the longshoreman, but provides no specifics to substantiate this vague allegation. And, as the longshoreman ended up paying *\$10,000 less* than what they had originally agreed to pay Perryman, the allegation of "serious injury" is wholly without merit.

As discussed, Perryman was a less than credible witness, given his contradictions, inability to differentiate between the various litigations involving longshore workers, and his evident animosity and resentment towards Marshall. His accusation that Marshall directed him to prepare a fictitious invoice is of dubious credibility. Moreover, there is no evidence of any damage as a result of the alleged fictitious invoice because Perryman recovered what he was originally entitled to recover under his contract with the plaintiffs.

With respect to the alleged misconduct regarding representation of multiple clients, the Bar admits the presumptive sanction is not disbarment. The Bar argues suspension is the appropriate sanction because of Marshall's "strength in numbers" attitude and "a settlement agreement that pitted one client against another." Bar Br. at 65. First, as discussed above, the *longshoremen* adopted the "all for one and one for all" attitude and agreed to proceed in the litigation by majority vote. As Chambers testified, the longshoremen felt that all minorities should be able to join the lawsuit and that the joinder of multiple plaintiffs would strengthen their claims. TR 208. Second, there is no evidence that the settlement agreement pitted one plaintiff against another. Indeed, the settlement Marshall negotiated resulted in monetary benefits for all the clients, promotions for some of the clients, and system-wide changes to

substantially reduce racial discrimination in the workplace that unquestionably benefited all the clients. The clients unanimously voted to accept the settlement. TR 1645.

With respect to the allegation that Marshall filed the Ninth Circuit appeal without his clients' permission and against their wishes and failed to explain the consequences of an appeal, the Bar again concedes that disbarment is not the presumptive sanction. The Bar fails to mention the letters in the record Marshall sent to the clients that spoke about the appeal and provided unequivocal notice of the appeal. Bar. Ex. 61; Bar Ex. 83; Marshall Ex. 79. That the clients disregarded Marshall's letters by no means shows misconduct on Marshall's part. Also, the Bar fails to mention the successful result Marshall obtained for four of the clients with respect to the appeal. Assuming, *arguendo*, there is some merit to the Bar's allegation regarding the appeal, an admonition, not disbarment or a suspension, would be the appropriate sanction given the successful outcome of the appeal.

With regard to Marshall's handling of the \$41,000, the Bar alleges disbarment, not suspension as the Board found, is the appropriate sanction because circumstantial evidence shows Marshall acted with an intent to benefit himself. The Bar fails to mention the *direct* evidence, namely the testimony of Dennis Wintch, that Marshall in good faith believed his

method of handling the \$41,000 was proper. Further, even with the accounting mistake, Marshall recovered substantially less for his work on behalf of the longshoremen than he was entitled to under the firm's agreement with the clients. There is no evidence to show Marshall acted with an intent to benefit himself.

Again, the Bar argues disbarment, rather than suspension as the Board found, is the appropriate sanction for Marshall's alleged failure to maintain complete records and provide an accounting for the settlement proceeds. As discussed, however, Tracy Chavez explicitly testified she received a cost breakdown from Marshall. There is no evidence that the cost breakdown was anything but accurate and satisfactory to the clients. Moreover, the Bar's own expert, Julie Mass, testified that the settlement accountings Marshall provided to the clients accurately reflected how the settlement proceeds were disbursed. Again, the Bar alleges, without substantiation, that the clients were seriously injured by the alleged misconduct. The evidence does not support this allegation. The clients received accurate cost breakdowns and settlement accountings.

With respect to the aggravating factors, the Bar argues Marshall's previous reprimand is a proper aggravating factor because it is not remote and is "highly relevant." On the contrary, Marshall's reprimand was issued in 1998 and was based on conduct that occurred in 1992, allegedly

in violation of the RPCs that are not implicated in this case. *See* Bar Ex. 109. Further, the Bar’s assertion that the reprimand is “highly relevant to show just what sort of an ‘impression’ any sanction less than disbarment is likely to make on him” is entirely inappropriate.

Although this Court in *Poole* indicated an attorney’s refusal to acknowledge the wrongful nature of his conduct may be an aggravating factor, in a case decided shortly before *Poole*, this Court questioned:

whether refusal to acknowledge the wrongful nature of one’s conduct is appropriately considered an aggravating factor. We are not persuaded that a lawyer continuing to assert on appeal that the alleged acts did not occur should have that assertion used against him or her.

*In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 196 n.8, 117 P.3d 1134 (2005). An attorney asserting on appeal that the charges and sanctions against him or her are unjustified should not be penalized for arguing he or she did not commit the alleged misconduct.

The Bar argues “[v]irtually every act [Marshall] committed was calculated to ‘get some more money’” for him. Bar Br. at 71. On the contrary, virtually every act Marshall took was calculated to get more money *for his clients*. Marshall *reduced* his fee from that to which he originally agreed in order to allow maximum recovery by his clients. He persuaded Perryman to reduce his fee by \$10,000. He expended a considerable amount of effort over the six months following settlement to

obtain highly beneficial non-monetary benefits for his clients and for all minority longshoremen. He sought no compensation for these efforts, and received none.

Citing ABA Standard 9.32(i), the Bar argues Marshall's interim rehabilitation cannot be a mitigating factor because the interim rehabilitation to which the ABA Standards refer is rehabilitation for a mental disability or chemical dependency. Bar Br. at 72. While ABA Standard 9.32(i) addresses interim rehabilitation in the context of a mental disability or chemical dependency, another standard – ABA Standard 9.32(k) – lists interim rehabilitation as a mitigating factor with no qualification that it be in the context of a mental disability, chemical dependency, or any other condition.<sup>15</sup> The Bar does not address interim rehabilitation under ABA Standard 9.32(k) as an appropriate mitigating factor. For the reasons set forth in Marshall's opening brief, he is entitled to interim rehabilitation as a mitigating factor. Marshall Br. at 70.

For the reasons discussed in Marshall's response to the Bar's motion to strike the letters submitted in connection with the Bar's motion for interim suspension, this Court can and should consider those letters as

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<sup>15</sup> The case the Bar cites, *In re Disciplinary Proceeding Against Christopher*, 153 Wn.2d 669, 105 P.3d 976 (2005), addresses only ABA Standard 9.32(i), not 9.32(k), and is therefore not relevant.

evidence of Marshall's character and reputation.<sup>16</sup> A review of these letters attests to Marshall's high standing in the community and willingness to take on the causes of the underrepresented. The letters are a more than sufficient basis to support the mitigating factor of character and reputation.

With regard to the proportionality analysis, the Bar argues that it is not proper to look at cases in which disbarment was imposed and compare the severity of the conduct warranting disbarment to the conduct Marshall is alleged to have committed. This, however, is the essence of a proportionality review.

The Bar's contention that this case is similar to *Whitt* is without merit. The attorney in that case failed to depose witnesses, failed to respond to her client's telephone calls, failed to inform her client of a malicious prosecution counterclaim, and failed to inform her client of a "walkaway deal" under which she agreed to dismiss her client's case with prejudice in return for dismissal of the counterclaim. The client's case was dismissed with prejudice without the client's knowledge or consent. The client did not learn of the dismissal of his case until eight or nine

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<sup>16</sup> This Court can take judicial notice of the letters because they are part of the record in this case presently before the Court or, at a minimum, are part of the record in a proceeding engrafted, ancillary, or supplementary to the case presently before the Court. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

months later. Moreover, after disciplinary proceedings against the attorney had been initiated, she admitted to supplying false information and fabricated documents in the disciplinary proceeding in a deliberate attempt to mislead the Bar. In ordering disbarment, this Court stated the lawyer “intended to deceive the disciplinary process in order to avoid disciplinary action.” *Whitt*, 149 Wn.2d at 719. It is clear from the Court’s opinion that the attorney’s falsifying information during her disciplinary proceeding was the conduct the Court felt was most deserving of disbarment:

Falsifying information during an attorney disciplinary proceeding is one of the most egregious charges that can be leveled against an attorney. . . . Ms. Whitt harmed her client by casting doubt on his claims, harmed the public by jeopardizing the reputation and perception of the legal system as a whole, and harmed the legal system by attempting to circumvent the disciplinary process to evade responsibility for her conduct.

*Id.*, 149 Wn.2d at 720.

The present case is nothing like *Whitt*. Rather than causing the dismissal of his clients’ case, Marshall proceeded with a very challenging case with very challenging clients and negotiated a favorable monetary and non-monetary settlement for all the plaintiffs. Marshall conducted meeting after meeting with his clients and kept them apprised of all significant developments in the case. And, there is absolutely no evidence

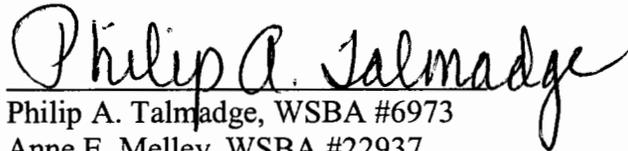
or allegation that Marshall fabricated or falsified any information during this disciplinary proceeding. The Bar's attempt to analogize attorney Whitt's admitted falsification and fabrication of evidence submitted to the Bar with Perryman's questionable assertion that Marshall asked him to fabricate an invoice is not effective. Marshall has not admitted to any alleged misconduct, as did attorney Whitt. Only Perryman, an individual with a grudge against Marshall and poor recall, alleged this. And, as discussed, it defies logic to assume Marshall would engage in this improper conduct just to see to it that Perryman recovered exactly the same amount he was entitled to under his contract with the longshoremen. Marshall has not submitted false information to the Bar, as did attorney Whitt. An attorney's submission of false information during his or her attorney's disciplinary proceeding is the conduct this Court in *Whitt* labeled one of the most egregious charges that can be leveled against an attorney. Such reprehensible conduct is not at issue here. For the reasons discussed in Marshall's opening brief, disbarment is an inappropriate sanction under the facts at issue here and in light of this Court's prior decisions on attorney discipline. At most, a reprimand or an admonition is an appropriate sanction.

IV. CONCLUSION

The Bar failed to meet its high burden of proof to support its allegations of misconduct against Marshall. Further, on this record, disbarment is not an appropriate sanction. For the reasons set forth here and in Marshall's opening brief, Marshall asks this Court to dismiss the charges against him entirely or, alternatively, to impose only such sanctions as are commensurate with the sustained allegations against him. Costs on appeal should be awarded to Marshall.

Dated this 30th day of May, 2006.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Anne E. Melley, WSBA #22937

Talmadge Law Group PLLC

18010 Southcenter Parkway

Tukwila, Washington 98188

(206) 574-6661

Attorneys for Appellant Bradley R. Marshall

# APPENDIX

A

# Marshall

LAW OFFICES

A Professional Legal Service Company

FILE COPY

■ SEATTLE

120 Lakeside Avenue Suite 300 Seattle, Washington 98122 (206) 324-4842 FAX (206) 325-3305

□ TACOMA

2200 North 30th Suite 201 Tacoma, Washington 98403 (206) 305-0475 FAX (206) 305-0007

Bradley R. Marshall  
Mark Wheeler  
Dennis J. Brennan

REPLY TO SEATTLE OFFICE

Administrator  
Sandra E. Taylor

June 11, 1998

Mr. Michael Chambers  
1011 South Oaks  
Tacoma, Washington 98405

RE: Jeffries, et., al., v. ILWU  
U.S. District Court Cause No.: C96-6032 FDB

Dear Mr. Chambers:

Congratulations are in order. Your recent victory in U.S. District Court is a milestone in the push for Civil Rights and will go along way in making life on the waterfront more pleasant for everyone for decades to come. It is always the few that liberate the many and liberty doesn't come cheap.

### Historical Significance.

The Jeffries case was an important milestone because it was the first of its kind to be tried in a court of law; that fact alone declared that you fifteen men were unafraid of obtaining a ruling from a federal court and were prepared to appeal the case to the Supreme court if necessary. In fact, the case against Local 98 is now pending before the 9<sup>th</sup> Circuit Court of Appeals. No matter what the outcome of that appeal, the Jeffries case will live in the minds of PMA officials, International officers and the rank and file and elected servants of Locals 19, 23 and 52 well into the 21<sup>st</sup> century.

### Substantial Recovery.

By now, most of you have read and heard the news reports across the state concerning our victory. A number of reporters have made the point that the \$800,000.00 received in the Jeffries case represents significantly more per person than the settlement involving the women; apparently the women settled as a class and thereby were required to share 3.3 million among 150 women. Because you men did not settle as a class you have kept the door open for future litigation by other ethnic minorities against these same defendants.

Mr. Michael Chambers  
June 11, 1998  
Page 2 of 2

In addition, we were able to successfully register Doug Woods as a Clerk, Michael Chambers as a Foreman, Rodney Rhymes as a Crane driver, Terrell Rushing as a Casual Foreman and Bob Frazier as a Clerk (but not accepted by Bob). We were also able to present argument to Judge Burgess that Damell Walker and Tracy Montgomery be placed on the B Registration list. We are waiting for the Judge's ruling on these registrations.

We will begin working on the needed changes in the Grievance procedure, Section 9 training, Sensitivity training and Dispatch, including Casual Foreman dispatch. We will want your input in these changes.

Settlement Accounting.

I have also instructed the firm's bookkeeper to prepare an accounting of all costs expended to date to enable me to provide you a complete summary of what each of you have paid towards costs and the exact amount you will each receive from the settlement proceeds. We expect to have this information within the next week, assuming we receive the cost statements from all the vendors in a timely fashion. We will be in touch with you within the next several days to schedule a meeting to discuss all of the particulars of the settlement agreement. At that time, I will answer any questions you may have.

Thank You.

We all have a lot to be thankful for and a number of individuals to thank, including Jim Walls, Ken Rohar, Kaye Thompson, Rosie Reichl, Wayne Perryman, Jim Tessier, Cynthia Casner, the Marshall, Wheeler, Zaug and LaBorde legal team, including legal assistants Kelly, Sandra and JoVon. Most importantly we must all thank God, without Him we would not have prevailed.

Very truly yours,  
MARSHALL LAW OFFICES

*Bradley R. Marshall*

Bradley R. Marshall  
Attorney at Law *by [initials]*

BRM/ktl

Enclosures

cc: Mark Wheeler, Esq.  
Justin B. Zaug, Esq.  
William P. LaBorde, Esq.  
Mr. Wayne Perryman  
Mr. Jim Tessier

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1111 10/99

July 28, 1999

RE: *Jeffries, et al., v. ILWU, et al.*

Gentlemen:

This letter is to update you regarding the status of the retainer in our trust account. As you know, at this time we are still in the process of appealing Judge Burgess' ruling dismissing your case against Local 98. If we prevail in this appeal, we will need the funds in order to litigate the matter against Local 98. Moreover, there is a camcorder that was purchased to videotape the depositions taken in conjunction with your case against the PMA and the various locals. Once the Appellate Court has ruled on our appeal regarding Local 98, we will be happy to purchase the camcorder from you. If the ruling is in favor of Local 98 and our cause of action is dismissed we will then also disburse the remaining funds left in the trust account to all of the named plaintiffs in this matter in equal shares. Until the appeal process, however, is completed we cannot disburse any funds. Thank you for your time and consideration in this matter.

Very truly yours,  
MARSHALL WHEELER ZAUG, PLLC

  
Bradley R. Marshall  
Attorney at Law

JBZ/ktl  
\\ltrs\bjctal72899.kl

**B**

August 27, 1998

Marshall Law Offices  
Brad Marshall, Attorney At Law  
120 Lakeside Avenue, Suite 300  
Seattle, WA 98122

Re: RUBEN CHAVEZ et. al VS ILWU, et. al Case No. C96-6032 FDB

Dear Mr. Marshall,

I would like to thank you for your response to my recent inquiries for a breakdown of costs incurred. However you stated in your letter dated August 19, 1998 that you were enclosing a copy of it, however it was not included with you letter sent. I AM REQUESTING THIS FOR THE THIRD TIME. I do not know what is the problem with receiving a piece of documents that I should have gotten at time of our signing of it. This is my right and I am getting concern that maybe you do not have any such agreement that is sign by myself.

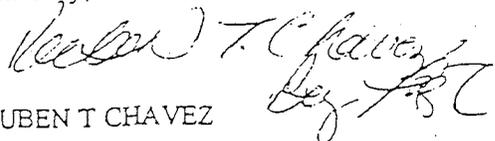
I am also concern with your accounting abilities. In the breakdown I am finding some major concerns with your addition. I can not understand why you feel a deposit is an expense??? In my limited abilities I have always thought that a deposit was a good thing and not an expense.

With this in mind I would like you to recalculate these expenses for I see them as only \$67,513.89 and not as you have shown them as \$108,513.89. I would like a copy of your agreement with ABC and a copy of all actual bills showing there exorbitant charges are legitimate. I do not feel that being charged over and over for single deliveries of \$10.00 is accountable in as much as you can put a thirty two cent stamp could have been used savings hundreds if not thousands of dollars.

Please respond to my request within 2 days and I would like a copy of my retainer/legal fee agreement to me in my hands by 8-31-98 and you may fax it to my at 253-593-3549.

I will send you this via fax along with in the mail.

Sincerely,

  
RUBEN T CHAVEZ

cc

Washington State Bar Association  
King County Bar Association

C

THE MARSHALL LAW FIRM

The undersigned, hereinafter "clients," employ The Marshall Firm, hereinafter "attorneys," to handle all claims of the clients or the clients' minor children or wards against any and all persons or entities arising out of Caro Suit PMA Longshore.

Clients and attorneys agree as follows:

- 1. **INITIAL EVALUATION:** Clients agree to pay the cost of obtaining necessary records and of having an expert evaluate clients' case, and will deposit \$ 1000.<sup>00</sup> with attorneys for this purpose. Any balance remaining will be refunded to clients if attorneys do not accept case. Attorneys charge no fee for this evaluation.
- 2. **ATTORNEY FEE:** Attorneys will receive an attorney fee of ~~Twenty Percent (20%)~~ <sup>Forty percent (40%)</sup> of all sums recovered by settlement or trial. In the event an appeal is filed by any party, attorneys will receive forty percent (40%) of all sums recovered after the date a notice of appeal is filed. "All sums recovered" includes all monies paid in settlement or award of damages, attorney fees, costs, penalties or interest. The attorney fee will be calculated before deduction of costs. If there is no recovery, no attorney fee will be paid.
- 3. **COSTS:** As required by attorney ethics rules, clients are responsible for payment of costs. Costs may include, but are not limited to, filing fees, messenger service fees, witness fees, research fees, expert fees, and charges for investigation, records, medical reports, photographs, exhibits, photocopies, teletypes, telephone long distance, postage, travel and accommodations, video-taping, and depositions. Clients agree to pay attorneys \$ 2000.<sup>00</sup> by 16 March, 19 97 to be placed in attorneys' trust account and applied as costs as incurred. If clients are unable to pay all costs as incurred, costs may be advanced by attorneys. Unreimbursed costs will accrue at 12 percent (12%) per annum and will be deducted from any recovery after calculation of the attorney fee.
- 4. **ADVICE CONCERNING ATTORNEY FEE:** Clients have been informed of the alternative of employing attorneys on an hourly fee basis. This alternative would require payment of a retainer at commencement of the case, payment of costs as incurred, and payment of fees each month at the rate of \$195 per hour for attorney services and \$75.00 per hour for paralegal services. In deciding to employ attorneys on a contingent fee basis, clients have considered the risks involved in this case, the experience and reputation of The Marshall Firm, the uncertainty regarding the number of hours necessary to prosecute the case and the fact that the clients ultimately will decide whether to accept or reject a particular settlement offer.
- 5. **STRUCTURED SETTLEMENT:** If any part of a recovery calls for annuity payments in the future, the attorney fee on this portion of the recovery will be computed based on the present cash value of the annuity, and shall be paid from the cash portion of the recovery at time of settlement.
- 6. **AUTHORITY, DUTIES AND REPRESENTATIONS:** Clients authorize attorneys to file a lawsuit if and when attorneys consider it advisable. Clients will cooperate with attorneys and will timely respond to attorneys' requests. Attorneys will make no settlement of clients' claims without clients' consent. Clients acknowledge that attorneys have made no guarantee of a successful result, and that any statements regarding the merit or outcome of the case are professional opinion only.
- 7. **ASSOCIATE COUNSEL:** Attorneys reserve the right to associate other attorneys in clients' representation, without additional expense to clients. Clients consent to such association, and to a division of attorney fees as may be agreed upon between associated counsel.
- 8. **PROBATE:** In the event a death requires commencement of a probate action to prosecute clients' case, clients authorize attorneys to retain probate counsel. Fees and expenses incurred in any probate proceedings will be considered a cost item.
- 9. **MEDICAL AND SUBROGATION PAYMENTS:** Clients authorize attorneys to pay from clients' share of any recovery any unpaid medical bills or subrogation interests related to clients' claim.
- 10. **WITHDRAWAL AND DISCHARGE:** If clients discharge attorneys, or if attorneys withdraw for cause, clients agree to pay attorneys a reasonable attorney fee and any unreimbursed costs. The attorney fee shall be, at attorneys' option, either (1) an hourly fee of \$195/hr for the attorney and \$75/hr for paralegal time expended on the case; 2) the contingency percentage of the last settlement offer; or 3) a pro rata portion of the contingent fee ultimately recovered based on the relative contributions to the case by The Marshall Firm and any successor law firms, as determined by the law of quantum meruit and the facts set out in Rule for Professional Conduct 1.5 (1). Client hereby grants Attorney a lien on any settlement or judgment proceeds for the amount due pursuant to this paragraph.

ATTORNEYS:

CLIENTS:

THE MARSHALL FIRM

BY: \_\_\_\_\_

DATE: \_\_\_\_\_

Ruben T. Chavez

DATE: 1-16-97

Ruben T. Chavez

DATE: 1-16-97

D

MARSHALL LAW OFFICES

120 Lakeside Avenue Suite 300, Seattle, WA 98122  
2200 North 30th, Suite 201, Tacoma, WA 98403

Telephone (206) 324-4842  
Fax (206) 325-3305

SETTLEMENT ACCOUNTING

Gross Amount Received As of July 28th, 1998		\$ 800,000.00
LESS		
ATTORNEY COST:		108,122.91
		<u>691,877.09</u>
LESS ATTY: FEE	MLO	152,400.00
LESS ATTY: FEE	MARK WHEELER	81,600.00
		<u>234,000.00</u>
LESS:	Wayne Perryman	71,459.00
SUB TOTAL		<u>386,418.09</u>
LESS: TRUST COST		5,000.00
LESS ADDITIONAL COST		1288.51
		<u>3,711.49</u>
PREVIOUS BALANCE		522.24
AMOUNT IN TRUST		<u>4,233.73</u>
NET PAYMENT:		<u>\$ 381,418.09</u>
DIVIDED BY 14 PLAINTIFFS		
AMOUNT PAID TO EACH	27,244.15	