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STATE OF WASHINGTON
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Supreme Court No. 200,448-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

J. BYRON HOLCOMB,

Lawyer (Bar No. 1695).

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

Craig Bray
Bar No. 20821
Disciplinary Counsel

WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, Washington 98101-2539
(206) 239-2110

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I. COUNTERSTATEMENT OF THE ISSUES

1. Under Rule 1.7(b) of the Rules of Professional Conduct (RPC), a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and obtains written consent after full disclosure of the material facts. Under RPC 1.8(a), a lawyer shall not enter into a business transaction with a client unless the terms are fair and reasonable to the client, are fully disclosed in writing, the client is given a reasonable opportunity to seek advice of independent counsel, and the client consents. Respondent J. Byron Holcomb obtained 24 interest-free loans from his client without transmitting the terms of the loans in writing or advising the client to seek advice of independent counsel. At the time, Respondent was in a precarious financial situation. His judgment about whether to continue pursuing his client's claim was affected by his need to borrow money from his client. He did not consult with the client about any conflict of interest, did not obtain a written waiver, and did not fully disclose facts about his financial condition. Did the Disciplinary Board properly conclude that Respondent violated RPC 1.8(a) and RPC 1.7(b)?

2. Respondent borrowed money from a current client 24 separate times. The client's wife consented to the loans. Each time a loan

was made, the client removed money from a checking account held in the names of the client, the wife, and their revocable trust and gave it to Respondent. When Respondent repaid the money, he did so with checks made payable to the client. Did the Hearing Officer and Disciplinary Board properly conclude that Respondent engaged in these loan transactions with his client despite the involvement of the client's wife and trust account?

3. A unanimous Disciplinary Board concluded that the proper sanction for Respondent's misconduct was suspension. Eleven Board members recommended that Respondent be suspended from the practice of law for six months, and one Board member recommended a one-year suspension. Should the Court affirm the Board's unanimous sanction recommendation of suspension for at least six months?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On July 30, 2004, the Washington State Bar Association (Association) filed a two-count amended formal complaint alleging as follows:

Count 1: By entering into loan transactions with his client when the terms were not fair and reasonable to the client and/or were not fully disclosed and transmitted in writing to the client, and/or when the client was not advised that he could seek advice from an independent lawyer, Respondent violated RPC 1.8(a).

Count 2: By continuing to represent Mr. Schiffner, including making decisions about whether to continue to pursue the matter after the dismissal of the initial claim, during the time Respondent was using Mr. Schiffner as the source for multiple short term loans, Respondent violated RPC 1.7(b).

Bar File (BF) 2.

On November 14 and 15, 2005, a disciplinary hearing was held before Hearing Officer David Hiscock. On May 9, 2006, the Hearing Officer filed his Findings of Fact, Conclusions of Law and Recommendation. BF 59 (copy attached as Appendix A). The Hearing Officer found, by a clear preponderance of the evidence, that Respondent had violated RPC 1.8(a) and RPC 1.7(b) as alleged in Counts 1 and 2, and recommended that Respondent be suspended from the practice of law for one year. BF 59, Conclusion of Law (CL) 36. Respondent filed a Motion to Reconsider on May 24, 2006. On July 14, 2006, the Hearing Officer “granted” the motion, reconsidered the evidence and his decision, but then affirmed the decision (essentially denying the motion to reconsider).

Both parties filed briefs with the Disciplinary Board (BF 69, 70, 73) and the Board heard oral argument on November 17, 2006. The Board filed its Order Modifying Hearing Officer’s Decision on December 13, 2006. BF 76 (copy attached as Appendix B). The Board adopted the Hearing Officer’s findings of fact and unanimously concluded that

Respondent violated RPC 1.8(a) and RPC 1.7(b). The Board deleted four of the Hearing Officer's conclusions of law having to do with aggravating and mitigating factors and concluded that the aggravating factors did not significantly outweigh the mitigating factors. The Board then recommended that Respondent be suspended from the practice of law for six months. The Board's vote on the sanction was 11-1 with one Board member voting for the longer one-year suspension recommended by the Hearing Officer. BF 76 at 1, n. 1. This appeal followed.

B. SUBSTANTIVE FACTS

Respondent was admitted to the practice of law in Washington on September 22, 1967. BF 59, Finding of Fact (FF) 1.

In December 1996, John Schiffner, acting *pro se*, filed an employment discrimination complaint against the Secretary of the Navy. BF 59, FF 1. In 1998, Respondent agreed to represent Mr. Schiffner. Id. Defined phases of the representation were covered by separate fee agreements that were negotiated as the case progressed. Id. Respondent continued to represent Mr. Schiffner until April 2003. Exhibit (EX) 23. During that time, Respondent represented Mr. Schiffner in various proceedings and advised him about whether and how to pursue the matter against the Navy after the initial claim was dismissed. BF 59, FF 1.

In March 2003, a dispute arose when Respondent sought a new contingent fee agreement at a higher percentage than before; Mr. Schiffner did not want to pay the higher rates. EX 5; BF 59, FF 2; Transcript (TR) 63-70. After a meeting on April 15, 2003, Respondent called the Schiffners' home and left a message that he was withdrawing from the case, and later did so, ending the representation. EX 6; EX 23. After this, Mr. Schiffner consulted with another attorney who advised him he did not have a case due to weakness in the evidence, and then dismissed his appeal. EX 24; TR 71-72.

During the period from December 16, 1999 through March 26, 2001, while representing Mr. Schiffner, Respondent asked Mr. Schiffner for multiple, short-term, interest-free loans. BF 59, FF 3. Respondent requested and received 24 such loans. EX 8; EX 9; EX 10. The loans varied in amount from \$750 to \$3,500. Id. Eleven of the loans were made by cashier's checks issued by the Kitsap Credit Union at Mr. Schiffner's request and these checks identified John Schiffner as the payor. EX 9. The remaining thirteen loans were made by way of personal checks drawn on a Kitsap Credit Union checking account held in the names of the "Schiffner Trust Agreement," "John Schiffner," and "Anita Schiffner," his wife. EX 10. All but three of these checks were signed by Mr. Schiffner.

The other three were signed by his wife. The Schiffners' signatures did not identify them as trustees. Id.

The Schiffner Trust Agreement is a revocable trust created in 1999 by John and Anita Schiffner. EX 18. They are the sole owners and controllers of the trust and are the trustees. They have unrestricted power to add to or remove property from the trust. Property in the trust is held for the benefit of the Schiffners and such residual beneficiaries as survive them. Id. Until one of the Schiffners dies, the character of the trust assets is no different from assets not in the trust. TR 149-50. Individual creditors of John and Anita Schiffner could invade the trust for repayment of their debts. TR 136. The trust bears the same tax identification number as Mr. Schiffner. TR 73, 136-37. The Schiffners use checks drawn on the above-mentioned Kitsap Credit Union checking account to pay their everyday expenses. TR 41.

At the time Respondent asked Mr. Schiffner for and received the first loan, he did not know the Schiffner Trust Agreement existed. TR 170-72. Respondent never reviewed the text or terms of the Schiffner Trust Agreement. TR 218-219; BF 59, CL 18.

When obtaining the loans from his client, Respondent did not advise Mr. Schiffner that his personal interests might conflict with Mr. Schiffner's interests, did not obtain a written waiver of any conflict of

interest, and did not provide the Schiffners with complete written information about his financial condition. BF 59, FF 1, FF 5. Respondent did not advise Mr. Schiffner that he could seek the advice of independent counsel regarding whether to loan Respondent the money. BF 59, FF 6. None of the loans was evidenced by a promissory note or other writing setting out the terms of the loan. BF 59, FF 8. The terms of the loans did not provide for the payment of interest, fees or penalties for late payment, fees or penalties for checks not backed by sufficient funds, or other common terms for loan repayment, and Respondent did not discuss these issues with the Schiffners. BF 59, FF 7, FF 9. None of the loans was secured. BF 59, FF 11.

For many, but not all, of the loans, Respondent gave the Schiffners post-dated personal checks to cash or deposit later, while he used his client's money in the present. All of Respondent's repayment checks were made payable solely to "John Schiffner," not to the "Schiffner Trust Agreement." EX 11. Some of Respondent's repayments were late, and some of the checks did not clear the bank. BF 59, FF 12. Mr. Schiffner bore the consequences, including additional bank charges, of Respondent's late payments or insufficient funds. BF 59, FF 13.¹ Ultimately, all of the

¹ Additional bank charges included a \$15.00 stopped payment charge and a \$5.00 returned check charge. EX 8.

loans were repaid, but the last check was not repaid for a year. TR 51-52, 207-08; EX 8.

At the time Respondent borrowed the money from Mr. Schiffner, he was having cash flow problems due to a dispute with Kitsap County over his residential property. BF 59, FF 10; TR 166-67. While he indicated he owned substantial non-liquid assets, those assets were tied up in the dispute. BF 59, FF 10; TR 166, 197-200. Respondent had exhausted the limits of his credit cards and other lines of credit and was in dire financial straits. TR 167, 198-201. Respondent did not disclose his financial condition to his client. BF 59, FF 1; TR 204-205.

Mr. Schiffner testified that, during the time Respondent borrowed money from him, he and his wife felt like "we were cash cows." TR 70. The Schiffners were concerned that if they stopped loaning money to Respondent it would adversely affect the way he handled Mr. Schiffner's case or cause Respondent to withdraw from the representation. TR 53-55, 114-15; BF 59, CL 25. Despite those fears, they did stop after the last loan was repaid. During the April 2003 fee dispute, the Schiffners felt Respondent owed them a break on his fees because they showed him consideration on the loans. TR 69-70.

III. SUMMARY OF ARGUMENT

1. The Hearing Officer and Disciplinary Board properly concluded that Respondent engaged in business transactions with his client because he asked the client to loan him money 24 separate times and every check he issued in repayment was made out to the client. The Disciplinary Board properly rejected Respondent's argument that, since his client's wife consented to the loans and since the money was withdrawn from a trust account, he was not dealing with a client when he borrowed the money. The fact that the client's wife consented to the making of the loans does not mean that Respondent was then doing business with the client's marital community to the exclusion of the client. The fact that the money with which the loans was made was withdrawn from a checking account held in the names of the client, the client's wife, and their revocable trust does not mean that Respondent was doing business with the trust to the exclusion of the client.

2. Respondent had the burden of proving that these business transactions with his client were ethical. Respondent failed to meet his burden as he could not prove there was no undue influence, he did not give his client the same information or advice as a disinterested attorney would have given, and his client would have received a greater benefit had the client dealt with a stranger.

3. The Hearing Officer and Disciplinary Board correctly concluded that Respondent violated RPC 1.8(a) by obtaining interest-free, penalty-free loans from his client without transmitting the terms of the loans in writing or advising the client to seek advice of independent counsel in relation to the loans.

4. The Hearing Officer and Disciplinary Board correctly concluded that Respondent violated RPC 1.7(b) by engaging in the loan transactions with his client without consulting with the client about the possible conflict of interest this presented, without obtaining a written waiver, and without fully disclosing facts about his financial condition.

5. The Disciplinary Board's unanimous recommendation that Respondent should be suspended for at least six months should be affirmed because Respondent acted knowingly and injured his client, and because the aggravating factors outweigh the mitigating factors and do not support a deviation below the minimum presumptive sanction.

IV. ARGUMENT

A. STANDARD OF REVIEW

“When challenged on appeal, a 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, 93 P.3d 166 (2004). “Substantial evidence exists if the record contains ‘evidence

in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001). The “substantial evidence” standard of review requires the reviewing body to view the evidence *and* the reasonable inferences therefrom “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” Ongom v. Dep’t of Health, 124 Wn. App. 935, 949, 104 P.3d 29 (2005). As Respondent has not challenged the Hearing Officer’s findings of fact, they are verities on appeal. In re Disciplinary Proceeding Against Boelter, 139 Wn.2d 81, 96, 985 P.2d 328 (1999).

The Disciplinary Board’s conclusions of law and recommendation are reviewed de novo. Guarnero, 152 Wn.2d at 59. The Supreme Court will uphold the conclusions of law if they are supported by the findings of fact. In re Disciplinary Proceeding Against Haley, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006) (Haley II).

The Court gives serious consideration to the Board's recommended sanction and will hesitate to reject a unanimous recommendation of the Board in the absence of clear reasons for doing so. In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 209-10, 125 P.3d 954 (2006).

**B. THE HEARING OFFICER AND DISCIPLINARY BOARD
CORRECTLY CONCLUDED THAT RESPONDENT
VIOLATED RPC 1.8(a) AND RPC 1.7(b).**

The Hearing Officer and unanimous Disciplinary Board found that (1) Respondent entered into business transactions with his client while representing the client, that the terms of the transactions were not disclosed in writing and were not fair and reasonable to the client, and that Respondent did not advise the client to seek advice of independent counsel, thereby violating RPC 1.8(a); and (2) that Respondent continued to represent his client during the time he was using his client as the source of multiple short-term loans without consulting with his client about the conflict, providing full disclosure of his own financial condition, or obtaining a written waiver of the conflict, thereby violating RPC 1.7(b).²

1. The burden was on Respondent to prove these loan transactions were not unethical.

“[A]n attorney-client transaction is prima facie fraudulent.” Haley II, 157 Wn.2d at 406. Because such transactions are presumptively fraudulent, once the Association proved that such transactions occurred, Respondent then bore the burden of proving that his actions were not unethical. Id. citing In re Disciplinary Proceeding Against McGlothlen, 99 Wn.2d 515, 524-25, 663 P.2d 1330 (1983).

² Copies of RPC 1.7 and RPC 1.8 as they existed at all times relevant to this matter are attached as Appendix C. RPC 1.7 and RPC 1.8 were subsequently amended effective September 1, 2006.

2. The Hearing Officer and Disciplinary Board properly found that Respondent engaged in the loan transactions with a client.

In opposition to the conclusion that he violated both RPC 1.8(a) and RPC 1.7(b), Respondent argues, as he did below, that he did not violate these rules because the money loaned to him was drawn from the Schiffners' trust account and because Mr. Schiffner's wife consented to the making of the loans. He maintains that the trust was a separate legal entity and that, since he did not represent the trust or Ms. Schiffner, he cannot be found to have engaged in business transactions with a "client" or to have failed to avoid a conflict of interest. Respondent's Brief (RB) at 12-17.

Whether an attorney-client relationship exists necessarily involves questions of fact, and each case turns on its facts. Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). Respondent's argument here ignores the facts. First, Respondent asked his client, Mr. Schiffner, for the loans. The fact that Mr. Schiffner's wife agreed that the loans be made does not change the fact that Respondent was transacting business with his client.

Second, at the time he asked for the first loan, Respondent did not know the trust existed. TR 170-72.³ He did not specify what account the money should be drawn from, but instead testified that was Mr. Schiffner's choice, and that he never told Mr. Schiffner he wanted to deal with the trust in some separate manner. TR 217. The fact that Mr. Schiffner chose to make some of the loans with checks drawn on the checking account held in the names of him, his wife and the trust is irrelevant. And eleven of the loans were made with cashier's checks so, in those instances, Respondent was paid with money that had already been withdrawn from trust. EX 9.

Third, every single check Respondent gave to his client in repayment of the loans was made payable to "John Schiffner" without restriction. EX 11. The checks were not made payable to the "Schiffner Trust Agreement" and did not reference the trust in any way. This evidence makes it clear that Respondent was dealing with his client, not with the trust to the exclusion of the client.

Moreover, the Hearing Officer properly credited the expert testimony of lawyer Richard Tizzano that dealing with the trust was no

³ Respondent testified that the first check he saw from Mr. Schiffner's trust account was EX 10-A, the first loan check his client gave him, and that only after seeing that check did he come to know about the trust.

different from dealing with Mr. Schiffner. TR 137. He credited it because the trust bore the same tax ID number as Mr. Schiffner and, until either he or Ms. Schiffner died, the property in the trust had the same character as if it was not in the trust (TR 73, 149-50); individual creditors of John and Anita Schiffner could invade the trust for repayment of their debts (TR 136; and see RCW 6.32.250⁴); and the Schiffners used the funds in the trust checking account to pay everyday expenses (TR 41). In fact, when asked, Mr. Tizzano was unable to identify how the trust was different from Mr. Schiffner the individual. TR 143.

Respondent seeks to interpret these rules narrowly in an attempt to escape discipline for his misconduct. But the RPC should be construed “so as to foster the purpose for which they are enacted,” which is “the protection of the public from attorney misconduct.” McGlothlen, 99 Wn.2d at 522. The prohibition against lawyer conflicts of interest is intended to protect the public by ensuring that the lawyer will represent his client “with undivided loyalty,” by guarding against “influences that interfere with [the] lawyer’s devotion to [his] client’s welfare,” and by helping to ensure that the lawyer will not “exploit” his client. Restatement

⁴ (“This chapter does not authorize the seizure of, or other interference with,...(2) any money, thing in action or other property held in trust for a judgment debtor where the trust has been created by,..., a person other than the judgment debtor...”(emphasis added)).

(Third) of the Law Governing Lawyers: Ch. 8 introductory n., § 121 cmt. b. (2000). Yet exploit his client is exactly what Respondent did. The Hearing Officer and a unanimous Disciplinary Board correctly concluded that Respondent's argument was without merit.

3. Respondent failed to meet his burden under McGlothlen.

McGlothlen imposed a three-part test that Respondent had to meet to prove that he should not be subject to discipline:

[A]n attorney attempting to justify a transaction with his or her client has the burden of showing (1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.

99 Wn.2d at 525. Although McGlothlen was decided under the former Code of Professional Responsibility, this rule applies equally under the RPC. Haley II, 157 Wn.2d at 406. This is a strict test and Respondent failed to meet any part of it.

First, Respondent cannot show that there was no undue influence. He obtained loans from his client that were unsecured and bore no interest, no penalties and no provisions for collection; and which were not in writing or memorialized with promissory notes. The Schiffners testified that they were concerned that ending the practice of loaning money to

Respondent would adversely affect the attorney/client relationship. TR 53-55, 114-15. Mr. Schiffner and his wife thus made loans that they otherwise would not. Respondent improperly manipulated his relationship with his client.

Second, Respondent could not show that he gave his client the same advice about lending him money that a disinterested lawyer would give. Respondent's financial situation was precarious at the time. Although he stated that he owned substantial resources, he admitted those resources were not liquid and that his situation was dire. TR 197-201. A disinterested lawyer would not recommend making interest-free, unsecured loans to a person in Respondent's financial condition with no more than an oral agreement as to the loans' terms, yet that is the nature of the loans Respondent obtained.

Third, Respondent failed to show that the transactions were as beneficial to Mr. Schiffner as they would have been had his client dealt with a stranger. Had Mr. Schiffner dealt with a stranger, he would have earned interest; possessed written, enforceable loan agreements; and not been responsible for additional fees and charges incurred when repayment checks bounced. See TR 138-39.

4. The Hearing Officer and the Disciplinary Board properly found that Respondent's representation of his client was materially limited.

Both the Hearing Officer and the Disciplinary Board correctly concluded that Respondent's representation of his client was materially limited by his own interests. His advice to Mr. Schiffner regarding the merits of Mr. Schiffner's case could have been compromised by his need to keep Mr. Schiffner around as a source of financing. In fact, the evidence indicates it was. Mr. Schiffner consulted another lawyer about his case soon after Respondent withdrew. That lawyer told Mr. Schiffner he did not have a good case because they did not have the "smoking gun."⁵ TR 71-73. Respondent agreed when he testified that he thought this "smoking gun" document was critical to Mr. Schiffner's case. TR 164. Respondent and Mr. Schiffner attempted to obtain the "smoking gun" in the year 2000, but failed. TR 73. This occurred during the period when Respondent was receiving loans from Mr. Schiffner. Yet despite not having the "smoking gun," Respondent continued to advise Mr. Schiffner to pursue the case. This strongly suggests that Respondent's candor about

⁵ Mr. Schiffner identified the "smoking gun" as a memo possessed by the Navy that listed supervisors whose job placements were going to be adversely affected. He believed his name was on that list. TR 72.

the merits of the case may have been affected by his need to borrow money from his client.

Additionally, Respondent's repeated use of his client as a "cash cow" (TR 70) to assist him through a difficult financial period caused his client to fear that, if he did not loan Respondent the money, the representation would be adversely affected. TR 53-55. Respondent then failed to repay some loans on time and did not pay the last one for a year. This made his client uncomfortable in communicating with him, put him at odds with his client, and created hard feelings that led to the end of the relationship.

It was not reasonable for Respondent to conclude that his representation of Mr. Schiffner would not be impaired by his own interest in continuing to obtain favorable loans. See BF 59, CL 28. Despite the potential for conflict, Respondent did not consult with his client about the conflict, fully disclose the material facts, or obtain written consent, all of which were required by RPC 1.7(b).

**C. THE HEARING OFFICER AND DISCIPLINARY BOARD
PROPERLY FOUND THAT THE PRESUMPTIVE SANCTION
FOR RESPONDENT'S MISCONDUCT IS SUSPENSION.**

This Court requires that the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) be applied in all lawyer discipline cases. In re Disciplinary

Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000). Application of the ABA Standards to arrive at a disciplinary sanction is a two-stage process. First, the presumptive sanction is determined by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The second is to consider any aggravating or mitigating factors that might alter the presumptive sanction. Id.

1. ABA Standard 4.32 is the correct standard to apply when determining the presumptive sanction for Respondent's violations of RPC 1.8(a) and RPC 1.7(b).

The Respondent agrees that ABA Standards § 4.3 is the appropriate section to refer to when determining the presumptive sanction to be applied in this case. RB at 19. ABA Standard 4.32 (Suspension) is the proper standard in this case because Respondent acted knowingly and his conduct injured his client.⁶

- a. The Hearing Officer and Disciplinary Board correctly concluded that Respondent's mental state was knowing.

Respondent argues that the Hearing Officer erred in finding that Respondent's state of mind was knowing rather than negligent. RB at 19-21. "Knowledge" is defined as "the conscious awareness of the nature or

⁶ A copy of ABA Standards § 4.3 is attached as Appendix D.

attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result,” whereas “negligence” is defined as “the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” ABA Standards at 17 (Definitions) The Hearing Officer’s determination of state of mind is a factual determination to be given great weight on review. In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 744, 122 P.3d 710 (2005).

Respondent argues that his conduct was merely negligent because he misunderstood the legal relationship between Mr. Schiffner and the trust. RB at 19. But consciousness that particular conduct violates the RPC is not a prerequisite for a finding of knowledge. In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 416, 98 P.3d 477 (2004). This Court has found knowledge where an attorney knew or should have known that a conflict existed. Id. Here, Respondent was well aware of the “nature or attendant circumstances of his conduct.” He knew he was asking a client to loan him money, and did it 24 times. He knew the terms of the loans did not provide for interest or reimbursement of fees and penalties incurred by the Schiffners. He knew that he had not fully disclosed his precarious financial situation, and knew that he had not

advised his client to seek advice of independent counsel. His mental state was properly found to be knowing, regardless of whether he understood all the details of the Schiffners' trust.

- b. The Hearing Officer and Disciplinary Board correctly concluded that Respondent's conduct injured his client.

Respondent's conduct caused actual and potential injury to his client. It injured the lawyer-client relationship as it caused Mr. Schiffner and his wife to become uncomfortable in their dealings with Respondent. BF 59, CL 25; TR 53-55, 70, 114-15. It also caused them pecuniary harm. Mr. Schiffner and his wife did not earn interest from the loans and were not reimbursed by Respondent for additional fees and charges they incurred when his repayment checks did not clear the bank.⁷ They were deprived of the use of their money while it was tied up with Respondent – indeed, in the case of the last loan, the money was tied up for a year. BF 59, FF 12, FF 13, CL 26; TR 51-53, 55; EX 8. There was also the potential that Respondent would default on one of the loans and the Schiffners would lose that money altogether. Both the Respondent's client and the client's marital community were injured. BF 59, CL 27.

⁷ The Disciplinary Board correctly adopted the Hearing Officer's conclusion that the lawyer-client relationship was harmed, but erred in concluding there was "no specific showing of any loss to the client" or that the record did not "establish the amount of the resulting losses." BF 76 at 3. EX 8 indicates that, at a minimum, the Schiffners incurred \$20.00 in stop payment and returned check charges.

D. THE COURT SHOULD AFFIRM THE DISCIPLINARY BOARD'S RECOMMENDATION OF A SIX-MONTH SUSPENSION.

The mitigating and aggravating factors should be examined to determine the length of the suspension. Halverson, 140 Wn.2d at 493. Generally, the minimum suspension is six months. Id. at 495; In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 762, 82 P.3d 224 (2004). A minimum suspension is warranted “where there are either no aggravating factors and at least some mitigating factors, or where the mitigators clearly outweigh any aggravating factors.” Halverson, 140 Wn.2d at 497. Here, aggravating factors exist and outweigh the mitigating factors. Although Respondent argues for an admonition, consideration of these factors does not justify a downward departure from the presumptive minimum suspension. The Disciplinary Board’s recommendation of a six month suspension is, if anything, lenient.

Respondent argues that none of the aggravating factors found by the Hearing Officer were supported by the evidence. RB at 23-24. Respondent also argues that the Hearing Officer erred in disallowing several other mitigating factors. RB at 24. But Respondent cites to no authority or specific facts in support of his argument and again seeks to ignore the evidence.

1. Substantial evidence supports the aggravating factors found by the Disciplinary Board.

The Hearing Officer concluded that the following aggravating factors from ABA Standard 9.22 were applicable in this case:

- (b) dishonest or selfish motive. Respondent used the funds from his client and the client's marital community for his own personal purposes and delayed repayment of the last loan for a year. Respondent needed these loans and testified that he had difficulty borrowing from other sources due to his precarious financial circumstances;
- (d) multiple offenses. Each loan was a separate offense;
- (g) refusal to acknowledge wrongful nature of conduct. As evidenced by his comments during his testimony and after closing argument. Respondent does not argue that he engaged in the conduct at issue, but insists it was not wrongful;
- (i) substantial experience in the practice of law. Respondent was admitted to the practice of law in Washington nearly 40 years ago and has practiced in both State and Federal courts;
- (j) indifference to making restitution. While the principle [sic] amount of all the loans was repaid, Respondent has not paid or offered to repay the additional fees and charges assessed to the Schiffners.⁸

BF 59, CL 32.

⁸ The Hearing Officer also concluded that the aggravating factors of (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process, and (h) vulnerability of victim, "should be considered as well." BF 59, CL 32 (second paragraph). The Disciplinary Board struck this paragraph. BF 76 at 2. The Association does not challenge the Board's determination with regard to these two factors.

- a. The aggravator of (b) dishonest or selfish motive is supported by substantial evidence.

The Hearing Officer and Disciplinary Board concluded that Respondent's actions were selfish because "Respondent used the funds from his client and the client's marital community for his own personal purposes and delayed repayment of the last loan for a year. Respondent needed these loans and testified that he had difficulty borrowing from other sources due to his precarious financial circumstances." BF 59, CL 32. This conclusion is supported by the findings of fact and Respondent's own testimony at hearing. BF 59, FF 10; TR 166-67, 180. Respondent even testified that "I had to keep my mortgage payment." TR 201. It is clear that Respondent put his own personal interests above those of his client, to the expense of the client.

- b. The aggravator of (d) multiple offenses is supported by substantial evidence.

The Hearing Officer concluded that Respondent committed multiple offenses. This was appropriate because two counts of misconduct were found and the misconduct continued over a period of more than two years. Poole, 156 Wn.2d at 225 (multiple offense aggravator applied when there were two counts of misconduct, one of which was based on over eight months of continued misconduct).

- c. The aggravator of (g) refusal to acknowledge wrongful nature of conduct is supported by substantial evidence.

This aggravator is properly applied when, as here, the lawyer does not deny that he engaged in the activity in question but instead argues that the activity was not wrongful. In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 196 n. 8, 117 P.3d 1134 (2005). Here, despite substantial evidence to the contrary, Respondent has steadfastly refused to admit that his conduct was wrongful. See, e.g., TR 174-75, 195, 217, 293-94; RB at 12; and see Dann, 136 Wn.2d at 81 (arguments in lawyer's briefs to the Court found to support this aggravator). In particular, Respondent argues that the existence of the trust and his client's willingness to advance the loans somehow excuses his conduct. But rationalizing the misconduct does not constitute acknowledgment of misconduct. In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 621, 98 P.3d 444 (2004); see also In re Disciplinary Proceeding Against Anschell, 149 Wn.2d 484, 513-14, 69 P.3d 844 (2003) (Court applied this aggravator where lawyer consistently maintained that he never represented one client and so there was no conflict of interest with regard to that client, and acknowledged that there was a conflict as to another client, but maintained it caused no harm).

- d. The aggravator of (i) substantial experience in the practice of law is supported by substantial evidence.

Respondent was admitted to the practice of law in Washington nearly 40 years ago, a long period of prior practice. Respondent repeatedly attempts to argue that this experience should be used to mitigate the sanction (RB at 4, 19, 22, 24), but despite his many years of practice and what should be extensive knowledge of the trust relationship between lawyer and client, he repeatedly crossed the line here and steadfastly refuses to admit a boundary existed. The ABA Standards clearly indicate that this should be considered an aggravating factor.

- e. The Disciplinary Board improperly struck the aggravator of (j) indifference to making restitution.

The Disciplinary Board struck factor (j) indifference to making restitution because it found no evidence the client ever requested restitution. BF 76 at 2. But this aggravator is supported by substantial evidence.

Mr. Schiffner incurred fees and penalties when checks Respondent gave him failed to clear the bank. EX 8. Respondent has never paid or offered to pay these amounts even though he knows his client incurred them due to Respondent's failure to timely repay some of the loans. BF 59, CL 32; TR 206. The Disciplinary Board's conclusion that this aggravating factor does not apply seems to flow from a belief that the

client had to make a specific request for restitution. BF 76 at 2. But here Respondent knew his client had incurred fees and penalties because Respondent had stopped payment on one check and another check he issued to his client bounced, yet he has never offered to repay those fees. He also knows he never paid interest on the money he borrowed, even in the instance where he did not repay the loan for a year. There should be no requirement that the injured client has to first make a specific request for restitution for this aggravator to apply. The Hearing Officer's conclusion on this factor should be reinstated.

2. The Hearing Officer and Disciplinary Board properly rejected Respondent's proposed mitigating factors.

The Hearing Officer concluded that the following mitigating factors from ABA Standard 9.32 were applicable:

- (a) absence of a prior disciplinary record;
- (c) personal or emotional problems. Respondent's spouse suffered severe health problems during the relevant time period. While the Respondent's judgment may have been blurred or clouded then, substantial time has passed and the Respondent has still not recognized the inappropriate nature of his acts. This is disturbing and reduces the weight given this mitigator.

BF 59, CL 34. The Disciplinary Board did not alter the Hearing Officer's conclusions as to the mitigating factors.

- a. The Hearing Officer and Disciplinary Board properly discounted the mitigator of (c) personal and emotional problems.

The Hearing Officer applied the mitigator of (c) personal or emotional problems, as Respondent's spouse suffered medical problems during the time of the loans, but then discounted this factor because substantial time had passed since the misconduct and, while Respondent's judgment may have been clouded at the time, he had still not recognized the inappropriate nature of his conduct. BF 59, CL 34. It was appropriate to discount this factor, not just for that reason but also because there was no demonstrated connection between these medical problems and Respondent's misconduct. In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 684, 105 P.3d 976 (2005) (rejecting mitigator for personal or emotional problems because there was no nexus between the problems and the misconduct).

While Respondent did have financial problems at the time, those appeared to be primarily caused by a property dispute with Kitsap County, not by Respondent's wife's issues, and are not a mitigating factor. TR 165-67; In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 774, 801 P.2d 962 (1990) (holding that personal financial problems are not a mitigating factor).

b. The Hearing Officer and Disciplinary Board properly denied application of other mitigating factors.

Respondent argues that several other mitigating factors should be applied: (b) absence of a dishonest or selfish motive; (d) timely good faith effort to make restitution; (e) full and free disclosure to disciplinary board; and (g) character and reputation. RB at 24. The Disciplinary Board affirmed the Hearing Officer's rejection of these mitigators.

First, as to "absence of a dishonest or selfish motive," the Respondent had a selfish motive. Second, as to "timely good faith effort to make restitution," Respondent made no effort to pay restitution. Third, as to "full and free disclosure," the Court has held that this mitigator does not apply in Washington discipline cases. Dynan, 152 Wn.2d at 622, citing In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 721, 72 P.3d 173 (2003). Fourth, as to "character and reputation," the only evidence of these were Respondent's own bare assertions, without any other proof.⁹

⁹ Respondent testified that Disciplinary Counsel Jean McElroy told him she wanted to make him a "poster child" and states that this shows the Association improperly brought this proceeding against him. RB at 10, 17. Both the Hearing Officer and the Disciplinary Board declined to credit this testimony. The Board stated it "does not see any merit in the Respondent's concerns about the injustice of disciplinary proceedings." BF 76 at 2.

E. THE REMAINING NOBLE FACTORS OF PROPORTIONALITY AND UNANIMITY DO NOT SUPPORT REDUCTION OF THE SIX-MONTH SUSPENSION.

In proportionality review, the Court compares the case at hand with “similarly situated cases in which the same sanction was either approved or disapproved.” In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 97, 101 P.3d 88 (2004) (quotation omitted). The respondent lawyer bears the burden of proving that the recommended sanction is disproportionate. Id.

Respondent cites five cases in an attempt to show the recommended sanction here is excessive: Egger, 152 Wn.2d at 393 (lawyer suspended for six months for charging an unreasonable fee and failing to disclose and get written consent to a potential conflict of interest), In re Disciplinary Proceeding Against Johnson, 118 Wn.2d 693, 826 P.2d 186 (1992) (lawyer suspended for 60 days and placed on probation for 2 years for twice borrowing money from clients without providing full written disclosure of his precarious financial situation), In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 66 P.3d 1069 (2003) (lawyer disbarred for preparing client's will that named lawyer as a beneficiary), Halverson, 140 Wn.2d at 475 (lawyer suspended for one year for engaging in a sexual relationship with a client), and In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 126 P.2d 1262 (2006) (Haley

I) (lawyer reprimanded for engaging in a conflict of interest by representing a corporation and its shareholders while at the same time being a personal creditor of the corporation). Respondent argues that he should get a lesser sanction than the lawyers in these cases because there was no showing that he injured his client, whereas in the other cases injury occurred. RB at 22-23.

First, these cases are not similarly situated to this one because none involved ongoing loans from a client. Moreover, as noted above, Respondent caused his client both actual and potential injury. And all of the cases Respondent cites found that suspension was the presumptive sanction, in contrast to Respondent's argument that he should only receive an admonition. Haley I is the only case of the five where the lawyer was not ultimately suspended, but even there the presumptive sanction was found to be suspension. That sanction was then mitigated down to a reprimand due to considerable delay in prosecuting the misconduct, a factor that is not present here. Haley I, 156 Wn.2d at 341-42.

This case is comparable to In re Disciplinary Proceeding Against McMullen, 127 Wn.2d 150, 896 P.2d 1281 (1995), in which the Court imposed a one-year suspension. McMullen solicited two loans totaling almost \$40,000.00 from his client. The client signed documentation of some disclosures but the lawyer failed to disclose his precarious financial

condition. After filing bankruptcy, the lawyer reaffirmed the debt and made regular payments. The Court weighed four aggravating factors (prior reprimand; dishonest or selfish motive; multiple offenses; vulnerability of the victim) against two mitigating factors (cooperation with bar investigation and effort to provide restitution), considered the Johnson case cited by Respondent, and concluded that a one-year suspension was appropriate. McMullen, 127 Wn.2d at 171-72. While the individual amount of each of Respondent's loans is lower than the two loans in McMullen, Respondent solicited a substantially greater number of loans from his client, similarly failed to fully disclose his precarious financial condition, and there are a similar number of aggravating and mitigating factors. When compared to McMullen, the six-month sanction recommended here is not disproportionate.

As to unanimity, the Disciplinary Board voted 11-1 in favor of a six-month sanction, with the dissenting member voting for a longer one-year suspension. The six-month suspension recommendation was therefore unanimous. The Court gives "great deference to the decisions of a unanimous Board[.]" In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 469, 120 P.3d 550 (2005); accord Boelter, 139 Wn.2d at 104. Such deference is based on the Board's "unique experience and

perspective in the administration of sanctions.” Egger, 152 Wn.2d at 404-05 (quotations omitted).

V. CONCLUSION

The Court should affirm the Disciplinary Board’s recommendation that Respondent be suspended from the practice of law for six months.

RESPECTFULLY SUBMITTED this 27th day of March, 2007.

WASHINGTON STATE BAR ASSOCIATION



Craig Bray, Bar No. 20821
Disciplinary Counsel

APPENDIX A

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FILED

MAY 09 2006

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JAMES BYRON HOLCOMB
Lawyer (Bar No. 1695).

Public No. 04#00048

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND HEARING OFFICER'S
RECOMMENDATION

This matter came on before the undersigned Hearing Officer by Notice of Appointment, dated November 16, 2004;

On March 15, 2005, following a conference call with Kevin Banks appearing for the Association and Kurt Bulmer appearing for the Respondent, a case-scheduling order was entered specifying dates for discovery, briefing and other pre-hearing motions, and the hearing itself, July 18, 2005;

On July 15, 2005, following a conference call with Craig Bray appearing for the Association and Kurt Bulmer appearing for the Respondent, an order was entered granting the Association's request for testimony by telephone and Respondent's request for a continuance for withdrawal of original counsel, Kurt Bulmer. Both motions

1 were unopposed;

2 On August 9, 2005, following conference call with Respondent's replacement
3 counsel, Brett Purtzer, and counsel for the Association, Craig Bray, a revised
4 scheduling order was entered, setting the hearing date for November 14, 2005;

5 In accordance with the August 9, 2005 order and Rule 10.13 of the Rules for
6 Enforcement of Lawyer Conduct (ELC), this matter was heard on November 14 and 15,
7 2005 at the office of the Washington State Bar;

8 Respondent James Byron Holcomb appeared at the hearing with attorney Brett
9 Purtzer;

10 Disciplinary Counsel Craig Bray and Kevin Bank appeared for the Association.
11

12 FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

13 The Formal Complaint filed by Disciplinary Counsel presented the following
14 Allegations:

- 15 1. Respondent J. Byron Holcomb was admitted to the practice of law in the State of
16 Washington on September 22, 1967.
- 17 2. In December 1996, John Schiffner, acting pro se, filed an employment discrimination
18 complaint against the Secretary of the Navy.
- 19 3. In 1998, Respondent agreed to represent Mr. Schiffner in that matter.
- 20 4. Respondent continued to represent Mr. Schiffner until about March 2003.
- 21 5. Defined phases of the representation (e.g., review of the case to decide whether to
22 accept representation, litigation through a decision, review of the case and issues for
23 appeal to determine whether to appeal, appeal) were covered by separate fee

1 | agreements. These fee agreements were negotiated separately as the case
2 | progressed and the need arose.

3 | 6. In early March 2003, a dispute arose about a proposed fee agreement for an appeal,
4 | and the representation ended.

5 | 7. On or about April 15, 2003, Respondent was notified that the case had not been
6 | selected for mediation. He conveyed this information to Mr. Schiffner at their last
7 | meeting.

8 | 8. After the last meeting, Respondent called the Schiffners and left a message that he
9 | was withdrawing from the appeal, and on April 17, 2003, he filed a request to withdraw
10 | as the attorney in the 9th Circuit appeal.

11 | 9. On June 25, 2003, the 9th Circuit Court of Appeals entered an order granting Mr.
12 | Schiffner's motion for, voluntary dismissal of the appeal.

13 | 10. During the period from December 16, 1999 through March 26, 2001, while he was
14 | representing Mr. Schiffner, Respondent asked for and received multiple short term
15 | loans totaling \$52,500 from Mr. and Mrs. Schiffner.

16 | 11. The loans were made by way of checks written on an account for the Schiffner
17 | Trust, which is made up of Mr. and Mrs. Schiffner, and for who the money is held in
18 | trust.

19 | 12. When obtaining the loans from the Schiffners, Respondent did not advise the
20 | Schiffners that his personal interests might conflict with their interests.

21 | 13. When obtaining the loans from the Schiffners, Respondent did not obtain from them
22 | written waivers of the conflicts of interest.

23 | 14. When obtaining the loans from the Schiffners, Respondent did not provide the
24 | Schiffners with complete written information about his financial condition.

1 15. Respondent never advised the Schiffners that they could seek the advice of
2 independent counsel regarding whether they should loan him the money he was
3 requesting.

4 16. Respondent did not discuss with the Schiffners whether the loans would bear
5 interest, or whether they would contain any provisions for fees or penalties for late, or
6 incomplete payments or bank charges incurred by the Schiffners in connection with a
7 payment.

8 17. None of the loans were evidence[d – sic] by a promissory note or other such writing
9 setting out the terms of the loan.

10 18. None of the loans provided for the payment of interest, late payment fees or
11 penalties, fees or penalties for checks not backed by sufficient funds, or other common
12 terms for loan repayment.

13 19. At the time of the loans, Respondent was having cash flow problems, but he owned
14 significant real property assets.

15 20. None of the loans were secured.

16 21. Most of the loans were for relatively short periods of time and for relatively small
17 amounts of money.

18 22. For many of the loans, Respondent gave the Schiffners a post-dated check to cash
19 later, while he used the Schiffners' money in the present.

20 23. Some of Respondent's repayments were late, and some of the checks did not clear
21 the bank.

22 24. The Schiffners bore the consequences, including additional bank charges, of
23 Respondent's late payments or insufficient funds.

24 25. Ultimately, all of the loans were repaid.

1 COUNT 1

2 26. By entering into loan transactions with his client when the terms were not fair and
3 reasonable to the client and/or were not fully disclosed and transmitted in writing to the
4 client, and/or when the client was not advised that he could seek advice from an
5 independent lawyer, Respondent violated RPC 1.8(a).

6 COUNT 2

7 27. By continuing to represent Mr. Schiffner, including making decisions about whether
8 to continue to pursue the matter after the dismissal of the initial claim, during the time
9 Respondent was using Mr. Schiffner as the source for multiple short term loans,
10 Respondent violated RPC 1.7(b).

11 Of the 27 separately enumerated Allegations, leading to the charges of violation of
12 RPC 1.8(a) and RPC 1.7(b), the hearing record at transcript page 286, lines 7-11
13 reflect Respondent Holcomb's admission of the allegations in paragraphs 1, 2, 3, 4, 5,
14 7, 8, 9, 13, 14, 21, 22, and 25. My Findings of Fact, Conclusions of Law and
15 Recommendations are, then directed at paragraphs 6; 10; 11; 12; 15; 16; 17;18; 19;
16 20; 23; and 24 as well as the ultimate findings on paragraphs 26 and 27. These
17 Findings, Conclusions, and Recommendations incorporate materials filed by the
18 Association and Respondent. They also reflect my own decision to reconsider and,
19 where inconsistent with the oral findings, amend my original oral findings in light of
20 concerns expressed by the Respondent coincident with delivery of the oral opinion and
21 in materials filed by the Respondent after the conclusion of the hearing.

22 FINDINGS OF FACT

23 1. Respondent has admitted the allegations in paragraphs 1, 2, 3, 4, 5, 7, 8, 9,
24 13, 14, 21, 22, and 25. The findings that follow address the Allegations not expressly
admitted by Respondent.

1 2. Allegations in Paragraph 6 – Respondent's Amended Answer stated: "Deny
2 there was a dispute. Admit the representation ended." I find there was not a meeting of
3 the minds regarding respondent counsel's continued representation of Mr. Schiffner. I
4 find that Paragraph 6 in the Allegations has been established. (tr 191 line 13);

5 3. Allegations in Paragraph 10 – Respondent's Amended Answer stated: "Admit
6 that while representing Mr. Schiffner individually, individual loans were made with
7 another entity called the Schiffner Trust Agreement ("Trust") with no more than one
8 loan outstanding at any given time. No loan was made with his client, John Schiffner,
9 individually, even though John Schiffner maintained his own checking account
10 individually at the Navy Federal Credit Union, Silverdale, Washington. Respondent
11 further states that the Trust agreement itself was never provided to him, nor has the
12 Trust agreement ever been provided to the Bar Association to the Respondent's
13 knowledge. Respondent is unsure of the time period or the amount of each individual
14 loan and, therefore, lacks information sufficient to form a belief as to the rest of the
15 averments, except that Respondent specifically denies that any individual loan of
16 \$52,000.00 was ever asked for or made by the Schiffner Trust Agreement and no
17 stacking of the loans was ever asked for or made, and, therefore, they are denied." I
18 find that Respondent asked for and received multiple short term loans totaling \$52,500
19 from Mr. and Mrs. Schiffner and that Paragraph 10 of the Allegations has been
20 established. (Ex 8, 9, 10);

21 4. Allegations in Paragraph 11 - Respondent's Amended Answer stated: "Admit
22 that the loans were made by way of checks written on the account of the Trust and
23 asserts the provisions of paragraph 10 above. Respondent specifically denies that he

1 ever represented Anita Schiffner individually, or the Trust, or that she ever signed one
2 of the retainer agreements between Respondent and John Schiffner. Respondent lacks
3 sufficient information to form a belief as to the rest of the averments in this paragraph
4 and are denied." I find that the loans to Respondent were made by way of checks
5 written on an account for the Schiffner Trust, which is made up of Mr. and Mrs.
6 Schiffner, and for whom the money is held in trust and that Paragraph 11 of the
7 Allegations has been established. (tr 146 line 13);

8 5. Allegations in Paragraph 12 - Respondent's Amended Answer stated:
9 "Denied". I find that when obtaining the loans from the Schiffners, Respondent did not
10 advise the Schiffners that his personal interests might conflict with their interests and
11 that Paragraph 12 of the Allegations has been established. (tr 56 line 15);

12 6. Allegations in Paragraph 15 - Respondent's Amended Answer stated:
13 "Denied". I find that Respondent never advised the Schiffners that they could seek the
14 advice of independent counsel regarding whether they should loan him the money he
15 was requesting and that Paragraph 15 of the Allegations has been established. (tr 103
16 line 5);

17 7. Allegations in Paragraph 16 - Respondent's Amended Answer stated:
18 "Denied". I find that Respondent did not discuss with the Schiffners whether the loans
19 would bear interest, or whether they would contain any provisions for fees or penalties
20 for late or incomplete payments or bank charges incurred by the Schiffners in
21 connection with a payment and that Paragraph 16 of the Allegations has been
22 established. (tr 39 lines 11-22);

23 8. Allegations in Paragraph 17 - Respondent's Amended Answer stated:

1 "Denied". I find that none of the loans were evidence[d] by a promissory note or other
2 such writing setting out the terms of the loan and that Paragraph 17 of the Allegations
3 has been established. (tr 59 lines 10-14);

4 9. Allegations in Paragraph 18 - Respondent's Amended Answer stated: " Deny
5 that any of the identified category of items are 'common terms for loan repayment'
6 under the circumstances of these loans. Deny that any such language was required.
7 Respondent relies on his Answer as set forth in paragraph 14 above and incorporates
8 the same herein." I find that none of the loans provided for the payment of interest, late
9 fees or penalties, fees or penalties for checks not backed by sufficient funds, or other
10 common terms for loan repayment and that Paragraph 18 of the Allegations has been
11 established. (tr 138 lines 16-25);

12 10. Allegations in Paragraph 19 - Respondent's Amended Answer stated:
13 "Admitted, except that he also had significant other assets in addition to real property
14 assets providing him with a net worth of between \$1,000,000 and \$2,000,000. Said real
15 property assets were tied up in litigation by the Kitsap County Health District ("KCHD")
16 in a lawsuit wrongfully filed against Respondent and his wife, which litigation is still on-
17 going and still ties up his property. The Bar Association was made well aware of the
18 fraud being perpetrated on him in his Bar Complaint against the Prosecutors
19 representing KCHD and the Bar to date has done nothing about this, and, furthermore,
20 had the Bar done something about this, as is and was its duty, any such claim as to
21 loans and Schiffner individually would not have come about." I find that at the time of
22 the loans, Respondent was having cash flow problems, but he owned significant real
23 property assets and that Paragraph 19 of the Allegations has been established. (tr 180

1 | lines 17-20);

2 | 11. Allegations in Paragraph 20 - Respondent's Amended Answer stated:

3 | "Denied." I find that none of the loans were secured and that Paragraph 20 of the
4 | Allegations has been established. (tr 116 line 5);

5 | 12. Allegations in Paragraph 23 - Respondent's Amended Answer stated:

6 | "Denied since generalized statements as to what happened to 'some' of the items lacks
7 | sufficient specific [sic] to allow Respondent to answer." I find that some of
8 | Respondent's repayments were late, and some of the checks did not clear the bank
9 | and that Paragraph 23 of the Allegations has been established. (tr 92 lines 10-14);

10 | 13. Allegations in Paragraph 24 - Respondent's Amended Answer stated:

11 | "Denied. Any costs were voluntarily assumed by the Schiffners." I find that the
12 | Schiffners bore the consequences, including additional bank charges, of Respondent's
13 | late payments or insufficient funds and that Paragraph 24 of the Allegations has been
14 | established. (tr 50 lines 6-11);

15 | CONCLUSIONS OF LAW

16 | Violations Analysis

17 | 14. The Association proved Count 1 by a clear preponderance of the evidence.
18 | By entering into loan transactions with his client John Schiffner when the terms were
19 | not fair and reasonable to the client and were not fully disclosed and transmitted in
20 | writing to the client, the Respondent violated RPC 1.8(a).

21 | 15. Respondent's attempts at narrowly defining his representation of John
22 | Schiffner individually and reframing his loans as coming from the Schiffner marital
23 | community or their community's trust account rather than his client are not convincing.

1 Accepting Respondent's argument would give any lawyer who entered into business
2 transactions with a client an immediate defense any time the client was married and
3 the lawyer did not represent both spouses. The continued use of this distinction
4 contributes to the sanctions analysis below in application of the aggravating and
5 mitigating factors.

6 16. Respondent's suggestion that the Association's interpretation of RPC
7 1.8(a) violates a Constitutional right to contract is equally troubling. There are several
8 other 'impositions' on a lawyer's Constitutional right to contract with their clients,
9 including a prohibition of contingent fees in domestic and criminal matters (RPC
10 1.5(d)(1) and (2)). The 'contract terms' Respondent secured from the Schiffners were
11 not 'reasonable on its face'.

12 17. The Association proved Count 2 by a clear preponderance of the evidence.
13 By continuing to represent Mr. Schiffner, including advising whether to continue to
14 pursue the matter against the Navy after dismissal of the initial claim, during the time
15 Respondent was using Mr. Schiffner as the source for multiple short-term loans,
16 Respondent violated RPC 1.7(b).

17 18. Respondent's claims regarding "alter ego" status and the need for
18 Washington attorneys to be "placed on notice" are unpersuasive in light of his own
19 testimony that he did not review the text for the Schiffner Trust Agreement and
20 testimony from Richard Tizzano concerning this revocable trust operating under the
21 social security numbers of the trustors. (tr 136)

22 Sanction Analysis

23 19. A presumptive sanction must be determined for each ethical violation. In re

1 Anschell, 149 Wn.2d 484, 501, 69 P.2d 844 (2003). The following standard of the
2 American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA
3 Standards") (1991 ed. & Feb. 1992 Supp.) is presumptively applicable in this case:

4 **4.3 Failure to Avoid Conflicts of Interest**

5 4.32 Suspension is generally appropriate when a lawyer knows of a
6 conflict of interest and does not fully disclose to a client the possible
effect of that conflict, and causes injury or potential injury to a client.

7 20. "Knowledge" is the conscious awareness of the nature or attendant
8 circumstances of the conduct but without the conscious objective or purpose to
9 accomplish a particular result.

10 21. The Respondent acted knowingly.

11 22. The Respondent knew he was seeking to borrow money from a client.

12 Respondent's re-characterization of this conduct as "an extension of credit" (tr 17 lines
13 1-6) is a distinction without a difference.

14 23. In entering into the loan transactions with the Schiffners, Respondent
15 knowingly failed to avoid the conflicts of interest with his client.

16 24. The Respondent's conduct caused actual and potential injury to the client
17 and to the public.

18 25. The lawyer/client relationship was injured. The client and his spouse
19 became uncomfortable in their dealings with Respondent and were concerned that
20 stopping the practice of loaning Respondent money would harm Mr. Schiffner's case. It
21 was disturbing to hear John Schiffner testify "we were cash cows..." (tr 70 line 9)

22 26. There was actual pecuniary harm. Respondent used the Schiffners as a
23 personal line of credit, but on terms that were not fair or reasonable to the client. The

1 client and his spouse did not earn interest from the loans and were not reimbursed by
2 Respondent for additional fees and charges they incurred in relation to the loans.

3 27. Both the client and the client's marital community were injured.

4 28. When a lawyer is financially compromised, there is a potential for injury to
5 the public as the lawyer's judgment may also be compromised. This can lead the
6 lawyer to use client resources to survive personal, short-term financial problems at the
7 expense of those clients. This situation was presented here.

8 29. Based on the Findings of Fact and Conclusions of Law and application of the
9 ABA Standards, the appropriate presumptive sanction is suspension.

10 30. "A period of six months is generally the accepted minimum term of
11 suspension." In re Cohen, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003).

12 31. Respondent's objection to the Association's proposed Conclusions (their ¶¶
13 26-37) and suggestion that any sanction should be limited to an admonition suggests
14 an ongoing failure to appreciate the seriousness of his conduct. Zealous advocacy
15 does *not* consist of contradicting or ignoring bad facts.

16 32. The Association has proposed the following aggravating factors from Section
17 9.22 of the ABA Standards:

18 (b) dishonest or selfish motive. Respondent used the funds from his
19 client and the client's marital community for his own personal
20 purposes and delayed repayment of the last loan for a year.
Respondent needed these loans and testified that he had difficulty
21 borrowing from other sources due to his precarious financial
22 circumstances;

21 (d) multiple offenses. Each loan was a separate offense;
22 (g) refusal to acknowledge wrongful nature of conduct. As evidenced
23 by his comments during his testimony and after closing argument.
Respondent does not argue that he engaged in the conduct at
24 issue, but insists it was not wrongful;

(i) substantial experience in the practice of law. Respondent was

1 admitted to the practice of law in Washington nearly 40 years ago
and has practiced in both State and Federal courts;
2 (j) indifference to making restitution. While the principle amount of all
the loans was repaid, Respondent has not paid or offered to repay
3 the additional fees and charges assessed to the Schiffners;
Each of these factors is properly presented, and is adopted herein. In
4 addition, factors (f) and (h) warrant consideration as well.
Respondent's continued reference to a document purporting to be
5 a 1995 financial statement (Resp Ex 1) in the face of substantially
changed circumstances during the times referred to in the
6 Allegations leaves the hearing officer wondering whether the
material differences are not apparent to Respondent, or that he
7 was making representations to a tribunal with a troubling lack of
candor. This hearing officer can think of little more that can be
8 added to a potential victim's vulnerability than worrying whether
their case will be fully and effectively advanced unless they submit
9 to the requests from their attorney. I find that factors (f) and (h)
should be considered as well.

10
11 33. Respondent's proposed papers, suggesting there are *no* aggravating factors
to be considered warrants a repeat of my concerns stated in ¶ 31 above.

12
13 34. The Association has proposed the following mitigating factors from Section
9.32 of the ABA Standards:

- 14 (a) absence of a prior disciplinary record;
15 (c) personal or emotional problems. Respondent's spouse suffered
severe health problems during the relevant time period. While the
16 Respondent's judgment may have been blurred or clouded then,
substantial time has passed and the Respondent has still not
17 recognized the inappropriate nature of his acts. This is disturbing
and reduces the weight given this mitigator.

18 Each of these factors is properly presented, and is adopted herein.

19 35. Respondent proposes the following additional mitigating factors under
20 Section 9.32:

21 "(b) absence of a dishonest or selfish motive"; this is in contrast to
aggravating factor 9.22(b) above. Respondent's choice to pursue his own
22 personal interests at the expense of a client (or the client's marital community, or
of funds held in trust by the client's marital community) is consistent with a
23 selfish motivation. I do not find this mitigating factor applies.

24 "(d) timely good faith effort to satisfy consequences of any perceived

1 misconduct"; the Respondent's printed response to Allegation 24 and his
2 participation in the hearing and post-hearing proceedings are not consistent with
this mitigating factor. I do not find this mitigating factor applies.

3 "(e) full and free disclosure to disciplinary board and cooperative attitude
toward proceedings"; inasmuch as this must be weighed against aggravating
4 factors 9.22 (g) and (j) above, I do not find this mitigating factor should apply.
and

5 "(g) character or reputation"; to present ones self as a person of high
character or reputation, with a "distinguished career in the Bar" having "a stack
6 of atta-boys" (tr 293 lines 19 -20) the lawyer's acts must be consistent with that
stellar reputation. Accepting this as a mitigating factor places an unfair burden
7 on the character and reputation of other Kitsap County practitioners who found
other ways to deal with short-term cash flow problems.

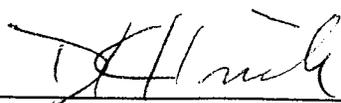
8 Recommendation

9
10 36. Based on the ABA Standards, and my consideration of the aggravating and
mitigating factors presented by the Association and Respondent, and finding the
11 aggravating factors significantly outnumber and outweigh the mitigating factors, I
12 recommend that Respondent James Byron Holcomb be suspended from the practice of
13 law for a period of one (1) year.

14
15 37. My recommendation of a one year suspension of Respondent Holcomb after
two days of hearing should be contrasted with the *two* year suspension of attorney
16 Alexander Higgins (WSB 20868) entered by stipulation. The acts of attorney Higgins
17 only affected lawyers within his own firm rather than members of the general public.
18 The total financial impact of attorney Higgins sixteen acts of petty defalcation to his law
19 partners added up to less than \$5,000; Respondent Holcomb's twenty four loans or
20 "extensions of credit" imposed upon a client who had no other attorney to turn to
21 without driving an hour or two into Seattle or Tacoma, exceeded \$50,000. Respondent
22 Holcomb's expressions of concern about the injustice, insanity or unreasonableness of
23 disciplinary proceedings (tr 293) may have merit. A reviewing panel may decide the

1 recommended sanctions are too lenient.

2 Dated: May 4, 2006

3 

4 David K. Hiscock, Bar No. 13509
5 Hearing Officer

6
7 Corrections noted for record:

Page	Line	Content	Correction
8	141	9 "attack"	"tack"
	150	11 "role"	"roll"
9	179	24 "wait"	"weight"
	296	25 "resent"	"recent"

10
11
12
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15
16 CERTIFICATE OF SERVICE

17 I certify that I caused a copy of the FF/KL & HO Recommendation
 to be delivered to the Office of Disciplinary Counsel and to be mailed
 to Brett Purzner Respondent/Respondent's Counsel
 at 1008 Yakima Ave, Ste 3021, by Certified/first class mail,
 postage prepaid on the 9 day of May, 2006
9:00 AM
Bedkey-Cowley
 Clerk/Counsel to the Disciplinary Board

APPENDIX B

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FILED

DEC 13 2006

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JAMES B. HOLCOMB
Lawyer
WSBA No. # 1695

Proceeding No. 04#00048

DISCIPLINARY BOARD ORDER
MODIFYING HEARING OFFICER'S
DECISION

I. SUMMARY

This matter came before the Board at its November 17, 2006 meeting. The Board approves the Hearing Officer's finding that Mr. Holcomb violated RPC 1.8(a) and 1.7(b). The Board rejects the recommended sanction of 1 year suspension. The Board recommends a reduction of this sanction to 6 month suspension.¹

II. MODIFICATIONS TO HEARING OFFICER'S CONCLUSIONS

1. Conclusion no. 31 is stricken. The Board does not believe that the sanction should be increased because of arguments raised in good faith during disciplinary proceedings².

¹ The vote on this matter was 11-1. Those voting in the majority were McMonagle, Heller, Romas, Mosner, Cena, Mina, Andrews, Darst, Madden, Fine and Carlson. Mr. Kuznetz voted in the Minority and would have approved the Hearing Officer's sanction recommendation.

² Conclusion 31 stated as follows: "Respondent's objection to the Association's proposed Conclusions (their ¶¶ 26-37) and suggestions that any sanction should be limited to an admonition suggests an ongoing

1 2. Conclusion 32(j) is stricken. There is no evidence that the clients ever requested
2 any restitution, beyond repayment of the loan. As a result, the aggravating factor of
3 indifference to restitution does not apply.³

4
5 3. The paragraph following conclusions 32(j) is stricken. The Respondent's
6 testimony concerning his financial situation does not establish any lack of candor.
7 Some degree of vulnerability is inherent in the attorney-client relationship. There is
8 no evidence that the clients in this case were vulnerable to any unusual degree.

9 4. Conclusion 36 is stricken. In view of the above, the aggravating factors do not
10 significantly outweigh the mitigating factors⁴.

11
12 5. Conclusion 37 is stricken. Cases involving stipulated discipline do not provide a
13 proper basis for comparison.⁵ The Board also does not believe that this case is
14 equivalent to one involving a \$50,000 loan. Since (with one exception) each loan was
15 repaid before the next was extended, the appropriate measure of seriousness is the
16 amount of the individual loans and the loan term. The Respondent received loans of
17 \$3,500 or less, for various terms over a 2-year period. With regard to the last two
18 sentences of conclusion 37, the Board does not see any merit in the Respondent's
19 concerns about the injustice of disciplinary proceedings.⁶

20 failure to appreciate the seriousness of his conduct. Zealous advocacy does *not* consist of contradicting or
21 ignoring bad facts.

22 ³ Conclusion 32(j) stated as follows: "The Association has proposed the following aggravating factors
23 from Section 9.22 of the ABA Standards: (j) indifference to making restitution. While the principal
24 amount of all the loans was repaid, Respondent has not paid or offered to repay the additional fees and
25 charges assessed to the Schiffners."

26 ⁴ Conclusion 36 stated as follows: "Based on the ABA Standards, and my consideration of the
27 aggravating and mitigating factors presented by the Association and Respondent, and finding the
aggravating factors significantly outnumber and outweigh the mitigating factors, I recommend that
Respondent James Byron Holcomb be suspended from the practice of law for a period of one (1) year."

⁵ "A stipulation is analogous to a plea agreement, and thus irrelevant in determining proportionality of
attorney discipline." *In re Anshell*, 149 Wn.2d 484, 518, 69 P.2d 844 (2003).

⁶ Conclusion 37 stated as follows: "My recommendation of a one year suspension of Respondent
Holcomb after two days of hearing should be contrasted with the two year suspension of attorney
Alexander Higgins (WSB 20868) entered by stipulation. The acts of attorney Higgins only affected
lawyers within his own firm rather than members of the general public. The total financial impact of
attorney Higgins' sixteen acts of petty defalcation to his law partners added up to less than \$5,000;
Respondent Holcomb's twenty four loans or "extensions of credit" imposed upon a client who had no

1 III. REASONS FOR REDUCING SANCTION

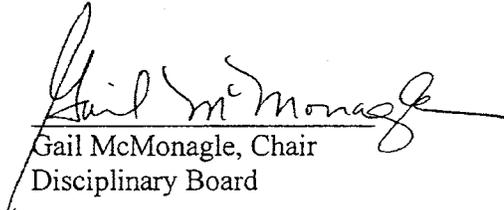
2 1. As set out above with regard to Conclusion 32, the Board disagrees with
3 three of the aggravating factors found by the Hearing Officer.

4
5 2. As set out above with regard to Conclusion 37, the Board disagrees with
6 the Hearing Officer's use of the total amount of the loans as a measure of
7 seriousness.

8 3. There is no specific showing of any loss to the client. All of the loans
9 were fully repaid before disciplinary proceedings commenced. The client
10 suffered a risk of non-repayment, but this risk did not come to fruition. The client
11 also lost the interest on the money loaned, and paid two fees for bounced checks,
12 but the record does not establish the amount of the resulting losses.

13 4. In view of the limited amount of the loans, the full repayment, and the lack
14 of any proof of financial losses, the Board concludes that the appropriate sanction
15 is a 6-month suspension.

16
17
18 DATED this 13th day of December, 2006.

19
20
21 
22 Gail McMonagle, Chair
23 Disciplinary Board
24
25

26 other attorney to turn to without driving an hour or two into Seattle or Tacoma, exceeded \$50,000.
27 Respondent Holcomb's expression of concern about the injustice, insanity or unreasonableness of
disciplinary proceeding (TR 293) may have merit. A reviewing panel may decide the recommended
sanctions are too lenient."

APPENDIX C

RPC 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For purposes of this rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

- (1) Otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or
- (2) The broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in absence of such designation, by the chief executive officer of the entity.

RPC 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS; CURRENT CLIENT

A lawyer who is representing a client in a matter:

(a) Shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) The client consents thereto.

(b) Shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation.

(c) Shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except

where the client is related to the donee.

(d) Shall not, prior to the conclusion of representation of a client, make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation .

(e) Shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client, except that:

- (1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and
- (2) In matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.

(f) Shall not accept compensation for representing a client from one other than the client unless:

- (1) The client consents after consultation;
- (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) Information relating to representation of a client is protected as required by rule 1.6.

(g) Shall not, while representing two or more clients, participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and the participation of each person in the settlement.

(h) Shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) Shall not, if related to another lawyer as parent, child, sibling or spouse, represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) Shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) Contract with a client for a reasonable contingent fee in a civil case.

(k) Shall not:

- (1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the lawyer/client relationship commenced; or
- (2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.
- (3) For purposes of rule 1.8(k), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

APPENDIX D

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

AS APPROVED, FEBRUARY 1986

AND AS AMENDED, FEBRUARY 1992

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[Updates and amendments are in brackets]

4.3 *Failure to Avoid Conflicts of Interest*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
- (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
 - (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
 - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
- 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
- 4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re

J. BYRON HOLCOMB,
Lawyer (Bar No. 1695)

Supreme Court No. 200,448-2

DISCIPLINARY COUNSEL'S
DECLARATION OF SERVICE BY
MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that he caused a copy of the Answering Brief of the Washington State Bar Association to be mailed by regular first class mail with postage prepaid on March 27, 2007 to:

Brett Andrews Purtzer
Attorney at Law
1008 Yakima Ave Ste 302
Tacoma WA 98405-4850

The undersigned declares under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

3/27/2007
Date and Place

CB
Craig Bray, Bar No. 20821
Disciplinary Counsel
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 239-2110