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SUPREME COURT
STATE OF WASHINGTON

No. 200,448-2

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BY RONALD R. CARPENTER SUPREME COURT

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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 05#01323

REPLY BRIEF

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STATEMENT OF THE CASE

The appellant, J. Byron Holcomb, submits this reply brief in response to the answering brief of the Washington State Bar Association.

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

The ABA Standards for Lawyer Discipline govern all disciplinary cases in Washington. In Re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 801 P.2d 962 (1990).

As recently as 2003, this Court reaffirmed that the Standards "constitute a model setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." In Re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 66 P.3d 1057 (2003).

As this Court is aware, the Standards are designed to promote (1) consideration of all factors relevant to imposing the appropriate level of sanction to an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline;

and (3) consistency in the imposition of lawyer disciplinary sanctions for the same or a similar offense within and among jurisdictions. Id.

As this Court has recognized, each disciplinary case involves unique facts and circumstances. The Court fashions an appropriate sanction for the unique facts and circumstances of each case. In Re Disciplinary Proceeding Against Romero, 152 Wn.2d 124, 94 P.3d 939 (2004).

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT MR. HOLCOMB WAS DEALING WITH A CLIENT WHEN HE OBTAINED A LOAN FROM THE SCHIFFNER TRUST.

The Association, arguing in support of the Disciplinary Board's recommendation of a six-month suspension, recites as "fact" matters that were not established at the hearing. The crux of the Association's argument is that Mr. Holcomb dealt with a client when he obtained the recurring loans from the Schiffner Trust. Yet, when relying on the facts to support its argument, the Association interchanges Mr. Holcomb's client - Mr. Schiffner - with the Schiffner marital community and the Schiffner Trust. As set forth in Appellant's opening brief, Mr. Holcomb never represented Mrs. Schiffner, the Schiffner marital community, nor the Schiffner Trust. Therefore, in order to accept the Association's argument, the Court must make a finding that these four distinct legal

entities are all the same client. But, because Mr. Holcomb carefully limited the scope of his representation with Mr. Schiffner by each fee agreement, this is a finding that has no support in the record. See Exhibits 1-5.

The Association suggests that Mr. Schiffner's wife simply agreed to the loans, apparently, in order to accommodate her husband. The evidence at hearing, however, established that the marital community of Mr. Schiffner and his wife, jointly, needed to authorize the loans or they would not have been made to Mr. Holcomb. TR 103:13-104:13; 109:24-110:5-16. Further, to suggest that Mr. Schiffner "chose to make some of the loans with checks drawn on the checking account held in the [name] ... of the Trust" is inaccurate as all monies were derived from the Schiffner Trust.

With respect to the Association's argument that Mr. Holcomb seeks to "interpret these rules narrowly in an attempt to escape discipline for his misconduct", Mr. Holcomb is not doing anything of the sort. Association's Brief at 15. Rather, he urges this Court not to expand an interpretation of the definition of "client" that would include not only Mr. Schiffner, but the separate entities that Mr. Schiffner was a part. The Association's argument suggests an interpretation of an RPC

such that Mr. Holcomb had a duty to inquire as to the structure of the Schiffner Trust to determine whether he was, indeed, dealing with Mr. Schiffner, the individual. Mr. Holcomb urges that if the Association deemed it necessary to call an expert witness - Mr. Tizzano - to testify about the makeup of the Trust - then that was something beyond what would be required of Mr. Holcomb to do in order to determine if he was dealing with Mr. Schiffner when he obtained monies from the Schiffner Trust. As Mr. Holcomb testified, he represented Mr. Schiffner in his individual capacity, and not Mrs. Schiffner, the Schiffner marital community or the Schiffner Trust.

Finally, to suggest that Mr. Holcomb exploited his client is simply not borne by the evidence. After the last loan was made, on or about March 26, 2001, Mr. Holcomb continued to represent Mr. Schiffner for an additional two years in his EEO matter. Significantly, Mr. Schiffner, the individual, entered into two separate fee agreements after the March 26, 2001, transaction and was contemplating entering into a third fee agreement before the attorney-client relationship ended. See Exhibits 3-5. Mr. Holcomb vehemently denies that he engaged in any dishonest, intentional, knowing, or deceitful conduct, nor, in any

fashion, exploit his client, Mr. Schiffner, when he obtained money from the Schiffner Trust.

The Association argues that Mr. Holcomb's advice "could" have been compromised by his need to keep Mr. Schiffner around as a source of financing. Association's Brief at 18. Additionally, the Association argues that "respondent's candor about the merits of the case 'may' have been affected by his need to borrow money from his client".

Association's Brief at 18-19. Here, there is absolutely no evidence to suggest that Mr. Schiffner's case was compromised or that Mr.

Holcomb's advice to Mr. Schiffner was, in any fashion, compromised by the loans obtained from the Schiffner Trust. Further, by the evidence of the subsequent fee agreements, which were made at arms length, there is no evidence in the record to support the Association's speculative argument.

II. AGGRAVATING/MITIGATING FACTORS

The Association urges that in addition to the aggravating factors found by the Disciplinary Board, the Court should include the following aggravating factor that the Disciplinary Board struck: indifference to making restitution.

Respectfully, and as noted by the Disciplinary Board, there is not substantial evidence to support this factor because no evidence exists that Mr. Schiffner ever requested restitution, which is also supported by Mr. Holcomb's testimony. TR 205-206. As such, the Court should uphold this conclusion regarding restitution. Additionally, the Court should find that the following aggravating factors recommended by the Disciplinary Board are not supported by substantial evidence.

1. Dishonest or Selfish Motive

The factor of a dishonest or selfish money is generally found in cases where an attorney abuses client funds through trust account violations, conversion of property or mishandling of settlement proceeds. See e.g. In Re Disciplinary Proceeding Against Heard, 136 Wn.2d 405, 963 P.2d 818 (1998). That factor does not apply to this case because no substantial evidence supports such finding. Further, the Association cannot point to any similar case where this factor has been included under comparable circumstances.

2. Multiple Offenses

The Disciplinary Board allowed the "multiple offenses" aggravator to apply, determining that each loan was a separate offense. Given the nature that this recurring loan was short term, it should be

viewed as one continual extension of credit as opposed to multiple short term loans. Therefore, if this Court deems a violation occurred, the Court should also find that only one offense occurred. As such, aggravator (d), multiple offenses, should not be considered by the Court.

3. Wrongful Nature of Conduct

As argued previously by Mr. Holcomb, he respectfully urges that he did not engage in any wrongful conduct and that he has not refused to acknowledge the wrongful nature of his conduct. As he has steadfastly maintained, he was not obtaining loans from a "client" when he obtained the funds from the Schiffner Trust. Rather, and as argued previously, he did not violate an attorney-client relationship. As such, that aggravating factor should not be considered.

4. Substantial Experience in the Practice of Law

Although it is clear that Mr. Holcomb has practiced for nearly forty years, this is the first time he has run afoul of the Bar Association. The Association argues that because of Mr. Holcomb's many years of practice, he should have extensive knowledge of the trust relationship between lawyer and client. Indeed, Mr. Holcomb does understand such a relationship, which is why he strenuously maintains that he did not violate any RPC in this case because he was not obtaining a loan from a

client. Rather, he dealt with a non-client to which the ethical rules at issue here would not apply.

III. THE COURT SHOULD FIND THAT ADDITIONAL MITIGATING FACTORS APPLY.

Mr. Holcomb respectfully urges that this court find that the additional mitigating factors of (b) absence of a dishonest or selfish motive and (g) character or reputation should apply. Without discussion, the Disciplinary Board did not address these mitigating factors.

With respect to the absence of a dishonest or selfish motive and as set forth previously, Mr. Holcomb's actions did not abuse the attorney-client relationship, nor did he mishandle client funds or trust accounts, or convert property or mishandle any settlement proceeds. Rather, this was simply a matter of obtaining a recurring loan over a period of time from a non-client.

Additionally, Mr. Holcomb's testimony, which was un rebutted, establishes that he, indeed, has a fine character and reputation. Absent contrary evidence, this Court should also find that this mitigating factor applies.

IV. SANCTION

As set forth within Mr. Holcomb's opening brief, he respectfully urges that this Court find that no sanction is warranted as this is not a sanctionable event occurred. Given the structured and specific attorney-client relationship Mr. Holcomb had with Mr. Schiffner, i.e representing him in the EEO matter, Mr. Holcomb urges that this Court find that he did not engage in any ethical violation.

If, however, the Court deems that Mr. Holcomb violated either of the ethical rules at issue, the only appropriate finding is that he was negligent in failing to recognize that a "client" was involved, and, therefore, the appropriate sanction would be that of admonishment.

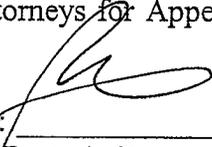
When considering the cases cited previously in Mr. Holcomb's opening brief at pg. 22, where a clear attorney-client relationship existed and a violation of that relationship caused undisputed injury, the de minimis injury involved in this case warrants that the only appropriate sanction be that of an admonishment.

CONCLUSION

The Court should reject the Disciplinary Board's recommendation and dismiss this action, or, in the alternative, impose an admonishment for Mr. Holcomb's, arguably, negligent act.

RESPECTFULLY SUBMITTED this 16th day of May, 2007.

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By: 

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BY RONALD D. CARPENTER

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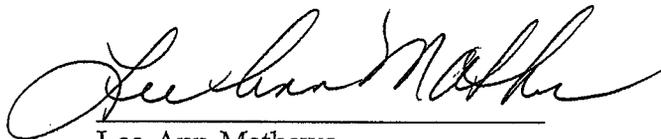
under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Washington State Bar Association
Attn: Disciplinary Board Clerk
1325 4th Avenue, Suite 600
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Signed at Tacoma, Washington this 16th day of May, 2007.



Lee Ann Mathews

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TO E-MAIL

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

From: Lee Ann [mailto:LeeAnn@montehester.com]
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Attached please find for filing appellant's reply brief. Thank you. <<Reply-Brief1.pdf>>

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