

Supreme Court No. 200,315-0  
Associated Case 200,320-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DISCIPLINARY PROCEEDING AGAINST

MARGITA A. DORNAY

Lawyer (Bar No. 19879).

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

(REDACTED VERSION – FILED PURSUANT TO PROTECTIVE ORDER)

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the Legal System**

## I. COUNTERSTATEMENT OF THE ISSUES

1. The Disciplinary Board concluded that Respondent committed the crime of false swearing by making inconsistent statements under oath in two or more official proceedings. The only difference between the crimes of false swearing and perjury is the materiality of the statements. Given the Board's apparent conclusion that Respondent's false statements were material to the proceedings, did it err in concluding that Respondent did not commit perjury in addition to false swearing?

2. Under Washington law, perjury or false swearing requires that Respondent's testimony be false. For testimony to be false, it must be "literally false." In this case, Respondent answered an unequivocal "no" to a question as to whether she had seen a police officer, with whom she had both a professional and intimate personal relationship, rageful "at any time." The Disciplinary Board concluded that the question was not ambiguous and clearly applied to all contexts in which Respondent interacted with the police officer, not only their limited professional interactions, and that based on the evidence, her answer was, therefore, "literally false." Was the Disciplinary Board correct?

3. Rule 8.4(c) of the Rules of Professional Conduct (RPC) prohibits conduct involving dishonesty, deceit or misrepresentation. The Disciplinary Board decided unanimously that Respondent intentionally

misled a court in sworn testimony. Was the Disciplinary Board correct in concluding that the presumptive sanction for providing intentionally misleading testimony under oath is disbarment?

4. The Disciplinary Board found three aggravating factors and three mitigating factors. One of these mitigators, cooperation with the Washington State Bar Association (Association) is not legally sufficient under settled case law. Did the Disciplinary Board err in reducing the presumptive sanction of disbarment to a three-year suspension on the basis that the mitigating factors outweighed the aggravating factors?

5. The Hearing Officer found, and the Disciplinary Board affirmed, that Respondent had not met her burden of proving a duress defense. Should this Court retry the facts as to whether Respondent established a duress defense?

6. Respondent asks this Court to reverse an evidentiary ruling of the Hearing Officer excluding the testimony of one of the ex-wives of a witness, on the basis that the testimony was irrelevant to Respondent's duress defense. Should the Court reverse the Hearing Officer's exercise of discretion to exclude irrelevant evidence?

7. Respondent asserts that the Hearing Officer improperly disregarded parts of her expert's testimony. Should the Court reverse the Hearing Officer's credibility determinations and reweigh the evidence?

## II. COUNTERSTATEMENT OF THE CASE

### A. SUBSTANTIVE FACTS

In the spring of 2001, Respondent, then a partner with the law firm of Kenyon Dornay Marshall (KDM), became romantically involved with a King County Sheriff's Deputy, David Hick. Hearing Officer's Findings of Fact and Conclusions of Law (Findings), Decision Papers (DP) P 32, ¶8-10; DP 33, ¶14. Dornay met Hick in the course of her duties as a contract prosecutor for the City of Kenmore. Hick was employed by the King County Sheriff's Office and was assigned to Kenmore. DP 32, ¶5. Respondent is married to Robert Noe, who was then also a partner at KDM. They have four daughters. DP 32, ¶ 4, Transcript of Proceedings, (TR) 1336-37.

At the time the affair began, Hick was in the process of divorcing his wife, Katie Hick ("Katie"). Hick and Katie had a son, Wyatt, who was then a toddler. DP 32, ¶6. In July 2001, the Snohomish County Superior Court entered an order granting Hick visitation with his son, who had moved to Spokane with Katie. The order directed that Hick and Katie exchange Wyatt in Ellensburg. DP 33, ¶12. At Hick's request, Respondent twice accompanied him to Ellensburg and back for the exchange of Wyatt, once in July and again in October 2001. DP 33, ¶ 12,

DP 34, ¶16.

In the late summer of 2001, the affair between Respondent and Hick became sexual. DP 33, ¶14. Hick met Respondent's young daughters, and gave Respondent gifts. Respondent gave Hick pictures of her and her daughters. DP 34, ¶15.

Sometime during the fall of 2001, Respondent became fearful of Hick's anger. Hick began having rageful outbursts if Respondent did anything to lead Hick to believe that Respondent was betraying him. DP 35, ¶19. For instance, during a weekend trip to Vancouver, B.C. in November 2001, Hick became enraged after they had an argument and purposely slammed his head on a night stand, cutting his forehead. DP 34, ¶17. On another occasion, Hick had Respondent put a service revolver to his head and told her to pull the trigger because, if she did not love him, he wanted to die. DP 35, ¶ 20. The relationship between Hick and Respondent was intense and emotional, with a pattern of arguments and reconciliations in the relationship. DP 36, ¶ 23. At times, Hick exhibited controlling behaviors characteristic of a perpetrator of "intimate partner" abuse.<sup>1</sup> DP 36, ¶23, 50, ¶ 2(c). However, although Respondent was

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<sup>1</sup> "Intimate partner" abuse refers to controlling behaviors and/or violence perpetrated by one of the partners in an intimate relationship against the other. TR 1554 .

genuinely fearful of Hick in the context of arguments they had in their relationship, there were other times when she was not afraid of him, and she unreasonably interpreted Hick's jokes that Hick and his friend, Joe Todesco, were part of the "mafia" as threats rather than jokes. DP 6, ¶ 11; DP 46, ¶ 9, ¶ 11; DP 47, ¶ 12.

During the period of the relationship, Respondent had knowledge of the legal system, and connections through her family to law enforcement officers, which would have allowed her to leave the relationship with Hick safely. DP 46, ¶ 11. Her father, Zolt Dornay, had recently retired from the King County Sheriff's Office, where he had been a deputy for 25 years, including nine years as a point man on the SWAT team. TR 721. Mr. Dornay and his wife lived in the same neighborhood as Respondent and her family, and helped care for their children after school. TR 747. In addition, one of her two brothers was a Seattle police officer. TR 1327. In her job, Respondent worked on a daily basis with prosecutors, judges, police officers and domestic violence advocates at several local courts. TR 601-06. Nevertheless, Respondent remained in the relationship with Hick until March 7, 2002. DP 41, ¶ 36.

On February 13, 2002, several weeks before the relationship ended, Respondent voluntarily agreed to testify in support of Hick at his dissolution trial in Snohomish County. DP 36, ¶ 25. Respondent

understood that she would be testifying about the child visitations she had witnessed when she accompanied Hick to Ellensburg. Id.

On the day of her testimony, Respondent drove in her own car to the Snohomish County Courthouse, where she joined Hick, his mother Sylvia Stearns and his friend Todesco, for lunch at a nearby delicatessen. DP 36, ¶ 25. Respondent, Hick, Todesco and Stearns sat at adjoining tables. TR 2305-06. Although Respondent knew Todesco did not approve of her extra-marital affair with Hick, Todesco was polite to Respondent at the lunch. Id. Respondent did not feel she was in any physical danger from Todesco. TR 1887. After lunch, Respondent went to the Courthouse and sat next to Todesco and Stearns in the public seating area while waiting to testify. TR 2306-07. When she was on the witness stand, Respondent was very calm, collected and professional, and showed no sign of nerves or fear. DP 37, ¶ 26; TR 55, 2307-08.

Hick's counsel began her examination by asking Respondent if she had seen Hick "in his professional capacity as well as in a more friend (sic) or personal capacity." Association Exhibit (ASSOC. EX) 16 at 2 (transcript of Respondent's February 13, 2002 testimony). Respondent answered "Often, correct." Id. Respondent then testified about how, as a friend, she had accompanied Hick on the child exchanges to and from Ellensburg, about her observations of Hick as a father ("he was a very

patient and devoted father, obviously”), and about “ride alongs” she had done with Hick while he was on the job. Id. at 2-6. Hick’s counsel then asked Respondent whether she had at any time seen Hick rageful, rant and rave or berate. Id. at 6. Respondent answered “No” to these questions. Id. Respondent did not plan to answer the questions about Hick’s rage in the framework of her limited interactions with Hick in the workplace, but rather in the broad context of her entire relationship with Hick. DP 38, ¶27, TR 1660-62.

After she provided her testimony, Respondent stayed and listened to the testimony of Katie. TR 1888-89. She then drove in her own car to Hick’s house to be with him. TR 1667, 2349-50. Respondent was not fearful before, during, or after her testimony on February 13, 2002. DP 46, ¶ 11.

Although Hick had asked Respondent prior to her testimony to lie about Katie’s “out of control” behavior at the child exchanges, and about additional trips to Ellensburg where Katie did not “show up” with Wyatt, Respondent decided to defy Hick and to testify truthfully about the exchanges. TR 1654-56. Hick did not threaten Respondent with any specific consequences if Respondent did not testify as he wished. ASSOC. EX 67 (respondent’s January 16, 2003 deposition testimony).

On the day after her testimony, February 14, 2002 (Valentine’s

Day), Respondent spoke with Hick at least five times on their private cell phones. She also sent him a large bouquet of roses and mailed him a card. DP 38, ¶ 28. Respondent then went on a family ski vacation, leaving her family dog in Hick's care. DP 38, ¶ 29.

In early March 2002, less than three weeks after her testimony in the dissolution trial, Respondent told her father about aspects of her relationship with Hick. Respondent told her father that Hick was a "psycho" with terrible emotional outbursts. DP 39, ¶31. She also told her father that she was not truthful when she testified in court that she had never seen Hick in a rage. Id.

In the first week of March 2002, Respondent told a co-worker about Hick's threatening behavior to her, and also that he had threatened other partners at KDM. DP 39, ¶32. On March 7, 2002, Respondent and Hick had an argument and broke up. DP 41, ¶36. The breakup that evening involved an argument in which Hick threw Respondent's car keys out in the snow, while Respondent slapped Hick twice in the face. DP 41, ¶ 36. When Respondent returned home, she told her husband for the first time about her relationship with Hick. Id.

In early April 2002, two KDM partners reported their concerns to the King County Sheriff's Internal Investigations Unit (IIU). DP 42, ¶ 39. Shortly thereafter, [REDACTED]

[REDACTED]

[REDACTED]

On May 1, 2002, the Court in Hick's dissolution trial entered final orders. In the parenting plan, the Court granted Hick the joint-decision making rights and generous visitation that he had requested. DP 42, ¶40. The Court did not credit Katie's allegations that Respondent was violent and abusive. ASSOC. EX 17 at 13-17 (transcript of oral opinion in Hick v. Hick, March 7, 2002).

On May 14, 2002, Respondent petitioned for an order of protection against Hick. DP 42, ¶41. On June 5, 2002, a hearing was held on the protection order. Respondent testified at the hearing that Hick had screamed at her, raged at her and ranted and raved at her during the course of their relationship, including in the period prior to February 13, 2002. DP 42, ¶42.

On June 5, 2002, Respondent signed a declaration under penalty of perjury in the Hick dissolution matter in support of Katie's motions to obtain a restraining order against Hick and modify the parenting plan. In that declaration, Respondent stated that she had frequently seen Hick fly into rages, throw furniture, and rant at her from the fall of 2001 onwards. DP 43, ¶44-45. Respondent stated that she had "made the decision to

perjure herself' on February 13, 2002. Id.

On January 16, 2003, during a deposition at the Association in this matter, Respondent admitted under oath that her testimony on February 13, 2002, that she had never seen Hick rageful, was false. DP 44, ¶47.

**B. PROCEDURAL FACTS**

On April 27, 2004, the Association filed an Amended Formal Complaint charging Respondent as follows:

COUNT 1

In making inconsistent material statements under oath in two or more official proceedings . . . one or the other of which was false and which Respondent knew to be false, Respondent committed the crime of perjury (RCW 9A.72.050(1)) and/or engaged in dishonesty, deceit and/or misrepresentation, in violation of RPC 8.4(b) and/or RPC 8.4(c) and/or RPC 8.4(d) and/or RPC 3.3(a)(1).

COUNT 2

In making inconsistent statements under oath in two or more official proceedings . . . one or the other of which was false and which Respondent knew to be false, Respondent committed the crime of false swearing (RCW 9A.72.050(1) and RCW 9A.72.050(2)) and/or engaged in dishonesty, deceit and/or misrepresentation, in violation of RPC 8.4(b) and/or RPC 8.4(c) and/or RPC 8.4(d) and/or RPC 3.3(a)(1).

COUNT 3

In testifying falsely under oath in Snohomish County Superior Court on February 13, 2002 and/or June 5, 2002 and/or King County District Court on June 5, 2002 and/or at her WSBA deposition on January 16, 2003, Respondent violated RPC 3.3(a)(1), RPC 8.4(c) and/or RPC 8.4(d).

Clerk's Papers (CP) 17-61; Bar File (BF) 29. On January 20, 2005, after a twelve day hearing, Hearing Officer Lawrence R. Mills filed Findings of Fact and Conclusions of Law. Decision Papers (DP) 30-54, BF 76.<sup>2</sup> The Association filed a full transcript of the proceeding on March 10, 2005. BF 82.

The Hearing Officer concluded that the Association proved Count 3 of the Formal Complaint. Findings, DP 47, ¶ 15. He concluded that Respondent violated RPC 8.4(c) and RPC 8.4(d) by making materially misleading statements under oath in King County Superior Court on February 13, 2002, and by failing to correct the materially misleading statements until June 5, 2002. *Id.* The Hearing Officer found that Respondent had acted knowingly and that the presumptive sanction was suspension. DP 49, ¶ 2. He rejected Respondent's claim that her misconduct should be excused because she testified under duress. DP 46, ¶ 11. After weighing the aggravating and mitigating factors, the Hearing Officer recommended a two-month suspension. DP 49-52.

On May 20, 2005, the Board considered the matter under Rule 11.2(a) of the Rules for Enforcement of Lawyer Conduct (ELC) (automatic review of decisions recommending suspension or disbarment) and, on June 29, 2005, the Board issued an order under ELC 11.12(f)

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<sup>2</sup> The Findings are attached as Appendix 1.

giving the parties notice that it intended to modify the Hearing Officer's Conclusions of Law to find that the record established a violation of Count 1 (perjury) or Count 2 (false swearing). DP 25-26, BF 90. The Board requested briefing on whether the record established violations of those counts, and on whether the Hearing Officer properly applied two cases cited by the Hearing Officer in support of his decision that Respondent had not committed perjury and false swearing, *i.e.*, State v. Olsen, 92 Wn.2d 134, 594 P.2d 1337 (1979) and Bronston v. United States, 409 U.S. 352, 93 S.Ct. 595 (1973). DP 25-6. The Board also asked for discussion of the appropriate sanction assuming that Respondent violated Count 1 or Count 2. Id.<sup>3</sup>

After briefing and oral argument, the Disciplinary Board unanimously concluded that Respondent had intentionally given misleading testimony to the Court in violation of RPC 8.4(c) and RPC 8.4(d) resulting in harm to the Court, the justice system and a vulnerable young child. The Board increased the Hearing Officer's sanction recommendation from two months to three years. DP 4-24, BF 95-99.<sup>4</sup> Nine of the thirteen Board members concluded that Respondent had also

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<sup>3</sup> Although the Association did not appeal the Hearing Officer's ruling due to limited resources, it argued for disbarment at both the hearing and before the Disciplinary Board. TR 2750, BF 101 (Transcript of Oral Argument).

<sup>4</sup> The Disciplinary Board decision is attached as Appendix 2.

violated RPC 8.4(b) by committing the crime of false swearing by providing material, false testimony to the Court. DP 7, ¶ 15. The majority concluded:

When Dornay testified under oath on February 13, 2002, in response to questions from Hick's attorney Ruth Spalter, [to] the questions "Have you seen him rageful at any time?" or "rant and rave" or "berate," Dornay's answers were not truthful. The question was unambiguous and the answer was responsive. Dornay lied with the intent to mislead the Court.

DP 6, ¶ 4. The Disciplinary Board unanimously affirmed the Hearing Officer in rejecting Respondent's contention that her violations should be excused due to duress.

At least 10 members of the Disciplinary Board believed that the presumptive sanction should be disbarment.<sup>5</sup> However, the Disciplinary Board determined that, because the three mitigating factors outweighed the three aggravating factors, the sanction should be reduced to a three-year suspension. DP 9 (majority opinion); DP 10-12 (concurring opinions of Kurtz, Mosner and Friedman).

By a vote of seven to six, the Disciplinary Board declined to find that Respondent had committed the crime of perjury when she gave the material, false testimony. DP 9, ¶ 5. Three of the dissenting members

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<sup>5</sup> The remaining three members did not explicitly address the issue of the presumptive sanction, but agreed that a three-year suspension was the appropriate sanction. Concurring Opinions of Schapps, DP 13-14; Lee (joined by McMonagle), DP 16-18.

stated that the Association had proven all the elements of perjury under Washington perjury statutes and applicable case law. DP 15 (concurring opinion of Bothwell); DP 16-18 (concurring opinions of Lee and McMonagle).

### **III. SUMMARY OF ARGUMENT**

Respondent intentionally deceived the Court when testifying on February 13, 2002 on behalf of Hick, a party to a dissolution case. At that time, Respondent was involved in a clandestine affair with Hick. When asked whether she had ever seen Hick “rageful” and “rant and rave,” Respondent answered no. Respondent’s false testimony was material to the Court’s decisions as to whether Hick was psychologically fit to have visitation rights and decision making roles with his young son.

When Respondent ended her relationship with Hick several weeks after she testified, she told her father, her law partners, and [REDACTED] that Hick was a rageful and violent person. She repeated these assertions when seeking an order of protection from Hick. Almost four months after testifying in support of Hick, and after the Court had entered the final parenting plan, Respondent filed a declaration under oath in Hick v. Hick asserting that she had “perjured herself” when she testified that Hick was not rageful.

The Hearing Officer concluded, and the unanimous Disciplinary Board affirmed, that Respondent intended to mislead the Court about Hick's propensity for ragefulness, in violation of RPC 8.4(c) and (d). Both the Hearing Officer and the unanimous Board rejected Respondent's claim that her misconduct should be excused because her testimony was given under duress. The Hearing Officer's factual finding as to whether Respondent had a reasonable apprehension of death or grievous bodily harm when she testified should not be disturbed.

A majority of the Disciplinary Board correctly found that Respondent committed false swearing because her testimony was false. This Court should affirm the Disciplinary Board because Respondent's argument, based on an after-the-fact review of the transcript of her testimony by her counsel, that she was asked an "ambiguous question" and gave a "literally true" answer, is without merit. Respondent was asked a question that was clear on its face, and her answers were patently false, as Respondent herself admitted in the weeks and months after she testified.

The nine members of the Disciplinary Board who concluded that Respondent committed false swearing also concluded that Respondent's testimony was material. Although six members of the Disciplinary Board found that Respondent committed perjury, seven members did not. Thus, a majority of the Disciplinary Board concluded that all of the elements of

perjury were proven, but inexplicably failed to find that Respondent had committed perjury. This conclusion was incorrect and should be reversed.

The unanimous Disciplinary Board concluded that the presumptive sanction for intentionally misleading the Court is disbarment. The Disciplinary Board improperly reduced the presumptive sanction to suspension, and gave too much weight to the mitigators. Because there were more aggravators than mitigators, and the aggravators are especially significant, there is no basis to vary from the presumptive sanction of disbarment.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

The Supreme Court has plenary authority in lawyer discipline matters. In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 208, 125 P.3d 954 (2006). It reviews conclusions of law de novo, but will not disturb challenged findings of fact if they are supported by substantial evidence. Id.; In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59, 93 P.2d 166 (2004). When reviewing factual findings, the Court will not modify findings of fact made upon conflicting evidence. In re Disciplinary Proceeding Against Huddleston, 137 Wn.2d 560, 568, 974 P.2d 325 (1999). Although the Court independently reviews the entire record, it gives particular weight to the credibility determinations of the

hearing officer, who has direct contact with witnesses and is best able to make such judgments. In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 813, 72 P.3d 1067 (2003). Unchallenged findings of fact made by the Hearing Officer and affirmed by the Disciplinary Board are accepted as verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005).

Although the Court gives the Disciplinary Board's sanction recommendation "serious consideration," it is not bound by it and is free to modify it. In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 677, 105 P.3d 976 (2005). However, the Court gives greater weight to the Board's sanction recommendation than to that of the Hearing Officer, because "the Board is the only body that hears the full range of disciplinary matters." Id.

**B. THE HEARING OFFICER AND DISCIPLINARY BOARD CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED THE RPC BY MISLEADING THE COURT AND PREJUDICING THE ADMINISTRATION OF JUSTICE**

Respondent claims that the only misconduct that the Association alleged against Respondent was that she committed perjury and or false/swearing so, if this Court concludes that her testimony was "literally truthful," she has committed no misconduct. Respondent's Brief (RB) at 26-27. Respondent is incorrect. The complaint charged Respondent with

violating rules that do not involve criminal conduct, including RPC 8.4(c) (misrepresentation, dishonesty and deceit) and RPC 8.4(d) (conduct prejudicial to the administration of justice). CP 17-61. Furthermore, even if her testimony were “literally true,” the Hearing Officer and the unanimous Disciplinary Board properly found that it misled the Court, which in itself constitutes a serious violation of RPC 8.4(c) and RPC 8.4(d). Whether Respondent’s misconduct constitutes false swearing or perjury, while certainly important, should not detract from the fact that Respondent intentionally misled the Superior Court on material facts. As stated by Disciplinary Board Member Schaps:

The issues raised by Dornay’s counsel as to Counts 1 and 2 revolve around counsel’s attempts to create a technical defense to the crimes of perjury and false swearing by counsel’s after-the-fact examination of the transcript of Dornay’s testimony . . . [T]hose arguments seek to distract the Board from the clear violations of Count 3.

Concurring Opinion of Schaps, DP at 18-19; see also Concurring Opinions of Friedman, Kurtz and Mosner, DP at 11-17 (“What is most critical is that Dornay intentionally misled the Superior Court on material facts.”)

RPC 8.4(c)’s prohibition against “dishonesty, fraud, deceit or misrepresentation” clearly applies to deceiving a tribunal or administrative agency, even if the Association does not charge (or prove) that Respondent committed a crime. See, e.g., In re Disciplinary Proceeding

Against Whitt, 149 Wn.2d 707, 719, 72 P.3d 173 (2005) (lawyer violated RPC 8.4(c) and RPC 8.4(d)) by falsifying evidence provided to the Bar Association); In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 616, 98 P.3d 444 (2004) (lawyer violated RPC 8.4(c) by knowingly misrepresenting his attorney fees in declarations filed with the Court; no criminal conduct alleged).

Respondent misled the Court as to material facts and prejudiced the administration of justice when she testified in a proceeding to determine the best interests of a young child who was the subject of a custody/visitation dispute. DP 4-18, DP 46, ¶ 9-10, DP 47, ¶ 15. This misconduct, like that of Whitt, relates to Respondent's basic veracity. Respondent swore to uphold the truth but instead disregarded "the foundation of the judicial system [which] is truth and honesty." Whitt, 149 Wn.2d at 721. Whether her testimony was misleading and deceitful, or misleading, deceitful and "literally false," her conduct violated a central tenet of the RPC, that a lawyer must tell the full truth when testifying in court. As this Court stated in In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998), "no ethical duty could be plainer" than the duty of a lawyer to tell the truth – particularly, as in this case, to a court.

**C. THE DISCIPLINARY BOARD PROPERLY FOUND THAT RESPONDENT TESTIFIED FALSELY AND COMMITTED THE CRIME OF FALSE SWEARING**

As the Disciplinary Board majority concluded, Respondent's testimony was more than "misleading." It was literally false, with the result that Respondent committed the crime of false swearing.

The crime of false swearing by inconsistent statements under RCW 9A.72.050(1) and RCW 9A.72.050(2) requires that: (1) Respondent made inconsistent statements under oath in two or more official proceedings; (2) one of the statements was false; and (3) Respondent knew one of the statements was false.<sup>6</sup>

To establish false swearing through inconsistent statements, "it is not necessary to prove which . . . statement was false but only that one or the other was false and known by the defendant to be false." 11A Washington Supreme Court Committee on Jury Instructions, Washington Practice: Washington Pattern Jury Instructions, Criminal § 118.22 (2d ed. 1994). If the statements are inconsistent, made in official proceedings, and one of them was known by Respondent to be false, she has committed false swearing. Id.<sup>7</sup>

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<sup>6</sup> The complete statute is attached as Appendix 3 to this brief.

<sup>7</sup> If the statements were also material to proceedings where the false testimony was given, the elements for first degree perjury are satisfied.

### 1. Respondent's Statements Were False

The Disciplinary Board correctly concluded that Respondent's testimony on February 13, 2002 was false as a matter of law. Respondent "lied with the intent to mislead the Court." DP 6, ¶ 4. In so doing, the Board specifically rejected Respondent's argument below, which she repeats on appeal (see RB at 27-37), that the question posed by Hick's counsel was ambiguous in context and that her answer was therefore "literally true." Id. The Disciplinary Board found instead that "the question was unambiguous and the answer responsive." DP 6, ¶ 4.

The Disciplinary Board is correct. At the start of the testimony, Spalter established that Respondent knew Hick both personally and professionally. DP 4, ¶ 26. Spalter began her questioning by asking Respondent about the child exchanges she had witnessed as Hick's friend Id. Spalter then asked Respondent about whether she had observed Hick on the job, and Respondent described two "ride alongs" she had done with Hick. Spalter then asked:

- Q. Okay. Have you seen him be rageful at any time?  
A. Rageful?  
Q. Yeah.  
A. No.  
Q. Rant and raved?  
A. No  
Q. Berate  
A. No . . .

Id. at lines 13-25. Spalter's question was not qualified in any manner. On the contrary, the question was "Have you seen him be rageful *at any time?*" (emphasis added). The plain meaning of the words "at any time" is the same as "ever," i.e., "at all times; through all time; at any period or point in time." Webster's, Third New International Dictionary (1961). Furthermore, Respondent's answers to Spalter's questions regarding seeing Hick rageful and ranting and raving were direct, non-evasive and unambiguous "No." These answers were untruthful.

While Respondent is correct that precedent exists for the proposition that the element of falsity is not established if the accused provides an answer that is literally true, that precedent does not apply to the facts here, where the answer was literally false.

An answer that is responsive and false on its face does not become "literally true" simply because a defendant or respondent can postulate "unstated premises of the question that would make his answer literally true." United States v. Bollin, 264 F.3d 391, 411 (4th Cir. 2001). In Bollin, a defendant was asked whether a co-conspirator "directed, coordinated, or orchestrated" disbursement of funds to investors as part of a fraudulent scheme. Defendant claimed that the use of the three verbs created a "fundamentally unclear" question, and that his answer of "to my knowledge, he did not" could be literally true, depending on how the

question was interpreted. The Court rejected defendant's argument. The question clearly referred to whether defendant knew if the co-conspirator engaged in some conduct intended to bring about the repayment of investors, and thus was not ambiguous. Id. Similarly, Respondent here was asked an unambiguous question as to whether she had seen Hick rageful at any time, and gave a false answer. Her after-the-fact argument that the question was unclear is without merit.

Respondent cites to cases where the criminal defendants gave literally true answers, but those cases are inapplicable because Respondent's answers were false. In State v. Olsen, 92 Wn.2d 134, 594 P.2d 1337 (1979), the government charged defendant, a Snohomish County employee, with unauthorized disposal of state property (bridge timbers) to private entities in exchange for liquor. One such entity was his former employer, a construction company called Spane Building. During grand jury testimony, defendant was asked whether he had delivered bridge timbers from "District Three Yard to Spane Mill." Defendant answered "No, I did not."

The government alleged that, even though Spane Building was a construction company and not a mill, it had certain equipment in its yard similar to what would be found at a mill and it could, therefore, be reasonably identified as a mill. Olsen, 92 Wn.2d at 137. There was no

evidence that defendant had ever referred to the business as “Spane Mill,” or had been present when others had used that term. Id. The Court thus found that defendant’s answer was literally true. Id. at 137-38. Because defendant’s answer was literally true, the Court opined that it was the interrogator’s duty to clarify the question and pin down the witness. Id. at 140. The Court also found that the State had not presented evidence showing that Respondent knew his answer was false. Id.

On its face, Olsen is clearly distinguishable. Because of the State’s lack of evidence that the defendant ever referred to Spane Building as Spane Mill, or that Spane Mill was the name commonly used to describe the business, it failed to prove that the defendant knew his answer was false. Id. By contrast, in this case, Respondent answered unambiguous questions that were not factually inaccurate. In addition, unlike in Olsen, the record in this case is replete with evidence that Respondent knew her answers were false at the time she provided them. See DP 39, ¶31; DP 42, ¶39; DP 43, ¶44-5; DP 44, ¶47.

Likewise, Respondent’s “contextual” argument (RB 30-33), which relies on State v. Stump, 73 Wn. App. 625, 870 P.2d 333 (1994), is flawed. In Stump, the Court overturned a perjury conviction because the defendant was asked a question that was ambiguous on its face. Defendant was asked: “Have you ever been involved in drugs yourself?”

He answered:

I'm not going to lie. I've smoked pot before. And yes occasionally I drink. But as far as hard drugs, narcotics, cocaine, never. Never. Absolutely not . . . We broke up because of that, behind that reason right there. That was the whole case. If she wasn't on drugs, she's a good girl . . . but I'm not into the drug scene . . . but no I'm not a drug user . . . I do drink occasionally, during football games, and get – you know, party.

Id. at 626. The State alleged that defendant had testified falsely when testifying at a trial where he was accused of burglarizing his ex-girlfriend's home. At the time of the testimony, Stump was serving a jail sentence resulting from a guilty plea to charges of delivery of cocaine. Id. at 627. The State charged that defendant's testimony that he was not "involved" in drugs was false, based on the defendant's admission in his guilty plea to delivering and selling drugs. Defendant argued that he interpreted "involved" in the context of drug usage and addiction only. Id. at 628-89.

The Stump Court framed the issue as "whether the question was so ambiguous that Mr. Stump's answer cannot be held to be a false statement." Id. at 628. In finding that the question was ambiguous, the Court noted that the question preceding the question at issue contributed to the ambiguity, thus supporting defendant's contention that he interpreted the question as relating only to his drug usage. Id. In the preceding

question, Respondent was asked why he had not seen his ex-girlfriend for some time, and he had responded: “Because of her drug involvement again.” Id. The Court noted that in Stump’s allegedly false answer (quoted above), he specifically referenced drug *use*, both by his ex-girlfriend and by himself. His contention that he interpreted the question as relating only to drug usage was thus very plausible. Id. at 629. Furthermore, there was no evidence that Stump knew that the interrogator (Stump’s defense attorney) meant “delivered or sold” when he used the word “involved,” or any evidence that the interrogator himself meant to encompass “delivered or sold” when he used the word “involved.” Id. Thus, the State failed to prove that Stump knew that his statement was false. Id. at 630.

Stump does not apply here because the question Respondent was asked -- “Have you seen him be rageful at any time?” -- was not ambiguous, regardless of what came before or after it. The question had a plain meaning not susceptible to interpretation. “At any time” meant “at any time.” Furthermore, unlike in Stump, Respondent in this case admitted on several occasions after her testimony on February 13, 2002 that, at the time she answered Spalter’s question, she knew she was responding falsely. DP 39, ¶31; DP 42, ¶39; DP 43, ¶44-5; DP 44, ¶47.

Respondent argues that the unstated premise of Spalter’s question

included a limitation to the workplace environment, based on the fact that the preceding questions mentioned the workplace. RB 32. But her claim of an unstated premise to Spalter's question is contradicted by Spalter's use of the unambiguous phrase "at any time." Those words do not become "ambiguous" simply because they were preceded by questions addressing a particular aspect of Respondent's relationship with Hick.

Respondent attempts to buttress her "ambiguity in context" argument by quoting the testimony of Spalter out of context (RB 32-36). Respondent asserts that Spalter "readily acknowledged" that the questions she asked could be answered in the context of the workplace. In fact, Spalter's testimony was that her questions were clear on their face – she was asking about Respondent's observation of Hick's behavior at any time Respondent had been with him, not just in the context of the workplace. Spalter's testimony on cross-examination was:

Q. (From Respondent's Counsel, Kurt Bulmer)

[A]nd then you ask, "Have you seen him be rageful at any time?" I believe your testimony was that you intended to mean by that as expansively as possible, any time, anywhere. Would that be fair as to what you were thinking?

A. Yeah, where she'd seen him, wherever that was, anytime, anywhere.

TR 138-39. On further questioning Ms. Spalter said that "she guessed" the question could somehow be interpreted as being in the workplace only.

TR 139. Later, on re-direct, she again repeated that by using the term “any time” she meant what she said – any time in all the different scenarios in which Respondent and Hick had spent time together. TR 149-50.

Of course, “a person can always postulate unstated premises of the question” that would make an answer “literally true.” Bollin, 264 F.3d at 411. Spalter’s “I guess so” was no more than a statement of the obvious fact that if, as Respondent’s counsel was attempting to do, a person can add hidden meanings and unstated premises, any question can then be argued to be ambiguous. When placed in context, it is clear from Ms. Spalter’s testimony that her question used the term “at any time” in accordance with its plain meaning – any time or place Respondent had been with Hick.

Finally, Respondent herself admitted at hearing that she did not find Spalter’s question ambiguous at all. Respondent testified:

Q. Recognizing that we have speed of thought going on here, nonetheless, as you sit here today what was your reaction to that question?

A. . . . I remember thinking, rageful at any time? Any time at all? The answer would have to be no.

Q. Why would the answer have to be no?

A. Because if she meant any time at all, at all, that would mean I have to say, yes, I have seen him rageful in this relationship that Dave and I had that Ms. Spalter couldn’t have known about or didn’t know about . . .

TR 1661-62. The Hearing Officer correctly found, based on this testimony, that Respondent did not intend to answer the question about Hick's rage in the framework of her observations of Hick in the workplace, but rather in the framework of any time she had been with him. DP 38, ¶ 27.

The Disciplinary Board was thus correct in finding that Respondent's testimony was literally false.

## **2. Respondent Knew Her Testimony Was False**

The Disciplinary Board correctly concluded that Respondent knew she had testified falsely on February 13, 2002. DP 7, ¶ 15. The Disciplinary Board held that, during the weeks and months following her testimony, Respondent "knew, and told others, that her testimony was not truthful and needed to be corrected." *Id.*

The Board's conclusion is fully supported by the facts in the record establishing that Respondent knew that her testimony on February 13, 2002 was false. Indeed, Respondent admitted this on no less than four occasions in the weeks and months following her testimony (including twice under oath).

- On March 3, 2002, Respondent told her father, Zolt Dornay, that she was "not truthful when she testified in Court that she had never seen Hick in a rage." DP 39, ¶31.
- On April 2, 2002, [REDACTED]



- On June 5, 2002, in her sworn declaration under penalty of perjury in the Hick divorce matter, Respondent stated that she “made the decision to perjure herself” on February 13, 2002, and that she had frequently seen Hick fly into rages and rant from the fall of 2001 onwards. DP 43, ¶ 44-45.
- On January 16, 2003, once again under oath during a deposition at the Association, Respondent testified that her testimony on February 13, 2002 that she had never seen Hick rageful, was false. DP 44, ¶47.

Respondent’s multiple admissions that she knew her testimony was false in the weeks and months after the offense are the best evidence of her state of mind.

**3. Respondent’s Statements in One or More Official Proceedings Were Inconsistent**

Respondent testified on February 13, 2002 that she had never seen Hick rageful, rant and rave or berate. DP 37, ¶26. She testified in later official proceedings that she had seen Hick rageful, rant and rave and berate prior to February 13, 2002. DP 42, ¶42; DP 43, ¶44-5; DP 44, ¶47. Her February 13, 2002 testimony was inconsistent with her testimony at the June 5, 2002 protection order hearing, with her declaration in support of Katie’s motion for restraining order and modification of the parenting plan of June 5, 2002, and with her testimony

at the Association's deposition on January 16, 2003. Id. She, therefore, made inconsistent statements under oath in one or more official proceedings.

In sum, the evidence clearly shows that the Disciplinary Board's conclusion that Respondent committed the crime of false swearing was correct and should be affirmed.

**D. THE DISCIPLINARY BOARD ERRED IN FINDING THAT RESPONDENT DID NOT COMMIT PERJURY**

The elements of perjury under the inconsistent statements statute are identical to those of false swearing, except for the additional element that the false testimony must be material to each of the proceedings. See RCW 9A.72.050(2); Washington Practice: Washington Pattern Jury Instructions, Criminal, supra at § 118.22; Concurring Opinions of Bothwell, DP 20; Lee and McMonagle, DP 22-24; In re Pearsall-Stipek, 141 Wn.2d 756, 775, 10 P.3d 1034 (2000). False swearing is a lesser included offense of first degree perjury. Id. at 777.

By a vote of seven to six, the Disciplinary Board concluded that Respondent had not committed perjury. DP 9 n.5. This is error because the testimony regarding Hick's ragefulness clearly was material to the custody and visitation issue and to the issuance of the Order of Protection against Hick, and to Respondent's deposition testimony in the disciplinary

proceeding.

A “materially false statement” is any false statement “which *could* have affected the course or outcome of the proceeding.” RCW 9A.72.010(1) (emphasis added). “It is not necessary that the false testimony bear directly upon the ultimate issue to be material; it is sufficient if it is material to any question that may properly arise in the trial of the case and that may affect the decision of the issue involved.” State v. Daniels, 10 Wn. App 780, 784, 520 P.2d 178 (1974); see also Dynan, 152 Wn.2d at 613-14. The materiality of a false statement is determined by the Court as a matter of law. RCW 9A.72.010(1); Dynan, 152 Wn.2d at 613.

The Hearing Officer (and the nine Board members who concluded that Respondent committed false swearing) correctly found that Respondent’s testimony on February 13, 2002 was material to the proceeding because it affected or could have affected the Court’s decision regarding Hick’s access to Wyatt. DP 47, ¶ 15; DP 7, ¶ 15. Judge Gerald Knight’s March 7, 2002 oral ruling in the dissolution trial shows that he considered Katie’s testimony regarding Hick’s “anger problem,” as well as testimony from others that Hick had no such problem, and ultimately concluded that Hick’s anger was not out of control, and did not present any danger to his son. ASSOC. EX 17 at 14-15. Judge Knight thus

discredited Katie's testimony and credited the testimony of Hick's witnesses (which included Respondent) that Hick was not unduly rageful or violent. Id. Later, when Respondent filed her June 5, 2002 declaration in the Hick dissolution correcting her testimony, and supporting Katie's motions to obtain court orders barring Hick from approaching or exercising visitation rights with Wyatt, Judge Knight "absolutely" relied on Respondent's declaration in entering those orders. TR 65-66; ASSOC. EX 32 (temporary order of June 21, 2002).

Although neither the Hearing Officer nor the Board considered whether Respondent's statements in the protection order hearing and the Association's deposition were material, the materiality of those statements is apparent. Respondent's testimony at the June 5, 2002 protection order hearing detailed several of Respondent's interactions with Hick to persuade the Court to grant Respondent a protection order from Hick, which the Court did. DP 42, ¶42. Finally, Respondent's testimony at the Association's deposition was patently material to the issues being investigated by the Association, i.e., whether Respondent had violated the RPC by giving false testimony under oath.

**E. RESPONDENT DID NOT ESTABLISH THE DEFENSE OF DURESS**

Respondent asks this Court to revisit the Hearing's Officer's factual finding, affirmed by the Disciplinary Board, that Respondent was not under a reasonable apprehension of death or grievous bodily harm when she testified. (RB 40-47). Because the Hearing Officer's findings are supported by substantial evidence, this Court should not disturb them.

**1. The Duress Defense is Limited to Situations Where Respondent Can Show a Reasonable Apprehension of Immediate Death or Grievous Bodily Injury.**

In criminal cases, duress is an affirmative defense in which the defendant "admits that she committed the unlawful act, but pleads an excuse for doing so." *State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994). The strict requirements of the duress statute reflect Washington's reluctance to "allow even the abnormal stresses of life to provide a basis for the defense." *Id.* at 365. The defendant has the burden of proving duress by a preponderance of the evidence. *Id.* at 368-69. Because a successful defense excuses the crime, Washington's duress statute establishes a high burden on Respondent. She must have a reasonable apprehension of "immediate death or immediate grievous bodily injury." RCW 9A.16.060.<sup>8</sup> In addition, the defendant must prove that she would

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<sup>8</sup> The elements of duress under RCW 9A.16.060 are:

(a) The actor participated in the crime under compulsion by another who by

not have participated in the crime except for the duress involved. Id.

Each element of a duress defense must be proven by Respondent. Id.

Courts are particularly skeptical of a duress defense to perjury as a courtroom is one of the safest places a person can be. This is because “[i]n a courtroom, the witness is surrounded by all the protection a court can muster.” Edwards v. State, 577 P.2d 1380, 1384 (Colo. 1978).

The first element of duress requires compulsion by another that creates a reasonable apprehension of *immediate* death or *immediate* grievous bodily injury (emphasis added). “Immediate” means “occurring, acting, or accomplished without loss of time: made or done at once.” State v. Janes, 121 Wn.2d 220, 241, 850 P.2d 495 (1993). See also Riker, 123 Wn.2d at 365 (requirements for duress are higher than for self-defense in that duress requires apprehension of “immediate death or body harm” while self-defense can be proven if there is reasonable fear of “imminent bodily harm”). Thus, Respondent needed to prove that she had a reasonable belief that threats against her or her family would come to fruition when she testified.

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threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

(b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved.

Contrary to Respondent's assertions (RB 45-60), the requirements for proving duress are no different where the defendant asserts that she committed the crime due to fear arising from a claimed abusive relationship. A defendant must still show that she had a reasonable apprehension of immediate death or grievous bodily injury. State v. Williams, 132 Wn.2d 248, 258-59, 937 P.2d 1052 (1997); Riker, 123 Wn.2d at 370. While the Court in Williams held that the defendant should be permitted to present expert evidence as to how her long experience of abuse by her former husband affected the reasonableness of her perception of immediacy, it did not lower the requirements for showing duress. Id.

**2. The Hearing Officer and the Disciplinary Board's Finding that Respondent Was Not Under Duress When She Testified on February 13, 2002 Should Not Be Disturbed**

Determining whether Respondent had a reasonable apprehension of immediate death or grievous bodily harm when she testified is a factual determination. Williams, 132 Wn.2d 248 at 259; Janes, 121 Wn.2d at 240. Although the Hearing Officer and Disciplinary Board placed the specific findings of fact in their conclusions of law (see DP 46, ¶ 11, DP 6, ¶ 11), they should properly be labeled findings of fact. Mislabeled conclusions of law should be reviewed as findings of fact for substantial evidence. Valentine v. Dept. of Licensing, 77 Wn. App. 838, 894 P.2d 1352 (1995).

When reviewing factual findings, the Court will not modify such findings even if made upon conflicting evidence. Huddelston, 137 Wn.2d at 568; Poole, 156 Wn.2d at 212.

The Hearing Officer found, and the Disciplinary Board affirmed, that “the evidence fails to support Dornay’s claim that Hick’s threats or use of force created an apprehension in her mind that she would suffer immediate death or immediate body grievous bodily injury if she testified that she had seen Hick angry or rageful.” DP 46, ¶ 11, DP 6, ¶ 11. The record is replete with evidence that, although Respondent had seen Hick rageful in the contexts of arguments in their relationship, she was not afraid that he would physically harm her if she did not testify as he wished, could have exited the relationship safely at any time, and was not fearful, either before, during or after her testimony. Id. For instance:

- By Respondent’s own admission, prior to her testimony, Hick never threatened her with bodily injury or death if she did not testify as he wished her to. ASSOC. EX 67 (respondent’s January 16, 2003 deposition);
- Although Hick had asked Respondent prior to her testimony to lie about Katie’s “out of control” behavior at the child exchanges, and about additional trips to Ellensburg where Katie did not “show up” with Wyatt, Respondent decided to defy Hick and to testify truthfully about the exchanges. TR 1654-56;
- As a result of defying Hick, Hick called Respondent names and gave her a “verbal beating,” but he did not physically harm her. TR 1668;

- Respondent drove in her own car to the courthouse to testify. Prior to her testimony, she lunched with Stearns, Hick and Todesco at a deli in Everett. Her demeanor was calm and confident, and the lunch conversation was routine. DP 36, ¶ 25; TR 1202, 2305-07, 2482-83;
- Respondent was not afraid of Hick's alleged "mafia" friend, Todesco, on the day of her testimony. TR 1887.
- Respondent was calm and professional on the witness stand, and did not appear fearful in any way. TR 55, 2307-8.
- After testifying, Respondent drove in her own car to Hick's house, where she joined him. The following day she sent Hick roses and cards for Valentines Day. TR 1667, 2349-50, DP 38, ¶ 28.
- Respondent had knowledge of the legal system and connections through her family and her work, which would have enabled her to safely exit the relationship with Hick if she needed to. DP 6, ¶ 11; DP 46, ¶ 11; TR 601-3, 605-07, 721, 747, 1327, 1337-42, 2356-58.

The Hearing Officer had the opportunity to hear and evaluate the credibility of Respondent's testimony that she reasonably feared that Hick would kill or inflict immediate serious bodily injury on her or her family if she testified that she had observed him rageful. The Hearing Officer also heard the testimony of Hick, and of numerous witnesses who observed Respondent's demeanor during the relationship and on the day of her testimony. The Hearing Officer heard numerous days of testimony and considered over 100 exhibits in the hearing, most of them relating to

Respondent's duress defense, and determined that Respondent had not established a reasonable fear of immediate death or grievous bodily harm. There was more than ample evidence to support the Hearing Officer's finding. The findings on conflicting evidence should not be disturbed. Huddleston, 137 Wn.2d at 568.

In addition to showing a reasonable apprehension of immediate death or bodily injury, to prove duress, Respondent also needed to establish that she would not have testified falsely except for the duress involved. RCW 9A.16.060(c). The record shows that Respondent had other motivations to testify falsely, i.e., to avoid the embarrassment of having to disclose the existence of her extra-marital affair with Hick. See DP 50, ¶ (1)(b) ("Dornay's motive in not offering testimony regarding the times she had witnessed Hick engaging in rageful, ranting and raving, and berating conduct was primarily to keep secret her ongoing relationship with Hick.") Thus, Respondent would have committed the crime to avoid the embarrassment of disclosure, regardless of any compulsion from Hick.

**F. RESPONDENT DID NOT ESTABLISH A RETRACTION DEFENSE**

Respondent likewise has not established a retraction defense under RCW 9A.72.060. A successful retraction defense requires that (1) the retraction takes place before the falsification substantially affects the

proceedings; and (2) the retraction takes place “before it becomes manifest that the falsification is or will be exposed.”

Respondent’s retraction of her February 13, 2002 testimony in June 5, 2002 met neither of these conditions. Her retraction took place well after the falsification had affected the proceeding. The Court in Hick v. Hick issued its oral opinion in the dissolution on March 7, 2002 and entered final orders (including a final parenting plan) on May 1, 2002. ASSOC. EX 17-19. See, e.g., United States v. Tucker, 495 F. Supp. 607, 613-14 (E.D.N.Y. 1980) (substantial effect on grand jury proceeding where false testimony resulted in short delay in grand jury indicting another defendant).

Furthermore, long before she retracted, it was manifest to Respondent that her falsification would be exposed. [Respondent herself told the IIU investigators on April 5, 2002 that she lied at Hick’s divorce trial] [PROTECTED], and when she filed for an Order of Protection on May 14, 2002, she detailed how Hick had been rageful and violent toward her. DP 42, ¶ 39; DP 42, ¶ 42. Respondent thus knew that her falsification had or would be exposed before she retracted.

**G. THE HEARING OFFICER HAD DISCRETION TO DISCREDIT THE TESTIMONY OF RESPONDENT’S EXPERT**

Respondent argues that the Hearing Officer abused his discretion

in failing to consider the “unrebutted” testimony of Respondent’s expert on domestic violence, Joan Zegree (RB at 52).<sup>9</sup> Respondent’s argument is meritless because (1) the Hearing Officer did credit parts of Zegree’s testimony (see DP 50, ¶ 2(c)); and (2) neither the Disciplinary Board nor the Hearing Officer were required to “give deference” to the “unrebutted” expert testimony.

The determination of the credibility of witnesses, as well as the appropriate weight to accord to conflicting testimony, is within the discretion of the finder of fact. Kagele, 149 Wn.2d at 813; Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963) (trier of fact, where evidence is conflicting, may believe entirely the evidence submitted by one party and disbelieve the evidence of the other, but also is not compelled to do so). The rule is no different for experts. The trier of fact has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence. Group Health Cooperative v. Washington Dept. of Revenue, 106 Wn.2d 391 at 399, 722 P.2d 787 (1986); Brewer v. Copeland, 86 Wn.2d 58, 74, 542 P.2d 445 (1975).

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<sup>9</sup> In fact, Zegree’s testimony was rebutted by fact witnesses who, unlike Zegree, observed Respondent during the relationship, and reported seeing no signs that Respondent was fearful or distressed. See Testimony of Elizabeth Abbott, a prosecutor who worked closely with Respondent at KDM, TR 2030-32; Testimony of Sandra Meadowcroft, another Prosecutor at KDM, TR 2361-62; Testimony of Joni Njos, a paralegal at the Shoreline District Court who frequently interacted with Respondent, TR 2393.

The Hearing Officer admitted and heard the testimony of Zegree, an expert on domestic and intimate partner violence who had never examined or treated Respondent. TR 1596. He appropriately weighed her testimony, as well as that of the numerous fact witnesses who had observed Respondent during the period when she was involved with Hick, and reached his conclusions as to Respondent's reasonable degree of apprehension on February 13, 2002 based on all the evidence.<sup>10</sup> This Court should not disturb his evaluation of the credibility of witnesses or involve itself in reweighing the evidence. Bland, 63 Wn.2d at 155.<sup>11</sup>

**H. THE HEARING OFFICER PROPERLY EXERCISED HIS DISCRETION IN EXCLUDING THE TESTIMONY OF HICK'S FIRST WIFE**

Similarly, the Hearing Officer acted within his discretion by excluding the testimony of an ex-wife of Hick, whom Hick had been married to for only a few weeks over ten years prior to the hearing.

The Hearing Officer has discretion in deciding evidentiary matters, and a reviewing court will not disturb the Hearing Officer's rulings absent

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<sup>10</sup> Respondent cites to State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988) in support of her argument that the Hearing Officer should have credited Zegree's testimony in its entirety. RB 53-60. However, Ciskie does not compel a trier of fact to blindly credit all of the testimony of an expert on battered woman syndrome. The Court simply upheld the trial court's discretionary decision to admit such testimony to rebut a claim by a defendant charged with rape that the victim's failure to report the rapes indicated consent. Here, the Hearing Officer admitted Zegree's testimony, and properly exercised his discretion in weighing it against the testimony of other witnesses.

<sup>11</sup> Similarly, despite Respondent's contentions (RB 24-25), the Hearing Officer was free to disregard in whole or in part the testimony of King County Deputy Rob Mathis, one of many fact witnesses who testified regarding Hick's personal history and character.

a showing of manifest abuse of discretion. Whitney, 155 Wn.2d at 465; see also State v. Cronin, 142 Wn.2d 568, 585, 14 P.3d 752 (2000). The Hearing Officer may exclude evidence that is irrelevant, immaterial or unduly repetitious. ELC 10.14(d)(1).

Respondent argues that the Hearing Officer abused his discretion because the ex-wife's testimony would allegedly have buttressed Respondent's claim that she testified under duress, supposedly because the ex-wife would have testified how she was also fearful of Hick. (RB 47-52). However, as the Hearing Officer correctly stated in his ruling, since Respondent did not know of the ex-wife's allegations in February 2002, those allegations would be irrelevant to Respondent proving a reasonable apprehension of death or bodily harm in February 2002. TR 796. Furthermore, the ex-wife's testimony concerned events that were remote in time, as the marriage had occurred approximately ten years previously. Id. The Hearing Officer did not, therefore, abuse his discretion in excluding the evidence.

## **I. THE APPROPRIATE SANCTION IS DISBARMENT**

### **1. The ABA Standards Govern the Sanction in Lawyer Discipline Cases**

The Washington State Supreme Court applies the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) in all lawyer discipline cases. In re

Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000).

Applying the ABA Standards involves a two-step process. The first is to determine a presumptive sanction by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential injury caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The second is to consider any aggravating or mitigating factors that might alter the presumptive sanction. Id.

In this context, "injury" means harm to a client, the public, the legal system or the profession that results from a lawyer's misconduct. ABA Standards, Definitions. Injury may be actual or potential. Id. "[A] disciplinary proceeding does not require a showing of actual harm. . . . The rationale is the need for protection of the public and the integrity of the profession." Halverson, 140 Wn.2d at 486.

## **2. Disbarment Is the Presumptive and Appropriate Sanction for Intentionally Misleading the Court**

ABA Standards 5.1 and ABA Standards 6.1 apply when a Respondent intentionally deceives the court. These ABA Standards provide:

### ***5.1 Failure to Maintain Personal Integrity***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

**5.11 Disbarment is generally appropriate when:**

- (a) **a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses.**
- (b) **a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.<sup>12</sup>**

***6.1 False Statements, Fraud, and Misrepresentation***

**6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.**

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the Court or that material information is improperly being withheld, and takes no remedial

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<sup>12</sup> ABA Standards 5.11 in its entirety is attached as Appendix 4.

action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.<sup>13</sup>

(Emphasis added).

ABA Standards 6.11 refers to intentional deceptions to the court. It makes no reference to criminal conduct. Similarly, ABA Standards 5.11(b) does not require that the lawyer have committed a crime. Thus, even in the absence of a finding of perjury and/or false swearing, Respondent's conduct here - intentionally deceiving the tribunal - should have a presumptive sanction of disbarment under ABA Standards 6.1 and/or ABA Standards 5.11(b).

The Disciplinary Board unanimously concluded that Respondent acted with intent to deceive the Court. DP 4-18. Intent is the "conscious objective or purpose to achieve a particular result."<sup>14</sup> Although Respondent argues that the Board erred in not adopting the Hearing Officer's mental state of "knowing" misconduct, (RB 41-42), the Disciplinary Board correctly concluded, based on its review of the evidence, that Respondent "lied with intent to mislead the Court." DP 6, ¶ 4. Indeed, there is no other possible conclusion from the Hearing

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<sup>13</sup> ABA Standards 6.1 in its entirety is attached as Appendix 5.

<sup>14</sup> "Knowing" is defined as the "conscious awareness of the nature of the attendant circumstances of the conduct without the conscious objective or purpose to accomplish a particular result." ABA Standards, Definitions.

Officer's own findings. The Hearing Officer found that Respondent "did not plan to answer the questions about Hick's rage in the framework of her observations of Hick in the workplace" at the time she testified, DP 38, ¶ 27, that Respondent admitted in her court declaration on June 5, 2002 that she had intentionally "perjured herself" on February 13, 2002 (DP 43, ¶ 45), and that Respondent misled the Court because if she had told the truth, "she would have had to disclose the existence of her secret extra-marital affair with Hick." DP 46, ¶ 10. Thus, Respondent acted with the conscious objective to deceive the Court, as she herself later admitted under oath.

As both the Disciplinary Board and the Hearing Officer concluded, Respondent's conduct caused actual or potential injury to Hick's young child by misleading the Judge who made the visitation decisions in the case. DP 8, ¶ 3, DP 47, ¶ 15. Respondent's testimony corroborated the Guardian Ad Litem's conclusions that Hick was not a rageful person, and thus should receive plentiful access to Wyatt under the parenting plan. TR 57-58; ASSOC. EX 17. The Court revoked these rights when Respondent later informed Judge Knight of Hick's rageful conduct towards her. ASSOC. EX 32. An attorney's misconduct causes "injury" if the conduct results in actual or potential injury to members of the public, the legal system, or the legal profession. See ABA Standards, Definitions; Dynan,

152 Wn.2d at 618. The fact that Hick never exercised his generous visitation rights in the period between the false testimony and Respondent's correction of that testimony because of continuing disputes with his ex-wife (see TR 1210-1211) had no effect on the degree of potential injury that resulted from Respondent's misconduct. In addition, there was an actual and significant adverse affect on the proceeding, as Judge Knight had to reopen the case and schedule new hearings.

Both the Disciplinary Board and the Hearing Officer also found that by deceiving the Court, Respondent engaged in conduct that was prejudicial to the administration of justice. DP 8, ¶ 3, DP 47, ¶ 15.

This Court recently emphasized the propriety of disbarment for a lawyer who engaged in intentionally deceitful conduct in Whitt, 149 Wn.2d 707, notwithstanding that the misconduct did not constitute a crime. Whitt falsified evidence submitted to the Association in response to a grievance filed against her. The Court held that Whitt's intentional falsification of documents warranted disbarment because it reflected "adversely on the lawyer's ability to practice law, the public perception of the legal system, and the judicial process as a whole." Id. at 721. The conduct of Whitt, like that of Respondent in this case, involves "the most egregious kind" of charges that can be made against a lawyer. Whitt, 149 Wn.2d at 720.

**3. Disbarment Is the Appropriate Sanction for Committing the Crimes of Perjury or False Swearing.**

Though a finding of criminal conduct is not required for disbarment where a lawyer intentionally misleads the Court, if this Court were to find that Respondent committed perjury or false swearing, the presumptive sanction of disbarment applies under both ABA Standards 5.11(a) and ABA Standards 6.11.

A lawyer who commits perjury on the stand and deceives the Court must be disbarred. Whitney, 155 Wn.2d at 467 (lawyer who, when acting as Guardian Ad Litem, provided false testimony in dissolution proceeding, is subject to disbarment under ABA Standards 5.11 and ABA Standards 6.11). When deciding the appropriate sanction in a case where a lawyer has committed a crime, the Court considers the severe damage to the integrity of the profession. In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 846 P.2d 1330 (1993). In Petersen, the Court specifically rejected the Disciplinary Board's imposition of suspension and probation as too lenient on a lawyer who had converted client funds, even though it acknowledged the existence of several mitigating factors. The Court emphasized that it was departing from the Board's recommendation and ordering disbarment because "violations of the law by lawyers contribute to the erosion of respect for legal institutions and the

law.” Id. at 872. When lawyers intentionally commit criminal acts, imposition of the presumptive sanction of disbarment serves the crucial purpose of lawyer discipline in preserving public confidence in the legal system. Id. See also In re Lamb, 49 Cal. 3d 239, 776 P.2d 765 (1989) (disbarment for lawyer who falsely impersonated her husband, notwithstanding lawyer’s claim that her husband was abusive and compelled her to impersonate him for purpose of taking the Bar Examination); In re Angel R. Pena, 164 N.J. 222, 753 A.2d 633 (2000) (two lawyers who committed perjury by giving false testimony in a civil trial disbarred); In re Hutchinson, 215 Or. 36, 332 P.2d 637 (1958) (disbarment for lawyer who committed perjury).

**4. The Disciplinary Board Correctly Struck Three Mitigating Factors.**

The Disciplinary Board unanimously concluded that the Hearing Officer had improperly applied three mitigating factors. The Disciplinary Board acted properly in striking these mitigators as they were either not supported by the facts in the record or by law.

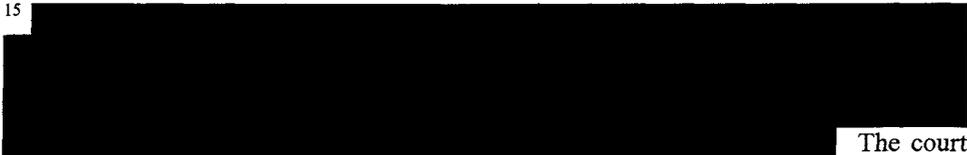
First, the Disciplinary Board struck the mitigator of timely good faith effort to rectify consequences of misconduct. The Disciplinary Board correctly found that Respondent’s correction of her false testimony was not timely, and that, as a prosecutor with experience in domestic

violence cases, she understood the danger to the child in delaying truthful testimony. DP 9, ¶ (d). Respondent admitted that she waited almost four months to correct the testimony, notwithstanding her assertions that she knew her testimony was false at the time she provided it. Final orders were entered on May 1, 2002, approximately five weeks before Respondent's correction. ASSOC. EX 19 (final parenting plan entered on May 1, 2002). Thus, there was ample evidence in the record that Respondent was not timely in correcting her testimony, and waited to correct it when it best suited her, rather than immediately correcting it to best serve the legal system.<sup>15</sup>

The Disciplinary Board also properly rejected the mitigator of "imposition of other penalties and sanctions." DP 9, ¶ (k). There was insufficient evidence in the record that Respondent had suffered any other "penalties or sanctions" from her conduct. Though the Hearing Officer stated that Respondent "lost her job" and was "forced to move away," Respondent testified that she left her job voluntarily. TR 1318. There was, therefore, no factual basis for the finding. The Hearing Officer also

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 The court should not disturb credibility determinations of the Hearing Officer. Kagele, 149 Wn.2d at 812.

found that Respondent had been subject to “public humiliation.” Although the Disciplinary Board did not address the issue, even if Respondent did experience public humiliation, humiliation or embarrassment does not conform with the plain meaning of the term “penalty and sanction,” and the mitigator should not be expanded to include every conceivable consequence of misconduct.

Finally, the Disciplinary Board struck the mitigator of “remorse.” The Disciplinary Board, in reviewing the entire record, did not find Respondent’s assertions of “remorse” convincing. Although the Disciplinary Board did not explain its reasoning for striking this mitigator, its adoption of the aggravator of “dishonest or selfish motive” and its conclusion that Respondent “lied with intent to mislead the Court” indicates that the Disciplinary Board believed that Respondent acted selfishly, and did not believe that any remorse Respondent expressed was genuine.

**5. The Disciplinary Board Improperly Applied the Mitigator of Full and Free Disclosure and Cooperative Attitude**

The Disciplinary Board erred in not striking another mitigator - “full and free disclosure to disciplinary board or cooperative attitude towards proceedings.” Attorneys are, and should be, expected to cooperate with the discipline process as part of their professional

obligations to the public and the self-regulatory system. “Cooperating with the disciplinary proceedings is not a mitigating factor, even though lack of cooperation may be an aggravating factor.” Whitt, 149 Wn.2d at 721 (quoting Huddleston, 137 Wn.2d at 579).

**6. The Disciplinary Board Properly Applied the Three Aggravating Factors.**

As found by both the Disciplinary Board and the Hearing Officer, Respondent acted with a dishonest or selfish motive in testifying falsely. Her “primary motive” in not offering testimony about Hick’s rageful tendencies was to keep secret her extra-marital affair with Hick. DP 50, ¶ 1(b). In short, Respondent was willing to mislead the Court to avoid revealing a secret affair. Respondent acted selfishly to avoid the consequences of her own personal decisions. The evidence fully supports applying this very significant aggravator. See Christopher, 153 Wn.2d at 681-82 (selfish motive significant aggravator where lawyer acts to protect herself from her own mistakes).

As to vulnerability of victim, it can scarcely be disputed that the three-year old child affected or potentially affected by Respondent’s false testimony was vulnerable. Both the Disciplinary Board and the Hearing Officer found that Hick’s propensity for ragefulness was highly relevant to the custodial and visitation decisions of the Court, and thus affected the

child. DP 7, ¶ 15; DP 47, ¶ 15. Vulnerability of victim is, therefore, a substantial aggravator.<sup>16</sup>

Finally, the Disciplinary Board correctly found that Respondent's substantial experience in the practice of law, almost all of it as a prosecutor, was an aggravating factor. The Board implied that this aggravator deserved special weight by stating that Respondent's failure to timely correct her testimony was particularly troubling given that, based on her prosecutorial experience in domestic violence cases, she should have had an enhanced understanding of the danger to a child in delaying truthful testimony. DP 9, ¶(d).

**7. The Board Erred in Determining that the Presumptive Sanction Should be Mitigated to a Three-Year Suspension.**

The Board properly applied three highly significant aggravators. It properly struck three mitigators, but incorrectly failed to strike one mitigator, cooperation with the disciplinary proceeding. Thus, the Board should properly have weighed three significant aggravators against the two remaining mitigators, *i.e.*, personal and emotional problems and absence of prior discipline.

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<sup>16</sup> Although Respondent now argues that she has consistently testified that Hick was not a danger to his child, and thus no harm would have occurred to the child if Hick had exercised his visitation rights, RB 45, she has not been consistent in testifying that Hick posed no danger to children. In petitioning for an order of protection, Respondent stated that Hick had boasted to her how easy it would be to "put a bullet through a child's head." ASSOC. EX 38.

Personal and emotional problems are not regarded as a significant mitigating factor (in the absence of a finding of a mental disability) in cases where the Respondent has engaged in serious misconduct warranting disbarment. See Christopher, 153 Wn.2d 669 at 683 (where attorney has engaged in criminal activity, and personal and emotional problems do not rise to the level of a mental disability, the mitigator of personal and emotional problems will be given little weight); In re Disciplinary Proceeding Against Selden, 107 Wn.2d 246, 728 P.2d 1036 (1986) (stressful divorce not a significant mitigating factor where Respondent stole from law firm – attorney disbarred).

Here the Hearing Officer found, and the Disciplinary Board affirmed, that Respondent had engaged in an extra-marital affair with a controlling and temperamental individual, which negatively affected her marriage. DP 50, ¶1(b); DP 9. Although Respondent felt scared at times during the relationship when Hick would be threatening, there were other times when she was not afraid of him, or unreasonably interpreted his jokes to be threats. See DP 46, ¶ 9, ¶ 11. She also had knowledge of the legal system and connections to law enforcement officers and others in the legal system that would have allowed her to leave the relationship safely. DP 46, ¶11. Thus, Respondent could have exited the relationship, but decided to continue in it. Respondent's "personal and emotional

problems” were, therefore, partially brought upon herself. Under such circumstances, this mitigator should receive minimal weight.

Absence of prior discipline is also not a significant mitigator, and does not justify a reduction in a presumptive disbarment sanction, when the Respondent has deceived the tribunal or engaged in other serious misconduct. See, e.g., Whitt, 149 Wn.2d 707 at 722; In re Disciplinary Proceeding Against Vetter, 104 Wn.2d 779, 794, 711 P.2d 284 (1985).

The Disciplinary Board thus erred in its conclusion that the weight of the mitigating factors exceeds the weight of the aggravating factors. There is insufficient justification to vary the sanction from the presumptive sanction of disbarment.

#### **8. Disbarment Is Not a Disproportionate Sanction**

Respondent has the burden of showing that the sanction imposed is disproportionate. In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 97, 101 P.3d 88 (2004). Respondent is incorrect that disbarment is a disproportionate sanction. In fact, the Court has imposed disbarment in two recent cases with similar facts.<sup>17</sup>

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<sup>17</sup> Respondent also raises other factors originally established by this court in In re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 667 P.2d 608 (1983) as relevant to sanction analysis. However, this court has retained only two of the Noble factors, *i.e.*, proportionality of the sanction, and degree of unanimity of the Disciplinary Board. See In re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 256-59, 66 P.3d 1057 (2003).

In Whitney, 155 Wn.2d 451, the Court disbarred an attorney, who, when testifying as a Guardian Ad Litem in a dissolution proceeding, falsely asserted that he had spoken to the school teachers of the children who were the subject of a custody dispute. Like Respondent here, Whitney deceived the Court, and therefore engaged in conduct prejudicial to the administration of justice. Id. at 467.

In Whitt, 149 Wn.2d 707, the Court disbarred an attorney who was not found to have committed any criminal conduct, but who deceived the Association by falsifying evidence in her disciplinary proceeding. Whitt, like this matter, concerns a lawyer's underlying veracity, and the lengths the lawyer is willing to go to protect her own interests while disregarding his/her obligations to tell the truth. The Court stated Whitt's lack of veracity weighed heavily in favor of disbarment. Id. at 721.

Respondent references four cases, which she claims show disproportionality. RB 67-52. In re Disciplinary Proceeding Against Plumb, 126 Wn.2d 334, 892 P.2d 739 (1995) involved welfare fraud. The Court imposed suspension rather than disbarment due to bar counsel's concession that disbarment was disproportionate to two other cases in which lawyers received stipulated suspensions. Id. at 339-40, 343-45. The Court has subsequently made clear that it was inappropriate to rely on stipulations when assessing proportionality. In re Disciplinary Proceeding

Against Boelter, 139 Wn.2d 81, 103, 985 P.2d 328 (1999). Plumb, therefore, should not be used to analyze proportionality here. In addition, the harm in Plumb -- financial harm to the welfare system, for which restitution was ordered -- was far less substantial than the actual harm to the legal system and the potential harm to the child here.

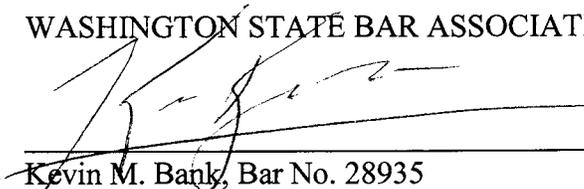
Christopher, 153 Wn.2d 669, is distinguishable by the fact that, in Christopher, the Court found eight mitigators, which, when weighed against only two aggravators, justified a reduction in the presumptive sanction of disbarment. Id. at 683- 86. Dynan, 152 Wn.2d 601, did not involve false testimony. Furthermore, although Dynan misrepresented his attorney fees to the Court, he did not intend to mislead the Court, and he did not act with a dishonest or selfish motive. Id. at 621. In this case, by contrast, Respondent acted with a dishonest and selfish motive and did intend to mislead the Court. Finally, In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 48 P.3d 311 (2002) is also inapposite because it involved knowing rather than intentional conduct, and concerned different RPC violations (ex-parte communications with the Court and contact with an opposing party Carmick knew to be represented).

**V. CONCLUSION**

Respondent intentionally misled the Court and committed the crimes of perjury and false swearing when appearing as a witness in a dissolution proceeding. Respondent's conduct caused potential injury to a vulnerable victim, severely damaged the integrity of the legal profession and subverted the administration of justice. Disbarment is the appropriate sanction.

RESPECTFULLY SUBMITTED this 9th day of June, 2006.

WASHINGTON STATE BAR ASSOCIATION



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Kevin M. Bank, Bar No. 28935  
Disciplinary Counsel

# **APPENDIX 1**

FILED

JAN 20 2005

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re	)	Public No. 03#00088
	)	
MARGITA A. DORNAY,	)	
	)	FINDINGS OF FACT,
Lawyer.	)	CONCLUSIONS OF LAW, AND
	)	HEARING OFFICER'S
WSBA No. 19879	)	RECOMMENDATION
_____	)	

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), a disciplinary hearing was held before the undersigned Hearing Officer on June 15-18, November 15-19, and December 27-29, 2004. Respondent Margita A. Dornay ("Dornay") appeared at the hearing and was represented by her attorney, Kurt M. Bulmer. Disciplinary Counsel Kevin Bank and Senior Disciplinary Counsel Jean K. McElroy appeared for the Washington State Bar Association ("WSBA").

**I. FORMAL COMPLAINT**

The First Amended Formal Complaint filed by the WSBA on April 27, 2004, charged Dornay with the following three counts of misconduct:

**COUNT 1**

In making inconsistent material statements under oath in two or more official proceedings, as set forth in this complaint and appendices, one or the other of which was false and which Respondent knew to be false, Respondent committed the crime of perjury (RCW 9A.72.050(1)) and/or engaged in dishonesty, deceit and/or

misrepresentation, in violation of RPC 8.4(b) and/or RPC 8.4(c) and/or RPC 8.4(d) and/or RPC 3.3(a)(1).

### COUNT 2

In making inconsistent statements under oath in two or more official proceedings, as set forth in this complaint and appendices, one or the other of which was false and which Respondent knew to be false, Respondent committed the crime of false swearing (RCW 9A.72.050(1) and (2)) and/or engaged in dishonesty, deceit and/or misrepresentation, in violation of RPC 8.4(b) and/or RPC 8.4(c) and/or RPC 8.4(d) and/or RPC 3.3(a)(1).

### COUNT 3

In testifying falsely under oath in Snohomish County Superior Court on February 13, 2002 and/or June 5, 2002 and or King County District Court on June 5, 2002 and/or at her WSBA deposition on January 16, 2003, Respondent violated RPC 3.3(a)(1), RPC 8.4(c) and/or RPC 8.4(d).

Based upon the pleadings in this case, and the testimony, documentary evidence, and exhibits admitted at the disciplinary hearing, the Hearing Officer makes the following findings of fact:

### II. FINDINGS OF FACT

The following facts were proven by a clear preponderance of the evidence:

1. Dornay was admitted to the practice of law in the state of Washington on November 13, 1990.
2. Dornay has no prior disciplinary record.
3. At all material times, Dornay was a partner in the law firm Kenyon Dornay Marshall, and prosecuted, or supervised the prosecution of, misdemeanor cases in various cities in King County, Washington.

4. At all material times, Dornay was, and is, married to Robert Noe, who is also a lawyer, and Dornay and Mr. Noe have four young daughters.

5. In the course of prosecuting misdemeanors in the City of Kenmore, Dornay met David Hick ("Hick"), a deputy employed by the King County Sheriff's Office who was assigned to the City of Kenmore as a patrol officer.

6. In January 2001, Hick filed a petition for dissolution of his marriage to Kate Hick and to establish a parenting plan for the Hicks' son, Wyatt, born October 14, 1999.

7. In March of 2001, after becoming aware of threats against Dornay by a defendant whom Dornay had prosecuted, Hick gave Dornay a handgun for her protection. Although Dornay initially did not want the gun, she kept it, applied for a concealed weapons permit with the help of Hick, and later went to a gun range to learn how to shoot the gun. Dornay kept the handgun in her car.

8. In mid-April 2001, Dornay picked up Hick at his house and Dornay and Hick went skiing at Stevens Pass. During this ski outing, Dornay and Hick shared personal information with each other.

9. Within the next few weeks following the ski trip, Dornay and Hick began having coffee and lunch together once or twice a week. Dornay talked to Hick about her personal life, including frustrations in her marriage, and Dornay was receptive to Hick's attention. Hick is a big, strong, physically-intimidating man. Dornay is an attractive, athletic woman.

10. During April and May 2001, Dornay and Hick frequently communicated by telephone using their work telephones. In late May 2001, Hick purchased two cell phones, one for Dornay and one for Hick, and Dornay and Hick began using the private cell phones to communicate with each other frequently. At that time, Dornay

and Hick also had pagers and used numeric codes to send endearment messages, such as "I love you very much," to each other.

11. On July 2, 2001, Hick signed a new Will disinheriting his wife, bequeathing to Dornay the sum of \$100,000, and naming Dornay as contingent trustee and guardian for Hick's son. Dornay did not know about Hick's revised Will before he signed it and she was surprised when Hick gave a copy of his revised Will to her.

12. On or about July 3, 2001, the Snohomish County Superior Court entered an order granting Hick visitation with his son, Wyatt. Because Hick's wife had moved to Spokane, the order directed that Hick and his wife exchange Wyatt for visitation purposes at the midway point in Ellensburg. On July 22, 2001, at Hick's request, Dornay accompanied Hick to Ellensburg and back for a child exchange.

13. In the summer or early fall of 2001, Hick told Dornay that her husband was having an affair; that Hick was connected in some way to the Mafia; and that his friend, Joe Todesco, whom Hick called "Uncle Joe," was the head of a Mafia family. Hick stated to Dornay that, as a prosecutor, she was a threat to "the family" and that Hick was the only thing protecting her.

14. In the late summer and early fall of 2001, Dornay and Hick frequently met each other at Hick's house for lunch or after work on weekdays. At some point during this time, the flirtatious relationship between Hick and Dornay, characterized by holding hands and kissing, became a sexual relationship. Dornay testified that the first two sexual acts with Hick were not consensual and were traumatic. Dornay told no one about what happened. Thereafter, Dornay and Hick had sex once or twice a week throughout the fall of 2001. [REDACTED]

[REDACTED]

15. In the fall of 2001, Hick picked up Dornay's young daughters at school at Dornay's request. In September 2001, Hick gave Dornay a gold and diamond bracelet and a gold ring. On October 13, 2001, which was both Dornay and Hick's birthday, Dornay gave Hick a birthday card in which she wrote "I love you so much!" and Hick gave Dornay a platinum diamond cross pendant with a chain. Dornay also gave Hick pictures of herself and family, and gifts of clothing. Hick somehow obtained, but not from Dornay, a photo of Dornay in a bikini taken in Hawaii when Dornay was younger.

16. In October 2001, Dornay accompanied Hick on another trip to Ellensburg to pick up Wyatt for visitation.

17. On November 17, 2001, at a Kenyon Dornay Marshall partnership meeting at Mr. Kenyon's house, Dornay told others she was leaving for a trip by herself to Vancouver, British Columbia, after the meeting. Dornay appeared excited and looking forward to her trip. After the partnership meeting Dornay and Hick went to Vancouver, British Columbia, for two nights at the Pan Pacific Hotel. At the hotel on Saturday night, Hick and Dornay had an argument about whether they should go to sleep or stay out later to go dancing. Hick became enraged, called Dornay a "fucking bitch" and purposely slammed his head on a night stand with a thick layer of glass on the top, shattering the glass and cutting his scalp so severely that there was blood all over the room and Hick. Dornay called hotel security personnel, who persuaded Hick to go to the hospital, where Hick refused treatment and would not cooperate. Hick and Dornay then returned to the Pan Pacific Hotel, which had moved them to a new room. Dornay finally got Hick calmed down and

stopped the bleeding. Hick then sat Dornay on the edge of the bed and lectured her to the effect "You betrayed me. You shouldn't have called security. If you betray me, I'll fucking kill you."

18. A few days after returning to Seattle from Vancouver, Hick gave Dornay an expensive tanzanite ring that Dornay had admired while she and Hick were in Canada.

19. Some time during the fall of 2001, Dornay became concerned for her safety. Hick would have angry outbursts if Dornay did anything to lead Hick to believe Dornay was not being true to him. The outbursts typically occurred in Hick's home when Dornay was trying to leave. To settle him down, Dornay would tell Hick she loved him, and Dornay told Hick at one point she would leave her husband on January 1, 2002.

20. Dornay testified that on one occasion at Hick's house, when Hick wanted to have sex and Dornay did not, Hick grabbed his service revolver, placed it in Dornay's hand, put the barrel to his temple, and told her to pull the trigger because if she did not love him, he wanted to die. When Dornay then began to cry and said "Please don't do this. I love you," he put the gun down and they hugged and kissed.

21. In late November or early December 2001, Dornay wanted to buy a particular horse called Tin Tin at Branch's Quarterhorses in Bothell. When Dornay went to purchase Tin Tin, she was told the horse had already been purchased. Unbeknownst to Dornay, Hick, through his friend, Joe Todesco, purchased Tin Tin for Dornay for \$5,500 with money borrowed from Mr. Todesco. Mr. Todesco testified he personally went to the stable, paid for the horse with cash, and received the bill of sale in the name of "John Hall," his friend from Louisiana, who was in the horse business. Hick gave Tin Tin's registry to Dornay for a Christmas present and Dornay's children

and Dornay began riding Tin Tin. At Christmas time, Dornay called Hick and told him how much she was looking forward to next year at Christmas time with him and all their children.

22. In early to mid-January 2002, Dornay asked her husband on several occasions to move out of the family home because things were not going well. Her husband said he would not move out and, after a few days, Dornay changed her mind.

23. The relationship between Dornay and Hick was intense and emotional. Dornay and Hick argued over the fact that Hick was dating other women, over whether Dornay should or would leave her husband to be with Hick, and over their true intentions in the relationship. Dornay and Hick had a pattern of arguments and reconciliations in the relationship. This pattern is consistent with the cycle of tension, verbal abuse or assault, and a "honeymoon" period that characterizes domestic violence, or, in this case, intimate partner violence.

24. On January 27, 2002, Dornay and her three younger daughters traveled with Hick to visit Hick's mother, Sylvia Stearns, in Oregon. The primary purpose of the trip was to purchase a saddle for the horse Tin Tin. No sexual activity occurred between Dornay and Hick on this trip.

25. On February 13, 2002, Dornay voluntarily testified at Hick's divorce trial before Superior Court Judge Gerald L. Knight in the Snohomish County Superior Court. Hick was represented at the trial by attorney Ruth Ann Spalter. Hick did not tell Ms. Spalter that he had an intimate relationship with Dornay. Before going to court, Dornay joined Hick, Mrs. Stearns, and Joe Todesco for lunch at a delicatessen in Everett. Ms. Spalter had only a brief conversation with Dornay outside the court

before Dornay testified. Dornay understood that she would be testifying about the child visitation exchanges she had witnessed.

26. When testifying as a witness in the *Hick v Hick* divorce trial, Dornay was very calm, collected, and professional. Hick's attorney, Ruth Spalter, asked Dornay some background questions about how long Dornay had known Hick, how often Dornay had seen Kate Hick, the two child exchanges Dornay had witnessed, and what Dornay had observed about Hick's interactions with Wyatt. Ms. Spalter then asked and Dornay answered as follows:

Q Okay. You've seen, I guess, Dave testify in a court on behalf of the State or the County, or whatever?

A Often, correct, often.

Q Have you ever seen him, quote, on the job or out at work?

A I actually did two ride alongs with Dave. So I actually have seen him on work for extends [sic] periods of time, correct.

Q When was that, approximately?

A I would say both occurred this summer.

Q This past summer?

A Correct

Q Okay. Have you seen him rageful at any time?

A Rageful?

Q Yeah.

A No.

Q Rant and raved?

A No.

Q Berate?

A No. I have to admit that I have seen him use what I call cop tone. He is occasionally a transport officer for our in-custody, and we have had a couple in-custody become unruly in the courtroom, and obviously he's taken a fairly aggressive stand in order to subdue those, and that was in open court with the judge on the bench, and it got the appropriate reactions from the defendants. But rage, no. Stern, yes.

Q Okay. Have you seen him in any way rage at his son?

A No, absolutely not. He is a very - from the three occasions that I've seen, he's a very devoted, gentle, very attentive father.

(Ex. 16, p. 6-7)

27. Dornay testified that when she answered "No" to the question of whether she had seen Hick rageful at any time, she would have signed her own death warrant if she had answered yes, meaning that she would have expected physical retaliation later from Hick. Dornay also testified she did not plan to answer the question about Hick's rage in the framework of her observations of Hick in the workplace, but that either by luck or instinct she did so.

28. On February 14, 2002, St. Valentine's Day, Dornay delivered a large bouquet of roses to Hick, mailed Hick a card, and had at least five telephone conversations with him. The next day, Dornay mailed Hick another card in which she professed her love for him and stated she missed him.

29. During the period from February 15 through February 23, 2003, Dornay left her family dog in the care of Hick while she and her family went on a ski vacation to California. During the ski trip, Dornay broke her arm while snowboarding.

Dornay called Hick from California. Dornay returned from California with her arm in a sling.

30. Dornay's father, Zsolt Dornay, was a King County Deputy Sheriff for many years before his retirement a few years ago. During a portion of that time he was the point man on the SWAT team. On February 28, 2002, Dornay's family became worried when Dornay was not home late in the evening. At that time, Dornay's arm was broken and she was taking pain medication. Zsolt Dornay had previously observed Dornay with Hick, and Zsolt Dornay called Hick at his home to inquire about Dornay's whereabouts. Hick responded by yelling "Do you think she is whoring with me? You probably think I'm with the mob too." When Hick finally calmed down, he told Zsolt Dornay he had not seen Dornay that night at all.

31. On March 3, 2002, Zsolt Dornay was concerned about how Dornay looked and had been acting. Dornay told her father about her relationship with Hick, that Hick was physically abusive, and that she felt she and her family were in danger. Dornay described Hick as a psycho with terrible emotional outbursts. Dornay also told her father she was not truthful when she testified in court that she had never seen Hick in a rage. Zsolt Dornay told Dornay she needed to "get right with God" and he took her to St. Mark's chapel to pray.

32. On March 4, 2002, Dornay told Margaret Starkey, her friend and the law office administrator for Kenyon Dornay Marshall, that she had befriended Hick, but that Hick had become violent and threatening. Dornay told Ms. Starkey that Hick was obsessed with her and that he had threatened to kill or harm Dornay, Dornay's husband, and members of the law firm. Dornay made Ms. Starkey promise that she would not tell anyone about the situation. On or about March 5, 2002, Dornay and Ms. Starkey opened a safe deposit box at a bank in Issaquah and placed in the safe

deposit box a copy of Hick's July 2, 2001 Will, a color photo of Hick in uniform, and Dornay's cell phone that Hick had given her.

33. On March 6, 2002, Dornay greeted Hick at court, but Hick ignored her. The same day, Dornay went to Hick's house at approximately 2:30 p.m. before Hick got home from work, and dropped off some of Hick's legal files that Dornay had been working on. Dornay called Hick to tell him she would mail him his house keys and that she assumed he would sell the horse Tin Tin. Hick called Dornay back and he was abusive, threatening and out of control.

34. On March 7, 2002, Dornay told Ms. Starkey that she was going to meet with Hick later that day to convince Hick to leave her alone. Ms. Starkey was concerned about Dornay's safety and tried to convince Dornay not to see Hick. Ms. Starkey suggested Dornay write out a statement that could be given to the authorities if anything happened to her. Dornay wrote out a statement in which she said that after she had left the voicemail message for Hick he called and told her to "quit fucking around with him because he was going to unleash a fury on me like hell has never seen." and that Hick "was the only thing between me and Joe Todesco that was keeping my family safe. Now that I had made him as an enemy that I should band together everyone I knew so my family could be protected." Dornay also wrote "He said that within six months everything I loved would be destroyed and he would take great pleasure in hurting me because I had hurt him so badly." Dornay also stated "I am terrified by Dave. I honestly believe that if I can't placate him that he will at a minimum hurt, even kill me or those I love. He is perfectly capable of killing me 'out of love for me' and then taking his own life." (Ex. 34)

35. Ms. Starkey kept Dornay's statement. Dornay agreed to call Ms. Starkey when she left Hick's residence. Dornay also agreed that Ms. Starkey

could call Dornay's father, Zsolt Dornay, if Ms. Starkey did not hear from Dornay by 11:00 p.m. on March 7, 2002.

36. On the evening of March 7, 2002, Dornay met Hick at his house to break off their relationship. During the course of the evening, Dornay and Hick drove to Dornay's office in Dornay's car because she said she had to pick up her daughter's birthday party invitations. At the office, Hick remained in the car while Dornay went into the office by herself. Dornay picked up the invitations and returned to her car. They drove back to Hick's house where Dornay and Hick had an argument. During the argument, among other things, Dornay slapped Hick twice in the face and Hick threw Dornay's car keys out in the snow. When Dornay failed to call Ms. Starkey by 11:00 p.m. as was pre-arranged, Ms. Starkey called Dornay's father a little after 11:00 p.m. During that telephone call, Ms. Starkey received a call from Dornay telling Ms. Starkey that was she was all right. When Dornay returned home, she told her husband about her relationship with Hick.

37. On March 8, 2002, despite her promise to Dornay to keep Dornay's relationship secret, Ms. Starkey told Mike Kenyon about Hick's harassing and threatening behavior as reported to her by Dornay because Ms. Starkey was concerned about the safety of the people who worked for Kenyon Dornay Marshall. On the afternoon of March 8, 2002, Mr. Kenyon and Ms. Starkey met with Dornay and her husband and her father at Dornay's home. Discussions centered on concerns over Hick's alleged threats against Dornay and her family and co-workers.

38. On or about March 11, 2002, Zsolt Dornay called Hick to arrange a meeting with him. On or about March 19, 2002, Zsolt Dornay met with Hick, returned his gun, and delivered two cashier's checks totaling \$6,000 to pay Hick for the horse Tin Tin and for Hick's financial contribution to the purchase price of the

saddle. Zsolt Dornay told Hick not to contact Dornay, and Hick did not contact Dornay after March 19, 2002.

39. On April 2, 2002, Mr. Kenyon, Ms. Starkey, and Sandra Meadowcroft of Kenyon Dornay Marshall met with Captain Annette Louie and Sergeant Frances Carlson of the King County Sheriff's Internal Investigation Unit to discuss the Dornay-Hick situation and the safety of the law firm's staff. On April 5, 2002, Captain Louie and Sergeant Carlson interviewed Dornay at Mr. Kenyon's residence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

40. On May 1, 2002, Judge Knight of the Snohomish County Superior Court entered a Decree of Dissolution and a Parenting Plan Final Order in *Hick v. Hick*. In the Parenting Plan, the court followed the recommendations of the guardian *ad litem* and ordered that Hick would have joint decision-making rights regarding his son and the generous visitation that he had requested from the court prior to the trial on February 13, 2002.

41. On May 14, 2002, Dornay, using her married name, Margita Noe, petitioned for a protection order in the King County District Court in Issaquah, seeking protection for her and her family from Hick. In her petition, Dornay alleged there was a domestic violence situation because she and Hick had "dated in past." The petition for an order of protection related in detail the events of March 7, 2002, including threats to kill Dornay and her husband, children, and pets.

42. On June 5, 2002, the King County District Court held a hearing on Dornay's request for a permanent order of protection. Dornay testified under oath at the June 5, 2002 hearing that Hick had screamed at her, raged at her, ranted and raved

at her, forced her to engage in sex with him without her consent, and threatened to kill her and her family during the course of their relationship, including in the period before her testimony in *Hick v. Hick* on February 13, 2002.

43. At the conclusion of the June 5, 2002 hearing, Judge Mary Anne Ottinger granted Dornay's request for a permanent order of protection from Hick and prohibited Hick from carrying a firearm. In her oral ruling, Judge Ottinger stated that she believed the relationship between Hick and Dornay was physical, romantic, and consensual throughout most of their relationship. Nonetheless, as a result of not being able to carry a firearm, Hick lost his job as a law enforcement officer.

44. Also on June 5, 2002, Dornay signed a declaration under penalty of perjury in *Hick v. Hick* stating that from and after the fall of 2001, Hick would "fly into rages" that "often lasted for hours." Dornay further stated "During these rages Mr. Hick was extremely violent. He would push, grab and restrain me. He would throw furniture and various other objects. He would rant and become fixated on a certain subject and would not relent until I was a groveling basket case conceding my faults and professing my love." (Ex. 30, p. 3)

45. In her June 5, 2002 declaration, which was filed on June 6, 2002 by Hick's former wife's attorney in support of a petition for modification and motion for a restraining order against Hick, Dornay stated that when she testified in *Hick v. Hick* on February 13, 2002, by stating under oath that she had not seen Hick go into rages, "I made the decision to perjure myself instead of bringing further harm to myself." (Ex. 30, p. 4)

46. On June 21, 2002, the Superior Court of Snohomish County granted Hick's former wife's petition by entering a temporary order (1) suspending residential time under the May 1, 2002 Parenting plan between Hick and his son, Wyatt;

(2) prohibiting further contact between Hick and Wyatt; and (3) reappointing the guardian *ad litem* to reassess custody and visitation issues if Hick responded to the modification petition. Hick did not respond.

47. On January 16, 2003, Dornay testified at a deposition in these disciplinary proceedings. At her deposition, Dornay testified that her testimony on February 13, 2002 in *Hick v. Hick* that she had never seen Hick rageful was false.

48. On November 16, 2004, after a long appeal process, Dornay's Protection Order against Hick came before the King County District Court on remand because the Superior Court found insufficient evidence to sustain a permanent order against Hick. On November 17, 2004, the King County District Court entered an order modifying the Protection Order against Hick, including the firearm prohibition, by entering an expiration date for the Order of February 17, 2005.

Based on the foregoing findings of fact, the Hearing Officer makes the following conclusions of law:

### III. CONCLUSIONS OF LAW

1. In these proceedings, the WSBA has the burden of proving each count by a clear preponderance of the evidence. Dornay has the burden of proving any affirmative defense by a preponderance of the evidence.

2. Dornay is charged with committing the crime of perjury under RCW 9A.72.050(1), which provides as follows:

Where, in the course of one or more official proceedings, a person makes inconsistent material statements under oath, the prosecution may proceed by setting forth the inconsistent statements in a single count, alleging in the alternative that one or the other was false and known by the defendant to be false. In such case it shall not be necessary for the prosecution to prove which material statement was false but only that one or the other was false and known by the defendant to be false.

3. In Washington there is an extremely high standard of proof of perjury. The Washington Supreme Court has described the requirements of proof in perjury cases as "the strictest known to the law, outside of treason charges." *State v. Olson*, 92 Wn.2d 134, 136 (1979). The United States Supreme Court has held that, under the federal perjury statute, even an evasive answer, if literally true, even though intended to be misleading, cannot constitute perjury. *Bronston v. United States*, 409 U.S. 352, 34 L. Ed. 2d 568, 93 S. Ct. 595 (1973). The elements and form of proof required to prove perjury in other contexts are applicable in attorney discipline cases. *In re Discipline of Huddleston*, 137 Wn.2d 560, 570 (1999).

4. When Dornay testified under oath on February 13, 2002, in response to questions from Hick's attorney, Ruth Spalter, the questions "Have you seen him to be rageful at any time?" or "Rant and rave?" or "Berate?" could be reasonably construed in context to relate to Dornay's observations of Hick's behavior "on the job or out at work." Dornay's answers were literally truthful as to Hick's behavior as observed by Dornay as Hick performed the duties of his employment.

5. The WSBA did not sustain its burden of proof by a clear preponderance of the evidence that Dornay committed perjury.

6. Dornay is charged with committing the crime of false swearing under RCW 9A.72.040(1), which provides as follows:

A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law.

7. Under the same analysis of the context of Ms. Spalter's questions to Dornay at the February 13, 2002 trial, Dornay's answers were literally truthful as to Hick's behavior as observed by Dornay as Hick performed the duties of his employment.

8. The WSBA did not sustain its burden of proof by a clear preponderance of the evidence that Dornay committed the crime of false swearing.

9. Nonetheless, Dornay's testimony on February 13, 2002 left the court with the false impression that she had never seen Hick rageful at any time. This was not true. Before February 13, 2002, Dornay had observed Hick having angry verbal outbursts and rages that arose in the context of arguments they had in the course of their relationship. In particular, Dornay had experienced the incident when Hick had Dornay put his service revolver to his head and the incident in the Vancouver, British Columbia hotel room in which Hick injured himself while enraged.

10. Dornay was aware at the time of her testimony that she had created the misimpression that she had never observed Hick to be rageful at any time, in the workplace or outside the workplace. Dornay did not clarify the scope of her answers to Ms. Spalter's questions on February 13, 2002, because if she had done so, she would have had to disclose the existence of her secret extramarital affair with Hick.

11. Dornay contends that her testimony concerning Hick's rage was given under duress. Although the Hearing Officer concludes that the WSBA has failed to sustain its high burden of proof that Dornay committed the crimes of perjury and false swearing, Dornay did not sustain her burden of proof by a preponderance of the evidence of the affirmative defense of duress. The evidence fails to support Dornay's claim that Hick's threats or use of force created an apprehension in her mind that she would suffer immediate death or immediate grievous bodily injury if she testified that she had seen Hick angry or rageful. There is no credible evidence that Dornay was fearful before, during, or after her testimony on February 13, 2002. In addition, another element of the duress defense is that any apprehension must be reasonable. Dornay's fears, if any, were not based on any specific threats by Hick and Hick's

previous statements regarding his Mafia connections and Joe Todesco were meant in a joking way and did not create a reasonable apprehension on the part of Dornay. Dornay also had the knowledge of the legal system and connections through her family and work to law enforcement officers and others in the legal system that would have allowed her to leave her relationship with Hick safely.

12. Dornay testified truthfully under oath regarding Hick's angry outbursts and rages in the King County District Court on June 5, 2002, in her declaration dated June 5, 2002, filed with the Snohomish County Superior Court in *Hick v. Hick*, and in her WSBA deposition on January 16, 2003.

13. Dornay is also charged with engaging in dishonesty, deceit, or misrepresentation in violation of RPC 8.4(b) or RPC 8.4(c) or RPC 8.4(d) or RPC 3.3(a)(1). RPC 3.3(a)(1) is applicable when a lawyer acting as an advocate knowingly makes a false statement of material fact or law to a tribunal. The conduct that the WSBA alleges subjects Dornay to discipline did not occur when Dornay was functioning as an advocate representing a client; Dornay was testifying as a witness. Accordingly, the WSBA has not proven by a clear preponderance of the evidence that Dornay's conduct as a witness violated RPC 3.3(a)(1).

14. The WSBA has not proven by a clear preponderance of the evidence that Dornay committed the criminal acts of perjury or false swearing in violation of RPC 8.4(b).

15. The WSBA has proven by a clear preponderance of the evidence that Dornay engaged in conduct involving deceit or misrepresentation that was prejudicial to the administration of justice in violation of RPC 8.4(c) and RPC 8.4(d). On February 13, 2002, when Dornay testified in *Hick v. Hick*, one of the issues for decision by the court in connection with fashioning a parenting plan was the proportion of

time, both residential and visitation, that each parent would spend with Wyatt, a minor child. At that time, Dornay was well aware of Hick's propensity for angry outbursts and rages. Whether Hick had a propensity to be rageful, berate, or rant and rave, as alleged by Hick's wife, was material to the court's decision regarding the Parenting Plan, in particular in relation to the mandatory limitation of residential and visitation time if the court were to find Hick engaged in the conduct described in RCW 26.09.191, such as acts of domestic violence and physical, sexual, or a pattern of emotional abuse of a child. At the time of her testimony on February 13, 2002, Dornay was aware that she had left a misimpression with the court that she had never, at any time, observed Hick in a rage. During the weeks and months following her February 13, 2002, testimony, Dornay knew, and told others, that her February 13, 2002 testimony left an erroneous impression with the court and needed to be corrected. Although Dornay did not technically "perjure herself" as she stated in her June 5, 2002 declaration that was filed in *Hick v. Hick* to correct the misimpression and explain fully Dornay's interactions and observations of Hick, Dorney nonetheless violated RPC 8.4(c) and RPC 8.4(d). With respect to this conduct, Dornay acted knowingly.

#### **IV. APPLICATION OF AMERICAN BAR ASSOCIATION STANDARDS**

1. Disciplinary sanctions are determined using the American Bar Association Standards for Imposing Lawyer Sanctions ("ABA Standards") as a framework. *In re Discipline of Johnson*, 114 Wn.2d 737 (1990). The ABA Standards provide that the following factors are to be considered in determining the appropriate disciplinary sanction:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

ABA Standard 3.0. Assessment of the duty owed in light of the lawyer's mental state and the injury or potential injury yields a presumptive sanction. Once the presumptive sanction is determined, aggravating or mitigating factors are considered.

2. Based upon the foregoing Findings of Fact and Conclusions of Law, the following ABA Standard for False Statements, Fraud, and Misrepresentation is applicable in this case:

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

The ABA Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." During the period from February 13, 2002 to June 5, 2002, Dornay acted knowingly in allowing the Snohomish County Superior Court to decide issues relating to the Parenting Plan for Wyatt Hick based on a false impression created by Dornay's testimony.

3. Dornay's conduct caused actual or potential injury to Hick's young child by creating a misimpression of Hick with the judge who made the custody and visitation decisions in the case. Dornay's failure to retract and correct her February 13, 2002 testimony promptly was prejudicial to the administration of justice.

4. Suspension involves the removal of a lawyer from the practice of law for a specified minimum period of time, and generally should last for a period of time not less than six (6) months and not greater than three (3) years. *In re Discipline of*

*Boelter*, 139 Wn.2d 81, 101 (1999), citing *In re Discipline of McMullen*, 127 Wn.2d 150 (1995) and ABA Standard 2.3.

#### V. AGGRAVATING AND MITIGATING FACTORS

1. The following aggravating factors contained in Section 9.22 of the ABA Standards are applicable in this case:

- (b) Dishonest or Selfish Motive. Dornay's motive in not offering testimony regarding the times she had witnessed Hick engaging in rageful, ranting and raving, and berating conduct was primarily to keep secret her ongoing relationship with Hick.
- (h) Vulnerability of Victim. Dornay's February 13, 2002, testimony created a false impression of Hick that affected the judge's decision regarding the Parenting Plan for Hick's three-year old child.
- (i) Substantial Experience in the Practice of Law. Dornay was admitted to the practice of law on November 13, 1990, and at the time of the events at issue in this disciplinary proceeding Dornay had over ten (10) years' experience prosecuting misdemeanors, including domestic violence cases.

2. The following mitigating factors contained in Section 9.32 of the ABA Standards are applicable in this case:

- (a) Absence of a Prior Disciplinary Record. Dornay has never before been the subject of disciplinary proceedings or sanctioned by the WSBA.
- (c) Personal or Emotional Problems. During the relevant period, Dornay was having marital problems; was involved in an extramarital affair with a man who exhibited controlling behaviors characteristic of a perpetrator of intimate partner violence; and after the relationship with Hick ended, Dornay exhibited some symptoms of post-traumatic stress disorder.
- (d) Timely Good-Faith Effort to Rectify Consequences of Misconduct. Although Dornay could have acted more quickly to correct the misimpression created by her February 13, 2002 testimony in *Hick v. Hick*, after

Dornay had obtained a protection order against Hick, she acted to correct the misimpression created by her testimony by seeing that her June 5, 2002 declaration was filed in *Hick v. Hick*.

- (e) Full and Free Disclosure/Cooperative Attitude. Dornay fully cooperated in the investigation and disciplinary proceedings.
- (k) Imposition of Other Penalties or Sanctions. As a result of this matter, Dornay has been exposed to public humiliation, including newspaper stories and postings on a hostile website; has lost her job; and has had to move away.
- (l) Remorse. Dornay has felt guilty and remorseful from the time she testified on February 13, 2002.

## VI. RECOMMENDATION

Based upon the applicable ABA Standards and the aggravating and mitigating factors, the Hearing Officer recommends that respondent Margita A. Dornay be suspended from the practice of law for a period of two (2) months.

The mitigating factors far outweigh the aggravating factors. At the time of Dornay's misleading testimony, she was nearing the end of an extramarital affair that ultimately concluded with escalating behavior by Hick that was characteristic of a domestic violence perpetrator when a woman is leaving an abusive relationship. At the end of the relationship, Dornay was traumatized and afraid, and her reputation in the legal community severely damaged. Moreover, because the Snohomish County Superior Court followed the guardian *ad litem's* recommendations in fashioning the final Parenting Plan in *Hick v. Hick* and later promptly modified the Parenting Plan in light of Dornay's June 5, 2002 declaration, Hick's minor son was protected and suffered no demonstrated harm.

The recommended sanction is based on Dornay's knowing failure to correct the material false impression conveyed to the court by her February 13, 2002 testimony during the period from February 13, 2002 to June 5, 2002.

The Hearing Officer further recommends that Dornay be required to pay all costs and expenses associated with these proceedings pursuant to ELC 13.9, in an amount to be determined.

DATED this 19th day of January, 2005.



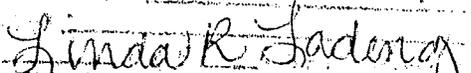
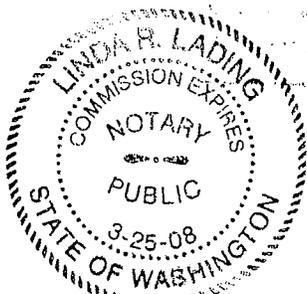
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STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

I certify that I know or have satisfactory evidence that Lawrence R. Mills is the individual who personally appeared before me, and said individual acknowledged that he signed this instrument as his free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: January 19, 2005



Print Name: Linda R. Lading  
NOTARY PUBLIC in and for the state of  
Washington, residing at Kent  
My appointment expires: 3-25-08

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Findings of Fact...  
to be delivered to the Office of Disciplinary Counsel and to be mailed  
to Kent Baker, Respondent/Respondent's Counsel  
at 740 Belmont Pl. E. Apt. 3, by Certified/first class mail,  
postage prepaid on the 21<sup>st</sup> day of January, 2005

[Signature]  
Clerk/Counsel to the Disciplinary Board

CERTIFICATE OF TRANSMITTAL

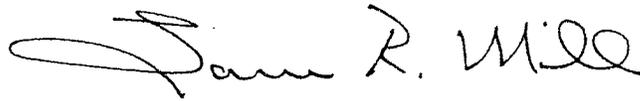
I hereby certify that a true copy of the foregoing Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation was sent via electronic mail and deposited in the United States Mail on the date last above written, postage prepaid, to the following persons:

Mr. Kevin Bank  
Ms. Jean K. McElroy  
Disciplinary Counsel  
Washington State Bar Association  
2101 Fourth Avenue, 4th Floor  
Seattle, WA 98121-2330

[kevinb@wsba.org](mailto:kevinb@wsba.org)

Mr. Kurt M. Bulmer  
Attorney at Law  
740 Belmont Place East, No. 3  
Seattle, WA 98102-4442

[kbulmer@comcast.net](mailto:kbulmer@comcast.net)



---

Lawrence R. Mills  
Hearing Officer

# **APPENDIX 2**

FILED

SEP 29 2005

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re

MARGITA A. DORNAY,  
Lawyer  
WSBA No. 19879

Public No. 03#00088

DISCIPLINARY BOARD ORDER  
REGARDING HEARING OFFICER'S  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDATION

THIS MATTER originally came before the Disciplinary Board at its May 20, 2005 meeting. At that time, the Board ordered additional briefing and oral argument on specific issues based on ELC 11.12(f). On September 16, 2005, the Board heard oral argument from the parties and reconsidered this matter;

IT IS ORDERED that the following amendments are made to the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation:

**FINDINGS OF FACT:**

(26) When testifying as a witness in the *Hick v. Hick* divorce trial, Dornay was very calm, collected and professional. Hick's attorney, Ruth Spalter, asked Dornay<sup>1</sup> how long Dornay had known Hick, how often Dornay had seen Kate Hick, the two child exchanges Dornay had witnessed, and what Dornay

<sup>1</sup> The words "some background questions about" were removed from this finding.

1 had observed about Hick's interactions with Wyatt. Ms. Spalter then asked  
2 and Dornay answered as follows:

3 Q Okay. You've seen, I guess, Dave testify in a court on behalf of the State or  
4 the County, or whatever?

5 A Often, correct, often.

6 Q Have you ever seen him, quote, on the job or out at work?

7 A I actually did two ride alongs with Dave. So I actually have seen him on  
8 work for extends [sic] periods of time, correct.

9 Q When was that, approximately?

10 A I would say both occurred this summer.

11 Q This past summer?

12 A Correct.

13 Q Okay. Have you seen him rageful at any time?

14 A Rageful?

15 Q Yeah.

16 A No.

17 Q Rant and raved?

18 A No.

19 Q Berate?

20 A No. I have to admit that I have seem him use what I call cop tone. He is  
21 occasionally a transport officer for our in-custody, and we have had a couple  
22 in-custody become unruly in the courtroom, and obviously he's taken a  
23 fairly aggressive stand in order to subdue those, and that was in open court  
24 with the judge on the bench, and it got the appropriate reactions from the  
25 defendants. But rage, no. Stern, yes.

26 Q Okay. Have you seen him in any way rage at his son?  
27

1 A No, absolutely not. He is a very - from the three occasions that I've seen,  
2 he's a very devoted, gentle, very attentive father. (Ex 16, p. 6-7)

3  
4 **CONCLUSIONS OF LAW:**

5 (4) When Dornay testified under oath on February 13, 2002, in response to  
6 questions from Hick's attorney, Ruth Spalter, the questions "Have you seen  
7 him rageful at any time?" or "rant and rave" or "Berate", Dornay's answers  
8 were not truthful. The question was unambiguous and the answer was  
9 responsive. Dornay lied with the intent to mislead the Court.

10 (7) Deleted in its entirety.

11 (8) The WSBA sustained its burden of proof by a clear preponderance of the  
12 evidence that Dornay committed the crime of false swearing.

13 (9) Dornay's<sup>2</sup> testimony on February 13, 2002 left the Court with the false  
14 impression that she had never seen Hick rageful at any time. This was not  
15 true. Before February 13, 2002, Dornay had observed Hick having angry  
16 verbal outbursts and rages that arose in the context of arguments they had in  
17 the course of their relationship. In particular, Dornay had experienced the  
18 incident when Hick had Dornay put his service revolver to his head and the  
19 incident in a Vancouver, British Columbia hotel room in which Hick injured  
20 himself while enraged.

21 (11) Dornay did not sustain her burden of proof by a preponderance of the  
22 evidence of the affirmative defense of duress<sup>3</sup>. The evidence fails to support  
23 Dornay's claim that Hick's threats or use of force created an apprehension  
24 in her mind that she would suffer immediate death or immediate grievous  
25

26 <sup>2</sup> The word "nonetheless" was deleted from this conclusion.

27 <sup>3</sup> The following words were deleted from this conclusion: "Dornay contends that her testimony concerning  
Hick's rage was given under duress. Although the Hearing Officer concludes that the WSBA has failed to  
sustain its high burden of proof that Dornay committed the crimes of perjury and false swearing".

1           bodily injury if she testified that she had seen Hick angry or rageful. There  
2           is no credible evidence that Dornay was fearful before, during, or after her  
3           testimony on February 13, 2002. In addition, another element of the duress  
4           defense is that any apprehension must be reasonable. Dornay's fears, if any,  
5           were not based on any specific threats by Hick and Hick's previous  
6           statements regarding his Mafia connections and Joe Todesco were meant in  
7           a joking way and did not create a reasonable apprehension on the part of  
8           Dornay. Dornay also had the knowledge of the legal system and  
9           connections through her family and work to law enforcement officers and  
10          others in the legal system that would have allowed her to leave her  
11          relationship with Hick safely.

12          (13) Dornay is also charged with engaging in dishonesty, deceit, or  
13          misrepresentation in violation of RPC 3.3(a)(1). RPC 3.3(a)(1) is applicable  
14          when a lawyer acting as an advocate knowingly makes a false statement of  
15          material fact or law to a tribunal. The conduct that the WSBA alleges  
16          subjects Dornay to discipline did not occur when Dornay was functioning as  
17          an advocate representing a client; Dornay was testifying as a witness. RPC  
18          3.3(a)(1) is not applicable.

19          (14) Dornay is also charged with engaging in dishonesty, deceit or  
20          misrepresentation in violation of RPC 8.4(b), (c) and (d). The WSBA has  
21          not proven by a clear preponderance of the evidence that Dornay committed  
22          the criminal act of perjury in violation of RPC 8.4(b).

23          (15) The WSBA has proven by a clear preponderance of the evidence that  
24          Dornay engaged in the crime of false swearing in violation of RPC 8.4(b),  
25          conduct involving deceit or misrepresentation in violation of RPC 8.4(c) and  
26          conduct that was prejudicial to the administration of justice in violation of  
27          RPC 8.4(d). On February 13, 2002, when Dornay testified in *Hick v. Hick*,

1 parenting plan was the proportion of time, both the residential and visitation,  
2 that each parent would spend with Wyatt, a minor child. At that time,  
3 Dornay was well aware of Hick's propensity for angry outbursts and rages.  
4 Whether Hick had a propensity to be rageful, berate or rant and rave, as  
5 alleged by Hick's wife, was material to the court's decision regarding the  
6 parenting plan. Ms. Dornay's February 23, 2002 testimony intentionally  
7 mislead the court. During the weeks and months following her February 13,  
8 2002 testimony, Dornay knew, and told others, that her February 13, 2002  
9 testimony was not truthful and needed to be corrected.

#### 10 APPLICATION OF ABA STANDARDS

11 (2) Based upon the foregoing Findings of Fact and Conclusions of Law, the  
12 following *ABA Standard* for False Statements, Fraud and Misrepresentation  
13 is applicable in this case:

14 6.11 Disbarment is generally appropriate when a  
15 lawyer, with the intent to deceive the court, makes a  
16 false statement, submits a false document, or  
17 improperly withholds material information, and causes  
18 serious or potentially serious injury to a party, or  
causes a significant or potentially significant adverse  
effect on the legal proceeding.

19 The *ABA Standards* define "intent" as "the conscious objective or purpose  
20 to accomplish a particular result."<sup>4</sup>

21 (3) Dornay's conduct caused actual or potential injury to Hick's young child by  
22 intentionally misleading the judge who made the custody and visitation  
23 decisions in the case. Dornay's untruthful testimony and failure to retract or  
24 correct her February 23, 2002 testimony promptly was prejudicial to the  
25 administration of justice.

26 <sup>4</sup> The Hearing Officer cited ABA Standard 6.12 (suspension) as applicable to this case. The Board finds that  
27 ABA Standard section 6.11 (disbarment) is the appropriate standard. The Hearing Officer also found that Ms.  
Dornay acted knowingly, as defined by the ABA Standards. The Board finds that Ms. Dornay acted  
intentionally.

1 correct her February 23, 2002 testimony promptly was prejudicial to the  
2 administration of justice.

3 (4) Deleted in its entirety.

4 **AGGRAVATING AND MITIGATING FACTORS:**

5 The Board strikes the following mitigating factors:

6 (d) Timely Good Faith Effort to Rectify Consequences of Misconduct. The  
7 Board finds that Ms. Dornay's efforts to correct her untruthful conduct were  
8 not timely. As a prosecutor with experience in domestic violence cases, Ms.  
9 Dornay understood the danger to the child in delaying truthful testimony.

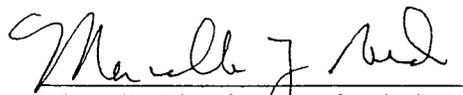
10 (k) Imposition of Other Penalties or Sanctions.

11 (l) Remorse.

12 **RECOMMENDATION:**

13 Based on the applicable ABA Standards and the aggravating and mitigating  
14 factors, the Disciplinary Board recommends that respondent Margita A.  
15 Dornay be suspended from the practice of law for 3 years. Although the  
16 Board adopted three aggravating factors and three mitigating factors, the  
17 Board finds that the weight of the mitigating factors exceeds the weight of  
18 the aggravating factors<sup>5</sup>.

19  
20 DATED this 26<sup>th</sup> day of September, 2005

21   
22 Marcella Fleming Reed, Chair  
23 Disciplinary Board  
24

25 <sup>5</sup> The votes on both the sanction recommendation and on upholding Count 3 were unanimous. The vote on  
26 **Count 1 (perjury)** was 6-7 with Fancher, Lee, McMonagle, Beale, Reed and Bothwell voting that Count 1  
27 was proven; and Friedman, Romas, Mosner, Schaps, Kurtz, Hollingsworth and Madden voting that either it  
was not proven or that reversing the Hearing Officer would not have changed the result. The vote on **Count 2 (false swearing)** was 9-4 with Fancher, Mosner, Lee, McMonagle, Reed, Madden, Romas, Beale and Bothwell voting that Count 2 was proven; and Schaps, Kurtz, Friedman and Hollingsworth voting that either it was not proven or that reversing the Hearing Officer would not have changed the result.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Disciplinary Board Order  
to be delivered to the Office of Disciplinary Counsel and to be mailed  
to Kurt Bulmer, Respondent/Respondent's Counsel  
at 740 Belmont Pl E, Seattle WA by Certified/first class mail,  
postage prepaid on the 29 day of September, 2005

Linda M. Justice  
Clerk/Counsel to the Disciplinary Board

FILED

SEP 29 2005

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re  
MARGITA A. DORNAY,  
Lawyer  
WSBA No. 19879

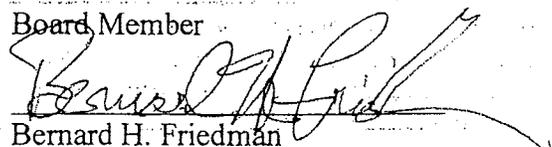
Public No. 03#00088  
CONCURRING OPINION

I concur in the Board's order. I write separately to emphasize that whether Dornay technically committed "false swearing" (or "perjury") matters little. (Given my understanding of the Washington case law, I believe the Bar did not prove that.) What is most critical is that Dornay intentionally misled the Superior Court on material facts. ABA Standard 6.11 applies under these circumstances even in the absence of perjury or false swearing. For such dishonesty here, a sanction just short of disbarment is appropriate.

DATED this 22nd day of September, 2005

\_\_\_\_\_  
Zachary Mosner  
Board Member

\_\_\_\_\_  
David Kurtz  
Board Member

  
Bernard H. Friedman  
Vice Chair

CERTIFICATE OF SERVICE

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at 740 Belmont Pl E, Seattle WA, by Certified/first class mail,  
postage prepaid on the 29<sup>th</sup> day of September, 2005

Binda M. Justice  
Clerk/Counsel to the Disciplinary Board

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7 BEFORE THE  
8 DISCIPLINARY BOARD  
9 OF THE  
10 WASHINGTON STATE BAR ASSOCIATION

11 In re

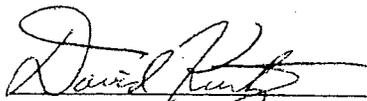
12 MARGITA A. DORNAY,  
13 Lawyer  
WSBA No. 19879

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20 appropriate.

21 DATED this 22<sup>nd</sup> day of September, 2005

22  
23   
24 David Kurtz #18475

Board Member

25  
26 \_\_\_\_\_  
Zachary Mosner  
Board Member

25  
26 \_\_\_\_\_  
Bernard H. Friedman  
Vice Chair

CERTIFICATE OF SERVICE

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Linda M. Justice  
Clerk/Counselor to the Disciplinary Board

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BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

10 In re

11 MARGITA A. DORNAY,  
12 Lawyer  
13 WSBA No. 19879

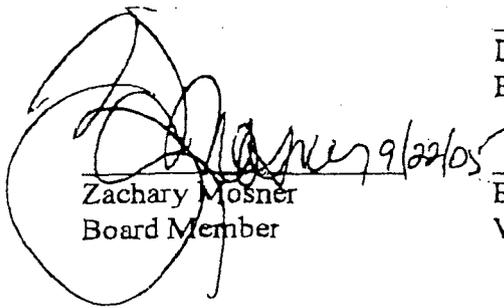
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21 DATED this \_\_\_\_\_ day of September, 2005

22  
23 \_\_\_\_\_  
David Kurtz  
Board Member

24  
25   
26 \_\_\_\_\_  
Zachary Mosner  
Board Member

27 \_\_\_\_\_  
Bernard H. Friedman  
Vice Chair

CERTIFICATE OF SERVICE

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Brenda M. Justice  
Clerk/Counsel to the Disciplinary Board

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BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re

MARGITA A. DORNAY,  
Lawyer  
WSBA No. 19879

Public No. 03#00088

CONCURRING OPINION

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DATED this \_\_\_\_\_ day of September, 2005

\_\_\_\_\_  
David Kurtz  
Board Member

  
\_\_\_\_\_  
Zachary Mosner  
Board Member

\_\_\_\_\_  
Bernard H. Friedman  
Vice Chair

FILED

SEP 29 2005

DISCIPLINARY BOARD

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BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re  
MARGITA A. DORNAY,  
Lawyer  
WSBA No. 19879

Public No. 03#00088

CONCURRING OPINION

I concur in the majority's upholding of Count 3. The question asked -- whether or not Dornay had seen Hick rageful "at any time" --is unambiguous (along with the subsequent questions regarding "rant and rave" and "berate"). Dornay testified that she understood at the time of her earlier testimony that the question asked unambiguously referred to "at any time" without restriction; that she answered the question with that understanding; and that she intentionally lied to the court. The issues raised by Dornay's counsel as to Counts 1 and 2 revolve around counsel's attempts to create a technical defense to the crimes of perjury and false swearing by counsel's after-the-fact examination of the transcript of Dornay's testimony and arguments that the context should be deemed to add an ambiguity to an otherwise clearly unambiguous question. Those arguments seek to distract the Board from the clear violations under Count 3. I find it unnecessary to resolve those technical arguments, since this matter can adequately be disposed of on the basis of the clear violations under Count 3. Discipline of Huddleston, 137 Wn.2d 560, 974 P.2d 325 (1999). I also concur with the majority's analysis

1 that a sanction less than the ultimate sanction of disbarment should be imposed  
2 and that a three year suspension is appropriate. Disciplinary Proceedings Against  
3 Christopher, 153 Wn.2d 669, 105 P.3d 976 (2005).

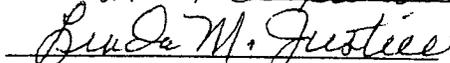
4 DATED this 27<sup>th</sup> day of September, 2005

5 

6 Ronald T. Schaps W.S.B.A. # 2283  
7 Board Member Pro Tem

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10 CERTIFICATE OF SERVICE

11 I certify that I caused a copy of the Concurring Opinion  
12 to be delivered to the Office of Disciplinary Counsel and to be mailed  
13 to Kurt Bulmer Respondent/Respondent's Counsel  
14 at 740 Belmont Pl. E. Seattle WA, by Certified/first class mail,  
postage prepaid on the 29<sup>th</sup> day of September, 2005

15   
16 Clerk/Counsel to the Disciplinary Board



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postage prepaid on the 29<sup>th</sup> day of September, 2005

Sandra M. Justice  
Clerk/~~Counsel~~ to the Disciplinary Board

FILED

SEP 29 2005

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re

MARGITA A. DORNAY,

Lawyer

WSBA No. 19879

Public No. 03#00088

CONCURRING OPINION

I concur in the sanction imposed in this case. However, my analysis of the false swearing statute (RCW 9A.72.040) and the perjury-by-inconsistent-statements statute (RCW 9A.72.050) persuades me that the only meaningful distinction between the two, for purposes of this case, is materiality. There is no genuine dispute that Ms. Dornay's statements in the child custody matter were material. Thus, the WSBA proved both perjury and false swearing, or it proved neither. I conclude it proved both by a clear preponderance. While I would have adopted the Hearing Officer's finding as to remorse, the aggravating factors in the case still far outweigh the mitigating factors.

1 I also agree with concurring opinions of Board Members Schaps and Kurtz that  
2 a lengthy suspension is justified solely on the basis of Count 3.  
3

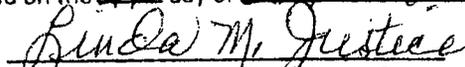
4 DATED this 28<sup>th</sup> day of September, 2005  
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6   
7 Amanda Lee  
8 Board Member

9 \_\_\_\_\_  
10 Gail McMonagle  
11 Board Member

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15 CERTIFICATE OF SERVICE

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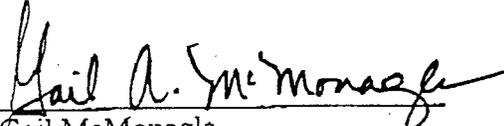
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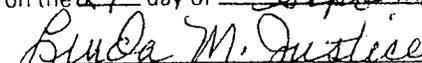
DATED this 28<sup>th</sup> day of September, 2005

Amanda Lee  
Board Member

  
Gail McMonagle  
Board Member

CERTIFICATE OF SERVICE

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Clerk/Counsel to the Disciplinary Board

# **APPENDIX 3**

Westlaw

Page 1

West's RCWA 9A.72.050

C

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs &amp; Annos)

Chapter 9A.72. PERJURY and Interference with Official Proceedings (Refs &amp; Annos)

**→9A.72.050. Perjury and false swearing--Inconsistent statements--Degree of crime**

(1) Where, in the course of one or more official proceedings, a person makes inconsistent material statements under oath, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and known by the defendant to be false. In such case it shall not be necessary for the prosecution to prove which material statement was false but only that one or the other was false and known by the defendant to be false.

(2) The highest offense of which a person may be convicted in such an instance as set forth in subsection (1) of this section shall be determined by hypothetically assuming each statement to be false. If perjury of different degrees would be established by the making of the two statements, the person may only be convicted of the lesser degree. If perjury or false swearing would be established by the making of the two statements, the person may only be convicted of false swearing. For purposes of this section, no corroboration shall be required of either inconsistent statement.

## CREDIT(S)

[1975 1st ex.s. c 260 § 9A.72.050.]

## LIBRARY REFERENCES

2000 Main Volume

Perjury ↪1.  
Westlaw Topic No. 297.  
C.J.S. Perjury §§ 2 to 3, 5 to 8, 21.

## RESEARCH REFERENCES

2005 Electronic Update

## Treatises and Practice Aids

13A Wash. Prac. Series § 1905, Judicial Interpretation-Perjury.

11A Wash. Prac. Series WPIC 118.01, Perjury-First Degree-Definition.

11A Wash. Prac. Series WPIC 118.02, Perjury-First Degree-Elements.

11A Wash. Prac. Series WPIC 118.12, Perjury or False Swearing-Requirements of Proof.

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West's RCWA 9A.72.050

11A Wash. Prac. Series WPIC 118.22, Perjury-Inconsistent Statements.

West's RCWA 9A.72.050, WA ST 9A.72.050

Current with 2005 legislation effective through July 1, 2005

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# **APPENDIX 4**

## 5.0 *Violations of Duties Owed to the Public*

### 5.1 *Failure to Maintain Personal Integrity*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

- 5.11 Disbarment is generally appropriate when:
- (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
  - (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
- 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.
- 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.
- 5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

# APPENDIX 5

## **6.0 *Violations of Duties Owed to the Legal System***

### **6.1 *False Statements, Fraud, and Misrepresentation***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

- 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
- 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
- 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
- 6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.