

Supreme Court No. 200,388-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISABILITY PROCEEDING AGAINST

JOHN M. KEEFE,

Lawyer (Bar No. 18371).

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

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I. COUNTERSTATEMENT OF THE ISSUES

Under the Rules for Enforcement of Lawyer Conduct (ELC), a lawyer who lacks the mental capacity to practice law or to assist counsel in defending a disciplinary proceeding must be transferred to disability inactive status. Following a two-day hearing, the hearing officer concluded that John M. Keefe (Keefe) is unable to practice law and unable to assist counsel due to a mental disability. The hearing officer based his decision on the unchallenged testimony of a forensic psychiatrist, a hearing officer, special disciplinary counsel, other fact witnesses, and numerous documents authored by Keefe. The hearing officer recommended that Keefe be transferred to disability inactive status, and the Disciplinary Board agreed. Should the Court affirm the Board's decision?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

This matter is before the Court on the Disciplinary Board's order recommending that Keefe be transferred to disability inactive status. The disability proceeding arose during the course of a disciplinary proceeding against Keefe.

1. Disciplinary Proceeding

In 2002, the Washington State Bar Association (Association) filed a formal complaint charging Keefe with two counts of misconduct: 1) failure to comply with court rules and directives, and 2) failure to avoid a conflict of interest. Transcript of Disability Hearing (TR) 27-28. A two-day disciplinary hearing commenced on April 24, 2003. Exhibit (EX) 12. Special Disciplinary Counsel Lawrence Schwerin (Schwerin) represented the Association. Keefe appeared *pro se*. Mark Baum (Baum) was the hearing officer. Susan Gallacci (now Ingram) was the court reporter. Id.

In December 2003, Baum issued findings of fact, conclusions of law and a recommendation that Keefe be suspended for six months. TR 56-57, 145. Keefe appealed to the Disciplinary Board. On March 16, 2004, Keefe filed a Reply Brief and Declaration asserting that an imposter posed as Schwerin during the disciplinary proceeding; that the disciplinary proceeding was “fixed” by Keefe’s former law professors, the law firm of Carney Badley Spellman, and the “Christian Right Mafia”; and that Keefe’s telephone calls were interrupted numerous times by lawyer John Dippold (Dippold).¹ EX 15 at 25-29, 56-59. Keefe’s Declaration also

¹ Dippold is a partner at Carney Badley Spellman. He also serves on the firm’s board of directors. TR 82.

revealed that he heard voices at the disciplinary hearing and on other occasions. Id. at 56-59.

Based on these unusual allegations, the Chief Hearing Officer ordered a disability proceeding under ELC 8.3 to determine Keefe's capacity to defend himself in the disciplinary proceeding, Keefe's capacity to defend the disciplinary proceeding with the assistance of counsel, and Keefe's capacity to practice law. Bar File (BF) 1. Terence Ryan was appointed as the hearing officer for the disability proceeding. Id.

The disciplinary proceeding was deferred pending the outcome of the disability proceeding. ELC 8.3(d)(2).

2. Disability Proceeding

The Association filed a formal complaint on April 20, 2004. BF 6. Keefe answered *pro se* on May 26, 2004. BF 11. The Disciplinary Board Chair (Chair) appointed lawyer Kurt Bulmer as counsel for Keefe on September 9, 2004. BF 16; ELC 8.3(d)(3). The Chair confirmed the appointment of counsel, over Keefe's objection, on October 19, 2005. BF 37; EX 25.

When Keefe refused to provide health care releases or participate in an independent mental health examination (IME), the Association moved the hearing officer for an order requiring Keefe to furnish releases and attend an IME. EX 23; BF 21. Keefe was properly served with the

motion, but did not respond. EX 23. The hearing officer ordered Keefe to furnish health care releases by September 19, 2005 and to participate in an IME by October 7, 2005. BF 29; ELC 8.3(d)(4) and (5). Keefe was properly served with the order by the Clerk to the Disciplinary Board on September 12, 2005, but did not comply. BF 29.

A two-day disability hearing commenced on October 24, 2005. BF 47. Keefe did not attend the hearing. Counsel for Keefe appeared but did not make objections, cross-examine witnesses, or offer any evidence or argument. At the beginning of the hearing, Keefe's counsel explained that Keefe's strategy was not to participate or allow his counsel to participate in the proceeding. TR 7-15.

The hearing officer issued amended Findings of Fact, Conclusions of Law and Recommendation (FFCL) on January 9, 2006. BF 52. The hearing officer found that Keefe's ability to distinguish fantasy from reality was impaired and that statements made by Keefe were delusional. FFCL at 10, 12. The hearing officer concluded that the Association proved by a clear preponderance of the evidence that Keefe is incapable of defending himself in the disciplinary proceeding, is incapable of assisting counsel in defending the disciplinary proceeding, and is incapable of practicing law. FFCL at 13-14.

The Disciplinary Board considered the matter automatically under ELC 8.3(d)(7)(C). The Association filed a brief in support of the hearing officer's decision. BF 61. Keefe did not file a brief.

The Disciplinary Board affirmed the hearing officer's decision by a vote of nine to three. BF 62, 63, 64. Keefe was transferred to disability inactive status immediately, in accordance with ELC 8.3(d)(8)(B).

Keefe's counsel filed a timely Notice of Appeal (BF 65) and filed an Opening Brief. Keefe also filed an Opening Brief *pro se*.²

B. SUBSTANTIVE FACTS

1. Lay Testimony and Exhibits

In his March 2004 Reply Brief and Declaration, Keefe described events that he perceived before, during, and after the disciplinary hearing.

EX 15. Among other things, Keefe asserted that:

- he called Schwerin's office around November 7, 2002 and spoke with a person who identified himself as Schwerin, but was not Schwerin (EX 15 at 27, 57-58);
- he called Schwerin's office on November 14, 2002 and the same person identified himself as Schwerin, but was not Schwerin. During the conversation, Schwerin's imposter told Keefe, "You know, Smith Carney [Carney Badley Spellman] is running this" (EX 15 at 28, 58);

² Keefe's *pro se* arguments are addressed in a separate section at the end of this brief. In a September 15, 2006 letter, the Supreme Court Clerk informed the parties that he was referring to the Court the issue of whether to consider Keefe's *pro se* brief.

- Schwerin's imposter participated in every motion hearing, Thomas Cacciola's January 2003 videotaped deposition, and every other deposition in the disciplinary proceeding (EX 15 at 28, 58);
- ten minutes into Keefe's opening statement at the April 2003 disciplinary hearing, Baum said, "You see Susie Matyas smiling." Susie Matyas was Keefe's childhood classmate in California (EX 15 at 25, 56);
- during Keefe's testimony at the disciplinary hearing, he uttered in a low voice, "This case, the entire proceeding is fixed." Keefe did not think he was heard, but moments later, Baum replied, "It is, it's the Christian Right Mafia" (EX 15 at 26, 56);
- after the videotape of Thomas Cacciola's deposition was played at the disciplinary hearing, Baum looked at Schwerin and said, "Tom Cacciola is dead." Months later, Keefe called Cacciola's office and learned that Cacciola had died (EX 15 at 26, 56, 59);
- while offering witness declarations during the disciplinary hearing, Keefe argued that the declarations were necessary to block tampering and intimidation by "a particular law firm here in Seattle." Moments later, Keefe heard Baum say in a low utterance, "They are. It's Butler Shaffer and Cathey Carpenter. It's her." Butler Shaffer and Cathey Carpenter are professors at Southwestern University, where Keefe graduated from law school (EX 15 at 26-27, 56-57);
- at the end of one hearing day, Schwerin said to Keefe, "I'm going to destroy John Dippold for referring this case to me." Dippold is a lawyer at Carney Badley Spellman (EX 15 at 28, 58);
- over the past few years, Dippold interrupted Keefe's telephone conversations a number of times (EX 15 at 29, 58);

- on July 28, 2003, Keefe made a call and heard numerous interruptions. The first interruption started with, “I’ll destroy him, they’ll stand in front of me.” Keefe was not sure of the speaker. Then, a voice said, “You think so, I’ll get to them, I’ll just pay em’ a million.” It was Dippold. Another interruption, “Where are you going to get that kind of money?” Again, Keefe was not sure of the speaker. Then, a voice responded, ‘I’ll just go to Microsoft, I’m the devil.” It was Dippold (EX 15 at 29, 58-59);
- after closing arguments, Schwerin said to Keefe, “Submit, and we’ll go easy on you” (EX 15 at 29, 59);
- being a “submitted lawyer” has “special significance in the American legal community because it means submission to the policies and principles of the Christian Right, a dominant religious coalition in the United States that . . . controls the courts and bar associations in almost every geographical area in the country” (EX 15 at 29).

Based on the testimony of Schwerin, Baum, Ingram, and Dippold and the exhibits admitted at hearing, the hearing officer found that these events alleged by Keefe never occurred. Specifically, he found that Schwerin, not an imposter, participated in the motion hearings, depositions, and telephone conversations with Keefe; that Schwerin, Baum, and Dippold did not make the statements described in Keefe’s Declaration; and that Dippold did not interrupt Keefe’s telephone conversations or have any involvement in Keefe’s disciplinary proceeding. FFCL at 8-9, 12. Dippold testified that he did not know Keefe, had never heard of him, and did not know why Keefe had singled him out. TR 83-

86. Dippold testified that he found Keefe's assertions "scary" and had concerns for his safety and the safety of his family. TR 85, 88.

Other documentary evidence reveals similar distortions in Keefe's perceptions and reasoning during the period May 2002 to October 2005. In 2002, Keefe sought to transfer the disciplinary proceeding to the Bar Association of New York or the District of Columbia because he believed he could not receive a fair hearing in Washington due to the strength of the Christian Right and its army of submitted lawyers.³ EX 1, 2; TR 134-38. In a May 28, 2002 declaration, Keefe wrote, "A submitted lawyer is forced to wear a minute hearing device through which the Christian Right and its mafia operate. There is an army of these people . . . whose sole function in life is to stop meritorious cases and lawyers like myself . . . and that is how they operate, through the ear device and a well-organized system of extortion, bribery and corruption" EX 1 at 7. Keefe concluded, "The inherent potential for abuse of the devices in my case . . . is so strong as to independently warrant the transfer" of the disciplinary proceeding to another state. EX 1 at 8.

Keefe also conducted considerable discovery into matters having no relevance to the disciplinary proceeding. FFCL at 6-8, 12. Keefe

³ Keefe also moved for the disqualification of Baum based on comments made by sources who "should remain in confidence" because to "do otherwise would potentially place their practices and clients at risk." EX 2 at 3.

propounded interrogatories asking about the use of implanted ear devices, mind scanning technology, and surveillance by the Association or its agents. FFCL at 6-7; EX 4 at 29-55, 59-67; EX 5 at 2-18. Baum testified that Keefe “was of the opinion that there were technologically advanced devices that were implanted in individual’s heads that could actually scan that individual’s mind, or could send back hearing or listening device impulses to some other location like a third-party location.” TR 139-40. Repeatedly, Keefe’s interrogatories asked whether certain individuals, including Bill Gates, Slade Gorton, Pat Robertson, or professors at Southwestern University used ear or mind scanning devices on Keefe, his family, his clients, or Baum. EX 4, 5. Keefe also took the depositions of two California residents who had no idea why they were being deposed.⁴ EX 27; TR 43.

In February 2003, Keefe filed a witness list including seven individuals⁵ from California and Michigan who, the hearing officer found,

⁴ Keefe asked deponent Ted Shaw (Shaw) if he knew John Spellman, Milton Smith, John Dippold, Butler Shafer, or Catherine Carpenter, among others. He also asked if Shaw knew of any involvement by Homeland Security in Keefe’s case, of the operation of any mind scanning technology in Keefe’s case, or of any committees formed in Los Angeles relating to Keefe’s activities. TR 27.

⁵ George McDonald, Kathy Carpenter, Art Asmer, Ginny Knowles, Ted Shaw, Mike Fitzsimmons, and Sergio Gonzales. “Kathy Carpenter” appears to be the same person as “Cathey Carpenter” in Keefe’s documents.

had no factual or other connection to the disciplinary proceeding. FFCL at 7, 12-13; EX 8 at 2-4; TR 33-34, 36, 41, 47, 64.

In June 2003, Keefe filed a Petition for Review with this Court arguing that the consequences of his refusal to “submit” to the Christian Right is “[s]low death by Christian Right hit squads, suspension and eventual disbarment.” EX 14 at 9.

In 2004 and 2005, Keefe filed pleadings with the United States District Court for the Central District of California (EX 19) and for the Western District of Washington (EX 30) repeating the assertions in his Reply Brief and Declaration (EX 15). Keefe further alleged that, during his testimony at the disciplinary hearing, Baum said, “You still have five years to serve on your sentence, for suing.” EX 19 at 4. Baum testified that he made no such statement and does not know what it means. TR 153.

2. Psychiatric Testimony

Dr. Brian Grant has been a psychiatrist since 1982 and is Board certified in both general and forensic psychiatry. TR 90-91; EX 26 (curriculum vitae). He is a distinguished fellow of the American Psychiatric Association and has conducted “well over a thousand” forensic evaluations in his career. TR 91-92, 95. Dr. Grant testified at the disability hearing after being qualified as an expert in psychiatry and

forensic psychiatry by the hearing officer. TR 97. Keefe did not object to Dr. Grant's qualification as an expert, he did not object to Dr. Grant's testimony, and he did not cross-examine Dr. Grant. See generally TR 90-125 (testimony of Dr. Grant).

Dr. Grant opined to a reasonable degree of medical certainty that Keefe's ability to receive and process information is impaired, that his ability to reason is impaired, and that his ability to distinguish fantasy from reality is impaired. TR 122-23. Dr. Grant's primary potential diagnosis was paranoid schizophrenia. TR 123.

Dr. Grant testified that his opinions were based on a review of documents, including documents authored by Keefe and transcripts of proceedings in which Keefe participated. TR 98-99; EX 28 (Dr. Grant's report). Dr. Grant testified that it is standard procedure in psychiatric evaluations to review records and, specifically, to review statements and writings by the subject. TR 94, 99. Dr. Grant planned to interview Keefe, but could not do so due to Keefe's refusal to make himself available. TR 97, 118.

Dr. Grant testified that the documents he reviewed presented recurring examples of Keefe's delusions, paranoia, and derailed thinking. TR 112-13; see generally TR 101-19. For example:

- EX 1 (Keefe's motion and declaration referencing the Christian Right Mafia, submitted lawyers, and ear devices) suggested a "lack of grasp of reality" and is "bazaar [sic] and probably delusional" (TR 102);
- EX 4 and EX 5 (Keefe's interrogatories inquiring about ear devices, mind scanning technology, and the involvement of celebrities or politicians in the disciplinary proceeding) seemed to have "no bearing" and "showed a lack of grasp of reality" (TR 106). There was an overall flavor of paranoia, "[t]he belief that a number of forces are at work against him in some conspiratorial fashion that is not in any way supported by credible data" (TR 107);
- EX 12 at 115-16 (Keefe's allegation of witness tampering during the disciplinary hearing) appeared to have a paranoid quality (TR 107);
- EX 14 (Keefe's Petition for Review referencing submitted lawyers and slow death by Christian Right hits squads) is "paranoid, bazaar [sic] and unsubstantiated by any facts or evidence or common sense." Keefe's language "goes to his thought processes. It is an apparent lack of grasp of reality" (TR 108);
- EX 15 (Keefe's March 2004 declaration regarding Schwerin's imposter, Dippold's telephone interruptions, and statements made by Baum and Schwerin) is a "continuation of a prior theme of a series of delusions, impaired reality testing, a lot of paranoia, derailed thinking, issues that have nothing to do with the case at hand" (TR 112-13);
- EX 30 (Notice of Removal filed by Keefe in October 2005) goes to his current mental status and "is noteworthy that this is contemporaneous to this hearing, and it appears that he, again, has a continuation of some of the same paranoid and delusional thinking" (TR 113, 115).

Dr. Grant opined to a reasonable degree of medical certainty that Keefe is showing a pervasive “imposition of delusional thinking” and a “lack of insight that there is anything wrong with him.” TR 122. Dr. Grant concluded that this “kind of thinking is so pervasive in his life, I would not want to see him practicing law and representing a person based on this.” TR 121.

III. SUMMARY OF ARGUMENT

The abilities to receive and process information, to reason, and to discern fantasy from reality go to the heart of lawyering. When a mental disorder so impairs a lawyer’s perception and judgment that he lacks the capacity to practice law or to defend a disciplinary proceeding, even with the assistance of counsel, the ELC require that he be placed on disability inactive status to protect the public and the integrity of the profession.

At hearing, the Association presented testimony from an expert in forensic psychiatry; the hearing officer, Special Disciplinary Counsel, and court reporter from Keefe’s disciplinary proceeding; and a Seattle lawyer who was accused by Keefe of repeatedly interrupting his telephone conversations. The Association also presented documentary evidence comprised of declarations, pleadings, briefs, and transcripts detailing Keefe’s statements and conduct over a three-year period. The Association’s evidence was uncontroverted because Keefe refused to

attend the hearing and refused to allow his appointed counsel to participate.

The hearing officer determined that Keefe lacks the capacity to practice law and to defend the disciplinary proceeding, citing Keefe's "clearly delusional" statements, his paranoid thinking, and his impaired ability to reason. The hearing officer recommended that Keefe be transferred to disability inactive status. The Disciplinary Board affirmed by a vote a nine to three, with even the dissent noting there is "substantial evidence that Respondent is incapacitated."

The decision of the hearing officer and Disciplinary Board should be affirmed.

IV. ARGUMENT

A. OVERVIEW OF DISABILITY PROCEEDINGS UNDER ELC 8.3

Lawyer disability proceedings are governed by ELC Title 8. Where, as here, the issue of a lawyer's capacity arises during the course of a disciplinary proceeding, ELC 8.3 applies. Under ELC 8.3(a), a hearing officer or chief hearing officer must order a disability proceeding if the respondent lawyer asserts, or if there is reasonable cause to believe, that the respondent is incapable of properly defending the disciplinary proceeding because of mental or physical incapacity. Furthermore, if

counsel does not appear for the respondent in the disability proceeding, counsel must be appointed. ELC 8.3(d)(3).

Disciplinary counsel may require the respondent to provide written releases for medical, psychological, or psychiatric records. ELC 8.3(d)(4). In addition, a hearing officer may order the respondent to be examined by a mental health professional to assist the hearing officer in making a determination. ELC 8.3(d)(5). If the respondent fails to appear for an examination, fails to furnish releases, or fails to appear at hearing, the following procedures apply:

(A) If the Association has the burden of proof, the hearing officer must hold a hearing and, if presented with sufficient evidence to determine incapacity, order the respondent transferred to disability inactive status. If there is insufficient evidence to determine incapacity, the hearing officer must enter an order terminating the supplemental proceedings and reinstating the disciplinary proceedings. A respondent who does not appear at the hearing may move to vacate the order of transfer under rule 10.6(c).

(B) If the respondent has the burden of proof, the hearing officer must enter an order terminating the supplemental proceedings and resuming the disciplinary proceedings.

ELC 8.3(d)(6). Under ELC 8.7, the party alleging incapacity has the burden of proof.

If the hearing officer finds that the respondent is capable of defending himself and has the capacity to practice law, the disciplinary proceeding resumes. ELC 8.3(d)(7)(A). If the hearing officer finds that

the respondent is not capable of defending himself in the disciplinary proceeding, but is capable of assisting counsel, the disability proceeding is dismissed and the disciplinary proceeding resumes. ELC 8.3(d)(7)(B). If the hearing officer finds that the respondent either does not have the capacity to practice law or is incapable of assisting counsel in defending the disciplinary proceeding, the hearing officer must recommend that the respondent be transferred to disability inactive status. ELC 8.3(d)(7)(C). In this case, the hearing officer found that Keefe is incapable of practicing law and incapable of defending the disciplinary proceeding, with or without counsel. FFCL at 14.

The Disciplinary Board reviews automatically a hearing officer's recommendation that a respondent be transferred to disability inactive status. ELC 8.3(d)(7)(C), ELC 11.2(b)(1). If the Disciplinary Board affirms the hearing officer's recommendation, as it did here, the respondent is transferred immediately. ELC 8.3(d)(8)(B).

The respondent has the right to appeal a transfer to disability inactive status to this Court. ELC 8.4, ELC 12.3(a). But the Disciplinary Board's order remains in effect unless and until the Court reverses it. ELC 8.4.

B. STANDARD OF REVIEW

When the Court reviews a decision transferring a lawyer to disability inactive status, the Court applies the same standard of review that it applies in lawyer discipline cases. In re Disability Proceeding Against Diamondstone, 153 Wn.2d 430, 438, 105 P.3d 1 (2005); see also ELC 8.3(d)(7)(C) (the procedures for appeal and review of suspension recommendations apply to recommendations for transfer to disability inactive status). The hearing officer's findings of fact will be upheld where they are supported by substantial evidence. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58-59, 93 P.3d 166 (2004). Unchallenged findings of fact are verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005), In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 594, 48 P.3d 311 (2002).

The hearing officer's conclusions of law are reviewed de novo and will be upheld where supported by the findings of fact. Diamondstone, 153 Wn.2d at 438; In re Disciplinary Proceeding Against Haley, 157 Wn.2d 398, 138 P.3d 1044, 1048 (2006) .

C. THE RECORD DEMONSTRATES THAT KEEFE LACKS THE CAPACITY TO PRACTICE LAW AND TO DEFEND THE DISCIPLINARY PROCEEDING

Keefe does not challenge the hearing officer's findings that he had delusions during legal proceedings and on other occasions, or that he asserted these delusions in documents filed with the Disciplinary Board and the courts. Respondent's Opening Brief (RB) at 15, 18. Instead, Keefe claims that the psychiatric evidence was insufficient to support the conclusion that he lacks the mental capacity to practice law or to defend himself in the disciplinary proceeding because the psychiatrist did not conduct an IME, did not meet with him, and did not state an unconditional diagnosis. RB at 15-17, 24.

Keefe's argument should be rejected because the ELC do not require an IME in disability proceedings, Dr. Grant testified to a reasonable degree of medical certainty that Keefe is mentally impaired, and the record as a whole contains substantial evidence to support the hearing officer's findings.

1. Substantial Evidence Supports the Hearing Officer's Findings of Mental Disability

Expert testimony is generally required to prove such medical facts as disability:

Expert testimony is generally required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson. Medical facts in

particular must be proven by expert testimony unless they are observable by [a layperson's] senses and describable without medical training.

In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 869, 846 P.2d 1330 (1993) (quotations and footnotes omitted). Recognizing that specialized medical knowledge may assist the hearing officer in a disability proceeding, ELC 8.3 permits the hearing officer to order an IME of the respondent. ELC 8.3(d)(5) (“[u]pon motion, the hearing officer may order an examination”). The ELC do not require an IME, however, to reach an incapacity determination. A hearing officer may recommend that a respondent be transferred to disability inactive status based on other expert and lay evidence. See, e.g., ELC 8.3(d)(6)(A).

This distinction is important where, as here, the hearing officer ordered an IME, but Keefe refused to participate.⁶ In disability proceedings that arise outside the context of a disciplinary proceeding, a respondent’s failure to appear at an IME, failure to waive health care provider-patient privilege, or failure to appear at hearing authorizes the Association to petition for the respondent’s interim suspension. ELC 8.2(d)(2). No such authorization exists under ELC 8.3 for disability

⁶ Keefe contends, in his *pro se* Opening Brief, that he “discovered” the hearing officer’s order requiring him to attend an IME on October 17, 2005. However, Keefe’s counsel does not claim that Keefe was unaware of the Association’s request for an IME or the hearing officer’s order.

proceedings that arise during a disciplinary proceeding. Instead, ELC 8.3(d)(6)(A) provides that, if the respondent fails to cooperate, the hearing officer must hold a hearing and, “if presented with sufficient evidence to determine incapacity,” order the respondent transferred to disability inactive status. If presented with insufficient evidence to determine incapacity, the hearing officer must terminate the disability proceeding and reinstate the disciplinary proceeding.⁷

Dr. Grant’s report and expert testimony were admitted at Keefe’s disability hearing, without objection by Keefe. EX 28; TR 97. Dr. Grant testified that he reviewed contemporaneous and historic records, detailing Keefe’s conduct and statements over a three-year period. TR 98-115. Dr. Grant testified that it is standard practice in psychiatric evaluations to review such records and that, based on his review, he was able to render certain opinions. TR 94, 99, 122-23.

Keefe complains that Dr. Grant did not make a diagnosis. RB at 24. In fact, Dr. Grant identified several differential diagnoses to be considered in Keefe’s case, and opined that the most likely is paranoid schizophrenia. TR 119-20. Dr. Grant testified, however, that “[t]he label is not as important as the level of impairment that seems to be present.”

⁷ It would be ironic to allow a respondent to avoid or, at least, reduce the likelihood of a finding of incapacity by refusing to release medical records and refusing to attend an IME.

TR 121. Indeed, nowhere do the ELC require a particular diagnosis to support a finding of incapacity. Instead, as Dr. Grant noted, the issue is the level of functional impairment. See, e.g., ELC 8.3(b); ELC 8.3(d)(7)(C).

Dr. Grant opined, to a reasonable degree of medical certainty, that Keefe's ability to receive or process information is impaired, that his ability to reason is impaired, and that his ability to distinguish fantasy from reality is impaired. TR 122-23. Dr. Grant testified that Keefe is showing pervasive "imposition of delusional thinking" and a "lack of insight that there is anything wrong with him." TR 122. The hearing officer found Dr. Grant's testimony to be "credible." FFCL at 12.

Keefe now complains that Dr. Grant did not meet with him. Dr. Grant testified that it is customary to meet with the subject, and that he was prepared before, and even after, the hearing to meet with Keefe. TR 97, 118, 124. Keefe chose not to participate in the IME, just as he chose not to participate in the disability hearing.⁸ In any case, Keefe's criticisms go to the weight to be accorded Dr. Grant's testimony, a determination that properly resides in the hearing officer. In re Disciplinary Proceeding

⁸ Although Keefe resides in California, he was in Washington the week before the hearing. TR 15-16.

Against Bonet, 144 Wn.2d 502, 512, 29 P.3d 1242 (2001). In this case, the hearing officer found Dr. Grant’s testimony to be persuasive.

“Substantial evidence exists if a rational, fair-minded person would be convinced by it. Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. And circumstantial evidence is as good as direct evidence.” Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C., 152 Wn.2d 387, 391, 97 P.3d 745 (2004) (citations omitted). Here, the hearing officer relied on the credible and uncontroverted testimony of Dr. Grant, Schwerin, Baum, Ingram, and Dippold, and the documentary evidence, to find that Keefe is suffering from a mental disability. Substantial evidence supports the hearing officer’s findings. This Court should not disturb them.

2. The Factual Findings Support the Conclusion that Keefe Lacks the Mental Capacity to Practice Law

In In re Meade, 103 Wn.2d 374, 693 P.2d 713 (1985), the Court addressed the standard to be used to determine whether a lawyer possesses the mental capacity to practice law.⁹ The lawyer in Meade was diagnosed as being “in a paranoid state, associated with an underlying depressive reaction.” Id. at 378. His treating psychiatrist testified that he was

⁹ Meade was decided under Rule 10.2 of the Rules for Lawyer Discipline (RLD), which required a transfer to disability inactive status where the hearing officer found that a lawyer “does not have adequate mental . . . capacity to practice law.” RLD 10.2(e)(1).

“competent to handle most legal matters,” but that “there would be some cases in which [his] judgment would be affected by his paranoid state and he [the psychiatrist] was unable to predict which cases those would be.”

Id. The Association presented no evidence to refute the opinion of the lawyer’s treating physician. Noting that the “primary issue” was whether the lawyer was “able to practice law adequately,” the Court transferred the lawyer to disability inactive status to protect the public and the profession:

The uncontroverted testimony of Meade’s psychiatrist is that Meade is suffering from a mental condition which affects his judgment in some cases. These cases are not identifiable in advance. Under these circumstances, the interests of the public in obtaining competent legal counsel and the reputation of the profession requires Meade’s transfer to inactive status at this time.

Id. at 379; accord Diamondstone, 153 Wn.2d at 441; In re Ryan, 97 Wn.2d 284, 287, 644 P.2d 675 (1982) (placing lawyer on inactive status under predecessor to RLD 10.2 because his delusional mental state “might” impair his judgment and subject clients to frivolous litigation).

In this case, Dr. Grant testified that the most likely diagnosis for Keefe’s condition is paranoid schizophrenia and that Keefe’s ability to reason, to receive or process information, and to distinguish fantasy from reality are impaired. He also testified that Keefe lacks insight that there is anything wrong with him. TR 122-23.

Schwerin and Baum testified about the effect of Keefe's mental disorder on his practice of law – filing inappropriate motions, conducting discovery into irrelevant matters, engaging in “over the top” litigation,¹⁰ and making outrageous assertions in legal pleadings. TR 137, 29-48, 56-57, 73; EX 1, 2, 4, 5, 6, 9, 12 at 115-16, 14, 15, 17, 18, 19, 20, 21, 27, 30.

Keefe argues that, at best, the Association proved he hears voices and has delusions in connection with his own representation. RB at 18. He posits that, in the absence of evidence showing an effect on other clients, he should not be transferred to disability inactive status. *Id.* Keefe fails to acknowledge that when he acted *pro se*, he engaged in activities related to the practice of law and his conduct had an impact on the legal system, opposing counsel, and third parties. Under similar circumstances, this Court has not hesitated to transfer a lawyer to inactive status based on the lawyer's mental incapacity to practice law. See In re Campbell, 74 Wn.2d 276, 279, 444 P.2d 784 (1968) (transferring lawyer, who had no client except himself, to inactive status based on lawyer's efforts to implement his belief that he had a constitutional right to use the courts to

¹⁰ Keefe requested relief from the United States Supreme Court after the disciplinary hearing concluded, but before Baum issued his findings, conclusions, and recommendation. TR 56.

compel someone who did not want to employ him to nevertheless pay him \$300 a month for an indeterminate future period).¹¹

Keefe also contends that the record does not support the hearing officer's conclusion because it does not adequately address what it means to practice law or how Keefe's impairments affect his practice of law. First, he claims there was no foundation for Dr. Grant's testimony that he is incapable of practicing law. RB at 16. But Keefe failed to object to Dr. Grant's opinion testimony at hearing. He chose, as a tactical matter, not to attend the hearing and not to allow his counsel to participate. He should not be allowed to change his mind at this late juncture. State v. Newbern, 95 Wn. App. 277, 288-289, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999) (failure to object to expert testimony waives issue on appeal); Rule 2.5(a) of the Rules of Appellate Procedure (RAP).

Next, Keefe claims that there was no other expert testimony linking his mental condition to an inability to practice law. RB at 16. But such evidence is not required in disability proceedings. A disability proceeding is an administrative inquiry by the Association into the

¹¹ Keefe claims that his conduct is distinguishable from the lawyer's in Campbell because he "has not brought any such suits." RB at 23. Keefe, however, filed a lawsuit against the Association in United States District Court asserting the same delusional beliefs that he asserted in the disciplinary proceeding. EX 19.

professional qualifications of one of its members. Additional expert testimony is neither required nor appropriate in this context:

An administrative agency may use its experience and specialized knowledge to evaluate and draw inferences from the evidence when finding unprofessional conduct. [A]n administrative board comprised of medical practitioners is competent to determine the propriety of medical conduct without the aid of expert testimony. And expert testimony regarding the propriety of medical conduct could be disregarded by a board of this type and in all probability would have little effect on the decision making process.

Brown v. State Dep't of Health, Dental Disciplinary Board, 94 Wn. App. 7, 13-14, 972 P.2d 101, review denied, 138 Wn.2d 1010 (1999) (citations and quotations omitted). The hearing officer, himself a lawyer (ELC 2.5(b)), was fully capable of making the determination regarding Keefe's capacity to practice law based on Keefe's demonstrated impairments. Diamondstone, 153 Wn.2d at 440. His conclusion is well supported by the evidence. The Court should affirm it.

3. The Factual Findings Support the Conclusion that Keefe Lacks the Mental Capacity to Defend the Disciplinary Proceeding

The Meade Court also addressed the standard to be used to determine whether a lawyer is competent to appear in bar disciplinary proceedings. Adopting the standard used in criminal proceedings to determine whether a defendant is competent to stand trial, the Court held that a lawyer must be (1) "capable of properly understanding the nature of

the proceedings against him. . . .” and (2) “capable of rationally assisting his legal counsel in the defense of his cause.” Meade, 103 Wn.2d at 380.

Under this standard, the lawyer in Meade was found not competent because even though “he intellectually understood the nature of the disciplinary proceedings, . . . his mental condition . . . interfered with his understanding of the underlying situation and made it impossible for him to respond appropriately or to raise legitimate defenses.” Id. As explained by the lawyer’s psychiatrist, even though the lawyer “may have appeared competent at the earlier proceedings because his appearance and verbal abilities were unaffected, the paranoid state would have affected his judgment on particular cases related to his delusional system.” Id. at 379.

Like the lawyer in Meade, Keefe may intellectually understand the nature of the disciplinary proceeding and may even be competent to handle “most legal matters,” but that does not mean he has the capacity to defend the disciplinary proceeding. Id. at 378-80.

The record is rife with examples of Keefe’s delusional beliefs and his attempts to implement those beliefs in the disciplinary proceeding and the courts. The documents reveal that Keefe’s mental impairment is affecting his “judgment on particular cases related to his delusional system,” the very concern expressed in Meade. Dr. Grant addressed the dichotomy this way, “[Keefe] is not so disorganized that he is not able to

make filings,” but “[t]here is a bit of a disconnect there. Whereas the substance makes no sense . . . the form seems to be well done.” See TR 116.

Even in instances where Keefe seems to be raising a legitimate issue, a closer look reveals that he is acting on a misapprehension rooted in a delusional belief. For example, Keefe claims that Baum rejected his offer of an exhibit, the videotape of Thomas Cacciola’s deposition. EX 15 at 28; see also Respondent’s *pro se* Opening Brief (2RB) at 5-6. The implication is that the excluded videotape would expose Schwerin’s imposter. But as shown by the hearing transcript and the testimony of Schwerin and Baum, the videotape was made part of the record. Baum merely rejected Keefe’s offer of a duplicate videotape, which Keefe admitted was identical to the videotape already in the record. EX 12 at 103-04; TR 52-53, 150-51. Nevertheless, Keefe continues to raise this issue.

In Meade, this Court explained the fundamental importance of determining a respondent’s capacity to defend a disciplinary proceeding. “If an attorney does not have the requisite mental competency to intelligently waive the services of counsel or to adequately represent himself or herself, the attorney’s due process right to a fair hearing is

violated if the attorney is allowed to appear pro se.” Meade, 103 Wn.2d. at 381.

Here, the hearing officer relied on un rebutted evidence to conclude that Keefe does not have the capacity to defend the disciplinary proceeding, with or without counsel. FFCL at 14. The Disciplinary Board affirmed, noting Keefe’s unwillingness even to utilize appointed legal counsel in the disability proceeding. BF 62. The hearing officer’s conclusion is well supported by the evidence. The Court should affirm it.

D. KEEFE’S *PRO SE* CLAIMS ARE MERITLESS

Keefe filed a *pro se* Opening Brief challenging the admissibility of Dr. Grant’s testimony, the determination that he (Keefe) lacks the capacity to practice law, and the appointment of counsel in the disability proceeding. This section will not revisit arguments already made regarding the admissibility of Dr. Grant’s testimony or the sufficiency of the evidence to support the findings and conclusions, but will address the following issues raised by Keefe *pro se*.

1. The Audio Tapes of Keefe’s Disciplinary Hearing Were Not a Permanent Record of the Association

Keefe challenges the hearing officer’s finding that the events described in Keefe’s March 2004 declaration were delusions, claiming that the hearing officer should have considered the destruction of the court reporter’s audio tapes of the disciplinary hearing. Citing ELC 3.6(a),

Keefe asserts that the audio tapes were permanent records of the Association and that the Association was required to maintain them. Keefe alleges that the Association improperly erased the audio tapes, which would have supported the statements in his Declaration. 2RB at 18. Keefe's claims should be rejected.

A court reporter's audio tapes of a disciplinary hearing are not considered "permanent records." ELC 3.6(a) provides:

Permanent Records. In any matter in which a disciplinary sanction has been imposed, the bar file and transcripts of the proceeding are permanent records. Related materials, including investigative files may be maintained in disciplinary counsel's discretion. Exhibits may be returned to the party supplying them, but copies should be retained where possible. (Emphasis added.)

"Bar file" is defined as the "pleadings, motions, rulings, decisions, and other formal papers in a proceeding." ELC 1.3(b). Thus, the court reporter's transcripts, not his or her audio tapes, are considered the permanent record of a hearing. In Keefe's case, the hearing transcript was properly maintained by the Association. See EX 12. The ELC do not require the Association to maintain the audio tapes, and the evidence shows that the Association never had possession of the tapes. TR 55, 79.

Keefe's disciplinary hearing was reported by Susan Ingram, an independent court reporter from the firm of Treece Shirley and Brodie. TR 75. Ingram began working as a court reporter in 1976, and became a

certified court reporter in 1980. TR 74-75. Ingram testified that, when she reported Keefe's disciplinary hearing, she used a Stenograph machine, tape recorder and spiral notebook. TR 76. She testified that she prepared the transcript herself and checked the entire transcript against the audio tapes for accuracy. TR 77-78. Once she was finished with the transcript, she followed her normal practice and recycled the tapes for use in future assignments. TR 80. Ingram testified that, in 30 years of court reporting, she has never given her audio tapes to anyone, and did not do so in this case. TR 79-80.

Ingram recalled that Keefe asked for her audio tapes during the disciplinary hearing and she declined to provide them. TR 78-79. The hearing transcript sets forth the following exchange:

Mr. Keefe: Okay, that's fine. (To the reporter) Would it be possible to get a copy of your tapes for my file?

The Reporter: I'd rather not do that. That's just an audio backup for me.

Hearing Officer: You do have a right to -- of course you can certainly purchase the report of proceedings, or I would say you have a right to get a copy of the report of proceedings, but the tapes typically belong to the court reporter as do their original disks.

Mr. Keefe: All right, then I shall wait for the transcript. I would like a copy of the transcript please.

EX 12 at 187-88. Keefe was served with a copy of the transcript on June 19, 2003. EX 13. Schwerin and Baum testified that Keefe did not notify

them of any problems with the accuracy of the transcript. TR 54, 144. No objection having been made, the transcript was deemed settled under ELC 11.4(d). Ingram testified that she does not recall receiving any further requests from Keefe for her audio tapes. TR 79.

In his *pro se* brief, Keefe asserts, “It is undisputed that respondent made many requests for the tapes . . . between March 2004 and . . . August 2005.” 2RB at 18-19. He deduces that the Association concealed information about the tapes from him. 2RB at 19. Because Keefe fails to cite to the record, it is difficult for the Association to respond. However, Keefe’s timeline does not take into account the fact that counsel was appointed to represent him in September 2004. From that time forward, the Association’s communications about the disability proceeding would have been with counsel, not with him.

In any event, by the time it became apparent from Keefe’s March 2004 declaration that the audio tapes might be important, the transcript had long been completed¹² and the tapes recycled. TR 80. Although Keefe claims that the tapes were the best evidence of the statements in his Declaration, Keefe could have offered other evidence. He could have testified, he could have cross-examined the Association’s witnesses, and he could have offered evidence of alleged events that occurred outside the

¹² The transcript was completed in May 2003. EX 12 at 189.

hearing. He did not do so. Substantial evidence supports the hearing officer's finding. The finding should be affirmed.

2. Due Process Required the Appointment of Counsel for Keefe in the Disability Proceeding

Keefe challenges the appointment of counsel to represent him in the disability proceeding, claiming that he had the capacity to represent himself. 2RB at 22-23.

ELC 8.3(d)(3) provides:

If counsel for the respondent does not appear within 20 days of notice to the respondent of the issues to be considered in a supplemental proceeding under this rule, or within the time for filing an answer, the Chair must appoint a member of the Association as counsel for the respondent in the supplemental proceedings.

Here, the Association filed a formal complaint on April 20, 2004. Keefe filed an Answer *pro se* on May 26, 2004. Counsel did not appear for Keefe within the time for filing an answer or at any other time in the disability proceeding. Under the ELC, the Disciplinary Board Chair was required to appoint counsel to represent Keefe, and did so on September 9, 2004.¹³ Although Keefe objected, he did not state a specific reason for his objection. EX 25. In fact, Keefe's counsel explained that Keefe did not

¹³ To the extent Keefe argues that the appointment was not timely, ELC 8.3(d)(3) does not place a time limit on the Chair's authority to appoint counsel.

object to him personally, but objected to the situation and would feel the same about any appointed counsel. TR 10-11.

This Court has held that due process requires the Association to appoint counsel for a lawyer in disability proceedings, if the lawyer does not obtain counsel. Diamondstone, 153 Wn.2d at 445. Keefe's argument to the contrary is without merit.

3. Keefe's First Amendment Claim is Waived and Meritless

It is difficult to discern precisely what Keefe's First Amendment argument entails; however, he seems to take the position that the disability proceeding is unconstitutional because it was brought as punishment for his statements of impropriety in the disciplinary system. 2RB at 25-26.

The Court need not reach this claim. In any event, it is meritless.

a. RAP 2.5(a)(3) Bars Review of Keefe's Newly-Raised Constitutional Claim

RAP 2.5(a)(3) provides that a party may raise a new issue on appeal if it involves a "manifest error affecting a constitutional right." Because this rule states an exception to the general rule precluding parties from raising new issues on appeal, the Court "construes[s] the exception narrowly by requiring the asserted error to be (1) manifest and (2) truly of constitutional magnitude. RAP 2.5(a)(3) was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional right not litigated below." State v. WWJ Corp., 138 Wn.2d

595, 602, 980 P.2d 1257 (1999) (quotations and citations omitted). An error is manifest only if it “results in concrete detriment to the claimant’s constitutional rights, and . . . rests upon a plausible argument that is supported by the record.” Id. at 603 (emphasis in original). “Without a developed record, the claimed error cannot be shown to be manifest, and the error does not satisfy RAP 2.5(a)(3).” Id. In other words, deficits in the factual record don’t support newly-raised claims; they defeat them.

b. Keefe Has Failed to Demonstrate that his First Amendment Claim is Supported by the Law or the Record

“Appellate courts will not waste their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” Id. Thus, under WWJ Corp., the Court will “preview the merits” of alleged constitutional errors to see if they have any chance of success. Id. Keefe’s claim fails this test.

In a two-page argument, Keefe cites three First Amendment cases dealing with lawyers who were sanctioned for statements violating rules against false criticism of judges, conduct interfering with the administration of justice, and/or extrajudicial statements to the press regarding a pending court proceeding.¹⁴ In each case, the issue was the

¹⁴ Keefe also cited a fourth case, which did not reach the First Amendment issue. United States v. Wunsch, 84 F.3d 1110, 1116 n.9 (9th Cir. 1996).

lawyer's speech. In this case, the issue is Keefe's mental capacity. Keefe's statements are significant only to the extent they are evidence of Keefe's mental condition, including his ability to receive, process, and use information. This does not implicate his First Amendment rights, but even if it did, the court must balance the First Amendment "interests against the State's legitimate interest in regulating the activity in question." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d 888 (1991).

Contrary to Keefe's assertion that he is being punished, a disability proceeding is designed to protect the public, the legal system, and the profession from lawyers who are mentally or physically incapacitated from practicing law. A disability proceeding that arises during a disciplinary proceeding is also designed to protect a respondent lawyer from being sanctioned if he is unable to defend himself due to a mental or physical incapacity.

Without citing any additional authority, Keefe concludes that his statements were protected. As this Court has observed, "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Disciplinary Proceeding Against Schafer, 149 Wn.2d 148, 168, 66 P.3d 1036 (2003) (quoting State v. Blilie, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997) (quoting In re Rosier,

105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)).

The Court should decline to address Keefe's First Amendment claim. Diamondstone, 153 Wn.2d at 443-44; WWJ Corp., 138 Wn.2d at 603.

V. CONCLUSION

The Court should affirm the Disciplinary Board's decision that Keefe be transferred to disability inactive status.

RESPECTFULLY SUBMITTED this 13th day of October, 2006.

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