

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2017 FEB 29 P 3:27

No. 200,448-2

*mc*

---

SUPREME COURT  
FOR THE STATE OF WASHINGTON

---

WASHINGTON STATE BAR ASSOCIATION,

Respondent,

vs.

J. BYRON HOLCOMB

Appellant.

---

APPEAL FROM THE DECISION OF THE  
WASHINGTON STATE DISCIPLINARY BOARD

Public No. 05#01323

---

BRIEF OF APPELLANT

---

Brett A. Purtzer  
WSB #17283

LAW OFFICES OF MONTE E.  
HESTER, INC., P.S.  
Attorneys for Appellant  
1008 South Yakima Avenue  
Suite 302  
Tacoma, Washington 98405  
(253) 272-2157

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> . . . . .	ii
I. <u>ASSIGNMENTS OF ERROR</u> . . . . .	1
II. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> . . . . .	2
III. <u>STATEMENT OF THE CASE</u> . . . . .	3
A. <u>Procedural History</u> . . . . .	3
B. <u>Facts</u> . . . . .	5
IV. <u>ARGUMENT</u> . . . . .	10
1. MR. HOLCOMB DID NOT VIOLATE ANY ETHICAL RULE. . . . .	12
2. ADMONISHMENT IS THE ONLY APPROPRIATE SANCTION IF ANY SANCTION IS WARRANTED. . . . .	19
3. ANY INJURY TO MR. SCHIFFNER WAS DE MINIMIS. . . . .	21
V. <u>CONCLUSION</u> . . . . .	24

TABLE OF AUTHORITIES

	<u>Page</u>
<u>STATE CASES:</u>	
<u>In Re Disciplinary Proceeding Against Egger,</u> 152 Wn.2d 393, 98 P.3d 477 (2004) . . .	15, 19, 22
<u>In Re Disciplinary Proceeding Against Halverson,</u> 140 Wn.2d 475, 998 P.2d 833 (2000) . . . . .	22
<u>In Re Disciplinary Proceeding Against Kuvara,</u> 149 Wn.2d 237, 66 P.3d 1057 (2003) . . . . .	10-12
<u>In Re Disciplinary Proceeding Against Plumb,</u> 126 Wn.2d 334, 892 P.2d 739 (1995) . . . . .	11
<u>In Re Disciplinary Proceeding Against Vetter,</u> 104 Wn.2d 779, 711 P.2d 284 (1985) . . . . .	11, 12
<u>In Re Disciplinary Proceeding of Haley,</u> 156 Wn.2d 324, 126 P.3d 1262 (2006) . . . . .	22
<u>In Re Disciplinary Proceeding of Miller,</u> 149 Wn.2d 262, 66 P.3d 1069 (2003) . . . . .	22
<u>In Re Discipline of Johnson,</u> 118 Wn.2d 693, 826 P.2d 186 (1992) . . . . .	22
<u>Jones v. Allstate Insurance Company,</u> 146 Wn.2d 291, 45 P.3d 1068 (2002) . . . . .	15

REGULATIONS AND RULES:

RPC 1.7 . . . . .	3-5, 12, 13, 15-17, 19, 20, 22, 23
RPC 1.8 . . . . .	3-5, 12, 13, 15-17, 19, 22, 23

OTHER AUTHORITIES:

ABA Standards . . . . .	10
Section 9.22 . . . . .	23
Section 9.32 . . . . .	23, 24
Standard 4.3 . . . . .	19
Standard 4.32 . . . . .	19

I. ASSIGNMENTS OF ERROR

1. The Washington State Bar Association Disciplinary Board erred when it affirmed the Hearing Officer's finding that Mr. Holcomb violated RPC 1.8(a) and 1.7(b).

2. The Washington State Bar Association Disciplinary Board erred when it concluded that the appropriate sanction is a six-month suspension.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Holcomb never represented the Schiffner marital community nor the Schiffner Trust. (Assignment of Error #1).

2. Neither the Schiffner marital community nor the Schiffner Trust are alter-egos of Mr. Schiffner, individually. (Assignment of Error #1).

3. Mr. Holcomb did not knowingly engage in any business transaction with a client, and, therefore, his mental state, if any ethical violation is found, was that of negligence. (Assignment of Error #2).

### III. STATEMENT OF THE CASE

#### A. Procedural History

On July 30, 2004, the Washington State Bar Association filed a Formal Complaint against J. Byron Holcomb citing violations of RPC 1.8(a) and 1.7(b.) A hearing was held November 14, 2005 before Hearing Examiner David Hiscock. On May 9, 2006, Hearing Officer Hiscock entered his Findings of Fact, Conclusions of Law and Recommendations. BF 59-75.

The allegation in this case arose tangentially from Mr. Holcomb's representation of John Schiffner regarding his EEO complaint against the federal government. While Mr. Holcomb represented Mr. Schiffner, Mr. Holcomb obtained a reoccurring loan from the Schiffner marital community through an entity known as The Schiffner Trust. Notwithstanding that almost two years passed since the time the last loan was made, Mr. Schiffner filed a bar complaint because Mr. Holcomb would not proceed with an appeal of his EEO case. The Bar did not raise any issues regarding the EEO case, but did, on its own, file

a Formal Complaint alleging the aforementioned RPC violations. BF 2.

After the hearing concluded and notwithstanding a significant issue as to whether Mr. Holcomb violated any ethical rule, the Hearing Examiner recommended Mr. Holcomb be suspended for one year. This recommendation was made despite the existence of substantial mitigating factors and a dearth of aggravating factors, and despite the WSBA's recommendation of a six-month suspension. Significantly, this is the only discipline action ever brought against Mr. Holcomb after almost 40 years of practice.

On November 17, 2006, the Disciplinary Board, after hearing, approved the Hearing Officer's findings that Mr. Holcomb violated RPC 1.8(a) and 1.7(b), but rejected the recommended sanction of one year suspension and reduced it to a six-month suspension.

Additionally, the Board modified the Hearing Officer's conclusions by striking Conclusions 31, 32(j), the paragraph following conclusion 32(j), 36 and 37. Specifically, the Board disagreed with three of the aggravating factors found by the

Hearing Officer, disagreed with the Hearing Examiner's use of the total amount of the loans as a measure of seriousness of the offense, and noted that the Association did not establish any specific monetary loss to the client. As a result, the Board concluded that in light of the limited amount of the loans, the full repayment, and the lack of any proof of financial loss, the appropriate sanction was a six-month suspension. BF 76-78.

Respectfully, Mr. Holcomb appeals the Board's affirmation of the Hearing Examiner's finding that he violated RPC 1.8(a) and 1.7(b) and the Board's recommendation of a six-month suspension. Respectfully, Mr. Holcomb urges this Court to find that he did not violation any RPC's but if the Court holds that any ethical violation occurred, it was *de minimis* and that the ABA Standards and case law suggest that the only appropriate sanction is an admonishment.

B. Facts

Respondent Byron Holcomb was admitted as a member of the Washington State Bar Association on September 22, 1967. In December, 1996, John

Schiffner, acting pro se, filed an employment discrimination complaint against the Navy. In 1998, Mr. Holcomb agreed to represent Mr. Schiffner in that matter, and Mr. Holcomb represented Mr. Schiffner until approximately March, 2003. Anita Schiffner, Mr. Schiffner's wife, acknowledged that Mr. Holcomb was her husband's EEO lawyer. TR 108:14-16; TR 109:21-23.

While Mr. Holcomb represented Mr. Schiffner, he was also represented by two other attorneys regarding other legal matters, including attorney Richard Tizzano who authored Mr. and Mrs. Schiffner's trust agreement. TR 80:9-19.

Throughout Mr. Holcomb's representation of Mr. Schiffner, fee agreements were entered into between Mr. Schiffner, in his individual capacity, and Mr. Holcomb. See Exhibits 1-5. In March, 2003, however, a dispute arose about the merits in proceeding with an EEO appeal, and Mr. Holcomb's representation of Mr. Schiffner ended. TR 189:4-11.

During the period from December 16, 1999, through March 26, 2001, Mr. Holcomb received a loan that was recurring. The loan was obtained

from the marital community of Mr. and Mrs. Schiffner and the loan was paid through a separate legal entity known as the Schiffner Trust. TR 122:14-25.

Mr. Holcomb testified that he and Mr. Schiffner discussed that the trust from where the loan proceeds were obtained was a separate entity from Mr. Schiffner in his individual capacity. TR 171:14-172:25. Mr. Schiffner acknowledged that the trust was a separate entity, and stated that because of problems with his son, he didn't want anybody to be able to reach those funds. TR 172:14-19. Based upon this discussion, Mr. Holcomb believed that Mr. Schiffner had the authority to lend funds from the Trust to Mr. Holcomb. TR 172:22-24.

Significantly, Mr. Holcomb never represented the Schiffner marital community nor the Schiffner Trust nor was Mr. Holcomb privy to the terms of the trust. TR 79:23-25; 80:4-5. Mr. Schiffner testified that he and his wife, jointly, needed to authorize the loan, and they would not have loaned additional monies to Mr. Holcomb absent him repaying any outstanding amount and providing

post-dated checks. TR 103:13-104:13; 109:24-110:5-16.

Each loan Mr. Holcomb obtained was typically repaid within a few days, although one loan remained outstanding for approximately one year, TR 82:18-84:6. The borrowed amounts ranged from \$1,500.00 to \$3,500.00, and at no time was there more than one amount outstanding. TR 85:13-20. Further, Mr. Schiffner was aware that Mr. Holcomb owned a significant piece of waterfront property, which was where his office was located, TR 90:7-23, and Mr. Holcomb's financial statement indicated that his net worth substantially exceeded any loan obtained from the Schiffners. See Ex. R-1.

During this period of time, Mr. Holcomb's wife developed kidney problems and needed dialysis treatment which significantly affected Mr. Holcomb's cash flow. TR 165:14-20. Significantly, the reason Mr. Holcomb sought funds from the Schiffners was because the Kitsap County Health District asserted that Mr. Holcomb's on-site septic system servicing his waterfront property was not in compliance and needed to be repaired

and placed a lien against his property, which prevented him from obtaining bank financing. TR 165:21-25; 166:8-18. Mr. Holcomb, realizing that a fraud was being perpetrated against him, began acting as a private attorney general on behalf of the public, and fought against the health district, particularly when he was approached by an individual representing an investment company who offered to buy Mr. Holcomb's property at a substantially reduced price and suggested that he could resolve the health district issues that plagued the property. TR 173:13-27. As Mr. Holcomb continued to fight this issue, which still continues today, he contacted the Kitsap County Prosecutor and informed him as to what was happening, but his pleas to the prosecutor were ignored. TR 179:16-21. As a result of the prosecutor's inactions in addressing the fraud that was arising from the Kitsap County Health District, Mr. Holcomb filed a bar complaint against the prosecutor, but the Bar Association failed to act, which precipitated Mr. Holcomb's financial situation and caused his short-term cash flow problems. TR 179:16-21.

Mr. Holcomb testified that although his property was tied up in a legal dispute with Kitsap County during this time, his assets were substantially in excess of any amount loaned by the Trust, TR 167:17-24.

Mr. Holcomb's short-term financial problems, and Disciplinary Counsel Jean McElroy's comment to Mr. Holcomb that she wanted to make Mr. Holcomb a "poster child" out of him to the other members of the Bar Association, is what gave rise to the formal complaint being filed in this case, as opposed to any clear violation of an ethical rule. TR 194:10-25.

#### IV. ARGUMENT

As this Court is aware, the ABA Standards govern the imposition of sanctions in attorney discipline cases in Washington. In Re Disciplinary Proceeding Against Kuvvara, 149 Wn.2d 237, 251, 66 P.3d 1057 (2003). The Standards were designed to increase uniformity in imposing sanctions. Id. at 256-57. The Standards constitute a model, setting forth a comprehensive system for determining sanctions while permitting flexibility and creativity when imposing

sanctions. Id. at 258. The Court should deviate from the presumptive sanction only if aggravating or mitigating factors are sufficiently compelling or justify the departure. Id.

Bar discipline is not to be imposed as punishment for misconduct. In Re Disciplinary Proceeding Against Plumb, 126 Wn.2d 334, 892 P.2d 739 (1995). Rather, the primary concern of discipline is to protect the public and deter other lawyers from similar misconduct. Id. Further, the duty of the Court and the Board in imposing discipline is to protect the public from dishonest, deceitful lawyering. In Re Disciplinary Proceeding Against Vetter, 104 Wn.2d 779, 711 P.2d 284 (1985).

When analyzing a lawyer discipline case, the Court must first determine a presumptive sanction. Kuvara, 149 Wn.2d at 252. When determining the appropriate sanction, the Court must consider the following questions: (1) What ethical duty did the lawyer violate? (2) What was the lawyer's mental state? and (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? Id.

Second, if the Court determines a sanction should be imposed, the Court must consider whether any aggravating or mitigating factors indicate the presumptive sanction should be altered. Kuvara, 149 Wn.2d at 252.

**1. MR. HOLCOMB DID NOT VIOLATE ANY ETHICAL RULE.**

The Board upheld the Hearing Examiner's finding that Mr. Holcomb violated RPC 1.8(a) and 1.7(b). BF 76. The facts in this case, however, do not establish, by a clear preponderance of the evidence, that any ethical rule was violated. Significantly, and as noted by Vetter, supra, there is absolutely no evidence Mr. Holcomb engaged in any dishonest or deceitful lawyering.

As set forth in Kuvara, supra, the first question that must be answered is what ethical duty did the lawyer violate. The Hearing Examiner found that Mr. Holcomb violated RPC 1.8(a) and 1.7(b). For both of those ethical violations, however, it is incumbent upon the Association to have produced, by a clear preponderance of the evidence, that Mr. Holcomb was dealing with a specific "client" and that while representing that

specific client, he violated RPC 1.8(a) and 1.7(b).

Here, the evidence establishes that Mr. Holcomb represented Mr. Schiffner, in his individual capacity, for his EEO complaint against the federal government. The recurring loan that Mr. Holcomb obtained, however, was from the Schiffner marital community and paid from The Schiffner Trust. It is un-rebutted that Mr. Holcomb never represented the Schiffner marital community nor The Schiffner Trust. Further, there is nothing within the RPC's to suggest that if an attorney represents a married individual in his or her individual capacity that the attorney also represents the marital community of that individual, or a trust of which the individual is a beneficiary.

Additionally, when Mr. Holcomb was discussing with Mr. Schiffner about some short-term financial assistance, Mr. Schiffner produced a checkbook from the Schiffner Trust Agreement. TR 171:21-172:2. Because Mr. Holcomb was surprised by this situation, he inquired of Mr. Schiffner about the trust, and Mr. Schiffner informed him that this

was a separate trust set up as a separate entity so that the funds could not be reached by creditors of his son. TR 172:4-19. Mr. Holcomb, using due diligence, then commented that the loan would be coming from a separate entity to which Mr. Schiffner agreed. TR 172:19-22. Based upon Mr. Schiffner's actions, it appeared to Mr. Holcomb that Mr. Schiffner had the apparent authority to loan money to Mr. Holcomb from the Trust. TR 172:22-24.

After the fact of the Trust was disclosed and Mr. Holcomb determined that it was a separate entity, he made no further inquiry, Noting that some of the loan checks made were signed by Mrs. Schiffner, one cannot reasonably suggest that any further inquiry was needed. TR 172:22-173:4. Further, Mr. Holcomb never represented the Trust, Anita Schiffner or the community interest of John and Anita Schiffner. TR 173:5-14.

Further, in presenting its case, the Association offered the expert testimony of attorney Richard Tizzano, the author of the Schiffner Trust, who testified about the parameters of the Schiffner Trust. The evidence

clearly established that Mr. Holcomb neither represented the trust nor that he had any information regarding the trust except for noting that the trust was where the loan originated and that Mr. Schiffner had the authority to loan money from the trust. Further, Mr. Holcomb commented to Mr. Schiffner that he understood that the trust was a separate legal entity, TR 172:18-21, which Mr. Tizzano also acknowledged. TR: 140:11-144:13. Mr. Tizzano also acknowledged that the Schiffner Trust was not the alter ego of John Schiffner. Id.

Therefore, to determine whether Mr. Holcomb violated either RPC 1.7(b) and 1.8(a), the evidence must first establish that either the Schiffner marital community and/or The Schiffner Trust was a client to whom Mr. Holcomb owed a duty. See In Re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 409, 98 P.3d 477 (2004). "The essence of the attorney/client relationship is whether the attorney's assistance or advice is sought and received on legal matters." Jones v. Allstate Insurance Company, 146 Wn.2d 291, 306, 45 P.3d 1068 (2002).

Here, neither the Schiffner marital community nor the Schiffner Trust was Mr. Holcomb's client. Accordingly, no violation of RPC 1.7(b) or 1.8(a) can be found. To the extent that the Findings of Fact and Conclusions of Law reference that an attorney/client relationship existed, Mr. Holcomb objects. Specifically, he objects to Conclusions of Law set forth at Paragraphs 14, 15, 16, 17, and 18 as the Conclusions of Law are not supported by the Findings of Facts. The Hearing Examiner, in the Findings of Fact, specifically referenced that each recurring loan Mr. Holcomb obtained was written on behalf of the Schiffner Trust account, which was representative of the Schiffner marital community. Pursuant to the testimony of Mr. Tizzano, upon which the Association relies, these entities are not the alter-ego of Mr. Schiffner, were not represented by Mr. Holcomb and, therefore, were not Mr. Holcomb's clients.

Further, when reviewing RPC 1.7 and 1.8, it is not clear to a reasonable attorney that one should be careful to consider all of the potential "clients" that one might unintentionally represent. The Hearing Examiner considered,

interchangeably, as a client John Schiffner, the community of John and Anita Schiffner, Anita Schiffner, individually, and the Schiffner Trust. Nothing within the RPC's suggest that a client can be all of these separate and distinct legal entities or that one is the alter-ego of the other.

Additionally, given the factual background as developed at the hearing, it is clear that Mr. Holcomb's conduct of obtaining the short-term loan was not a clear violation of the suggested RPC's, but a suggested violation based upon an unforeseen interpretation as to what constitutes a client. Given Ms. McElroy's comment that Mr. Holcomb would be made the "poster child" regarding client conflict cases, it is clear that the Association's actions in bringing this matter against Mr. Holcomb were improper. Clearly both RPC 1.7 and 1.8 contemplate that an attorney may not engage in certain transactions with a "client" unless certain assurances are made. But, under the circumstances of this case, the Board interpreted RPC 1.7 and 1.8 to create a violation by expanding, without comment, what constitutes a

"client" and then seek to punish conduct that is not clearly defined. Such unforeseen enlargement is beyond what a reasonable lawyer, exercising due diligence, would consider as being violative of an RPC.

What is clear in Mr. Holcomb's case is that he clearly defined not only his client - John Schiffner, individually as an EEO plaintiff - but also clarified the scope of representation for his client by way of fee agreements for each aspect of the representation. Given that Mr. Holcomb clearly defined who he was representing, it is unforeseeable that the RPC's he is alleged to have violated could be expanded to make him responsible for dealing with a legal entity he had never represented in an attorney-client relationship.

Respectfully, and based upon the aforementioned, this Court should find that Mr. Holcomb was not dealing with a client when he obtained the loans from the Schiffner marital community or the Schiffner Trust, and that no ethical violation occurred.

**2. ADMONISHMENT IS THE ONLY  
APPROPRIATE SANCTION IF ANY  
SANCTION IS WARRANTED.**

As the Court is aware, Standard 4.3 sets forth the sanctions to be imposed in a conflict of interest case. Here, the Hearing Examiner found that Standard 4.32, suspension, applied finding that Mr. Holcomb acted knowingly or with knowledge. Respectfully, the clear preponderance of the evidence established that, if anything, Mr. Holcomb misunderstood the expanded definition of "client" as set forth in RPC 1.7(b) and 1.8(a) and the interpreted legal relationship between Mr. Schiffner, the Schiffner Trust and the Schiffner marital community. Further, this was an isolated incident in Mr. Holcomb's almost 40 years of practice. Accordingly, Mr. Holcomb's conduct, if any misconduct is found, should only be that of negligence. Clearly, under such circumstances, the suspension standard in this case has not been met.

Without conceding that he dealt with a "client" or violated RPC 1.7(b) and 1.8(a), in comparison to his situation, Mr. Holcomb asks the Court to consider In Re Disciplinary Proceeding

Against Egger, 152 Wn.2d 393, 98 P.3d 477 (2004).

There, the Supreme Court found that Mr. Egger violated RPC 1.7(b) when, without question, he represented two different clients in the same transaction. Further, the injury to the clients was substantial as noted by the fact that Mr. Egger's law firm, Williams Kastner & Gibbs, settled the conflict of interest case for one million dollars, of which Mr. Egger was required to pay \$28,000.00.

Here, there was no clear conflict of interest violation by Mr. Holcomb. If the Court finds that the Schiffner marital community and the Schiffner Trust are alter-egos of Mr. Schiffner, individually, and, therefore, were unrecognized clients of Mr. Holcomb, and that he had a duty to recognize this situation, but failed to do so, then the negligence standard is the only appropriate standard to apply.

Here, Mr. Holcomb, if anything, was arguably negligent, even though a clear preponderance of the evidence should not support that finding. Accordingly, the evidence does not support that

Mr. Holcomb acted knowingly, and any suspension is inappropriate.

**3. ANY INJURY TO MR. SCHIFFNER WAS DE MINIMIS.**

When determining the injury, one must look at the actual or potential injury that is caused as a result of the RPC violation. Here, the only possible injury Mr. Schiffner testified about was that he was concerned that if he did not loan Mr. Holcomb money, his representation would be compromised. Significantly, however, Mr. Holcomb's representation of Mr. Schiffner lasted two years after the last loan was made. Importantly, the recurring loan started in December, 1999 and continued through March of 2001. Mr. Holcomb's representation, however, spanned from April 6, 1998 through April 15, 2003, a full two years after the final installment. A finding that Mr. Schiffner was injured, either actually or potentially, is not supported by the evidence. Rather, the evidence supports a finding that Mr. Holcomb continued to represent Mr. Schiffner in his EEO complaint long after the last loan was provided, which was in March, 2001.

Accordingly, there is no injury that can be established.

By contrast, once again, Mr. Holcomb points to the Egger case as well as the cases of In Re Discipline of Johnson, 118 Wn.2d 693, 826 P.2d 186 (1992); In Re Disciplinary Proceeding of Miller, 149 Wn.2d 262, 66 P.3d 1069 (2003); In Re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 998 P.2d 833 (2000); In Re Disciplinary Proceeding of Haley, 156 Wn.2d 324, 126 P.3d 1262 (2006). In all of the aforementioned cases, where this Court upheld suspensions, ranging from sixty days to two years, the clients suffered actual injury. Additionally, some of those cases involved lawyers who had multiple instances of misconduct.

Here, however, Mr. Holcomb has an unblemished record. Even if this Court interprets RPC 1.7(b) and 1.8(a) to find that an ethical violation occurred, the Association failed to establish any financial injury, and, respectfully, failed to show any injury to Mr. Schiffner, individually, particularly when Mr. Holcomb's representation of Mr. Schiffner lasted two years after the last loan

was made. It was only because of a disagreement about Mr. Holcomb's continuing representation of Mr. Schiffner on an appeal of the EEO matter that this loan issue came to light. Accordingly, based upon the aforementioned, the actual or potential injury to the Schiffners was nonexistent.

#### MITIGATING FACTORS

In the Board's order modifying the Hearing Examiner's decision, it struck the finding that the aggravating factors substantially outweighed the mitigating factors. Respectfully, Mr. Holcomb urges that if this Court upholds that a violation of either RPC 1.7(b) or 1.8(a) occurred, he urges that the mitigating factors substantially outweigh any aggravating factors, and, therefore, admonishment is the appropriate sanction, if any.

The Hearing Examiner found, and the Board adopted, the following aggravating factors from Section 9.22 of the Standards: (b), (d), (g) and (i). Additionally, the Hearing Examiner found the following mitigating factors from Section 9.32 of the Standards: (a) and (c). Respectfully, Mr. Holcomb objects to the aggravating factors set forth herein as a clear preponderance of the

evidence has not established that those aggravating factors exist.

Additionally, the Hearing Examiner disallowed Mr. Holcomb's proposed mitigating factors under Section 9.32 as follows: (b), (d), (e) and (g). Mr. Holcomb objects to the disallowing of these proposed mitigating factors and urges that a clear preponderance of the evidence supports a finding that the aforementioned mitigating factors exist.

V. CONCLUSION

Respectfully, this Court should find that Mr. Holcomb violated no ethical rules in his representation of John Schiffner, individually, and dismiss this matter. If, however, the Court determines that an ethical violation occurred, the only appropriate sanction would be that of an admonishment.

As set forth previously, Mr. Holcomb has been a practicing attorney in the State of Washington for almost 40 years, and he is respected by his peers as he has held himself out as a true professional. The circumstances in this case show nothing less.

The sanction of suspension recommended by the Board is not supported by a clear preponderance of the evidence. Rather, what is supported by the evidence is that Mr. Holcomb provided legal assistance to a client, and during a period of time through the course of that legal representation, he obtained a recurring loan from a non-client. Nothing about this loan compromised Mr. Holcomb's representation of Mr. Schiffner or caused him any injury, actual or potential. Further, the evidence does not establish that anything about Mr. Holcomb's legal representation of Mr. Schiffner, or any other client, was anything less than exemplary. As a result, the Court should dismiss this matter in its entirety.

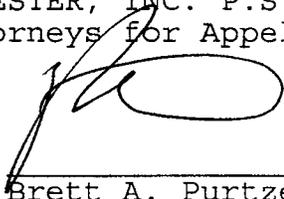
If the Court determines a sanctionable event occurred, the appropriate sanction is that of an admonishment. An admonishment is a sanction that adequately protects the public, but recognizes that an issue arose with a talented attorney, an attorney who is still able to provide valuable and competent representation to clients now and in the future. Further, such sanction recognizes all

other aspects of Mr. Holcomb's representation of other clients, which has been beyond reproach.

Accordingly, the Court should modify the Board's recommendation and if it does not dismiss this matter in its entirety, impose an admonishment against Mr. Holcomb.

RESPECTFULLY SUBMITTED this 28th day of February, 2007.

LAW OFFICES OF MONTE E.  
HESTER, INC. P.S.  
Attorneys for Appellant

By: 

\_\_\_\_\_  
Brett A. Purtzer  
WSB #17283

RECEIVED  
SUPERIOR COURT  
STATE OF WASHINGTON

2007 FEB 28 P 2:28

CERTIFICATE OF SERVICE

*dm*

CLERK

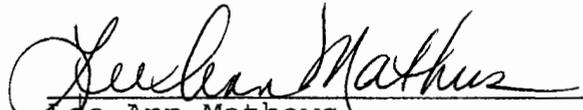
Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Washington State Bar Association  
Attn: Disciplinary Board Clerk  
1325 4th Avenue, Suite 600  
Seattle, WA 98101-2539

Washington State Bar Association  
Attn: Craig Bray  
1325 4th Avenue, Suite 600  
Seattle, WA 98101-2539

J. Byron Holcomb  
Attorney at Law  
P. O. Box 10069  
Bainbridge Island, WA 98110

Signed at Tacoma, Washington this 28th day of February, 2007.

  
Lee Ann Mathews

Rec. 2-28-07

-----Original Message-----

**From:** Lee Ann [mailto:LeeAnn@montehester.com]  
**Sent:** Wednesday, February 28, 2007 1:43 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Holcomb #200,448-2

Greetings, attached please find Mr. Holcomb's opening brief. Thank you. <<Holcomb Opening Brief.pdf>>

Lee Ann Mathews  
Paralegal  
Law Offices of Monte E. Hester, Inc., P.S.  
1008 S. Yakima Avenue, Suite 302  
Tacoma, WA 98405  
office (253) 272-2157  
fax (253) 572-1441  
email [leeann@montehester.com](mailto:leeann@montehester.com)  
web [www.montehester.com](http://www.montehester.com)

This e-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of this e-mail or any attachment is prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender and delete this copy from your system. Thank you for your cooperation.