

Supreme Court No. 200,469-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DISCIPLINARY PROCEEDING AGAINST

JACK L. BURTCH,

Lawyer (Bar No. 4161).

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

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Jonathan Burke  
Bar No. 20910  
Disciplinary Counsel

WASHINGTON STATE BAR ASSOCIATION  
1325 4<sup>th</sup> Avenue, Suite 600  
Seattle, Washington 98101-2539  
(206) 733-5916

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## TABLE OF CONTENTS

I. OVERVIEW .....	1
II. COUNTERSTATEMENT OF ISSUE.....	2
III. COUNTERSTATEMENT OF CASE .....	2
A. DONNA MCGUIN MATTER .....	2
B. ROXIE MORELAND MATTER .....	7
C. PROCEDURAL HISTORY AND DECISION .....	10
IV. SUMMARY OF ARGUMENT .....	12
V. LEGAL ARGUMENT.....	14
A. STANDARD OF REVIEW .....	14
B. BURTCH FAILED TO DEMONSTRATE THAT ANY OF THE FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.....	15
C. BURTCH RECEIVED A FAIR HEARING.....	17
1. Burtch Was Given Ample Opportunity to Present “Expert Witness” Testimony .....	18
2. Hearing Officer Properly Allowed Impeachment and Rebuttal Evidence On Burtch’s Character After Burtch Opened the Door .....	21
3. Hearing Officer Properly Admitted Evidence of Prior Misconduct Because It Shed Light On Burtch’s Claims That His Misrepresentations Were Unintentional Mistakes, and Supported the Aggravating Factor “Pattern of Misconduct” .....	25
4. Aggravating Factors Such as “Pattern of Misconduct” Need Not Be Charged In the Complaint.....	27
5. Burtch’s Prior Disciplinary Record Was Properly Admitted .....	28
6. Hearing Officer Properly Considered McGuin’s Prior Testimony .....	29
7. Amount Owed By Burtch to McGuin Has Not Been Re-litigated.....	34

8. Other Miscellaneous Objections By Burtch Are Baseless.....	36
D. DISBARMENT IS THE APPROPRIATE SANCTION FOR BURTCHE'S MISCONDUCT .....	39
VI. CONCLUSION.....	42

## TABLE OF AUTHORITIES

### Cases

<u>Ang v. Martin</u> , 118 Wn. App. 553, 76 P.3d 787 (2003) .....	22
<u>Brewer v. Copeland</u> , 86 Wn.2d 58, 542 P.2d. 445 (1975).....	20
<u>Conduct of Leonard</u> , 308 Or. 560, 784 P.2d 95 (1989) .....	21
<u>Disciplinary Action Against Boulger</u> , 637 N.W.2d 710 (N.D. 2001) .....	21
<u>Disciplinary Action Against McKechnie</u> , 656 N.W.2d 661(N.D. 2003) .....	21
<u>Eriks v. Denver</u> , 118 Wn.2d 451, 824 P.2d 1207 (1999).....	21
<u>Florida Bar v. Vannier</u> , 498 So.2d 896 (Fla. 1986) .....	31
<u>Group Health Cooperative v. Washington Dept. of Revenue</u> , 106 Wn.2d 391, 722 P.2d 787 (1986).....	20
<u>Hizey v. Carpenter</u> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	21
<u>In re Cupples</u> , 952 S.W.2d 226 (Mo. 1997).....	31
<u>In re Disability Proceeding Against Diamondstone</u> , 153 Wn.2d 430, 105 P.3d 1 (2005).....	31
<u>In re Disciplinary Proceeding Against Allotta</u> , 109 Wn.2d 787, 748 P.2d 628 (1988).....	38
<u>In re Disciplinary Proceeding Against Bonet</u> , 144 Wn.2d 502, 29 P.3d 1242 (2001).....	15
<u>In re Disciplinary Proceeding Against Burtch</u> , 112 Wn.2d 19, 770 P.2d 174 (1989).....	28
<u>In re Disciplinary Proceeding Against Cohen</u> , 150 Wn.2d 744, 82 P.3d 224 (2004).....	28
<u>In re Disciplinary Proceeding Against Dann</u> , 136 Wn.2d 67, 960 P.2d 416 (1998).....	29
<u>In re Disciplinary Proceeding Against DeRuiz</u> , 152 Wn.2d 558, 99 P.3d 881 (2004).....	16, 39
<u>In re Disciplinary Proceeding Against Gillingham</u> , 126 Wn.2d 454, 896 P.2d 656 (1995).....	6

<u>In re Disciplinary Proceeding Against Guarnero</u> , 152 Wn.2d 51, 93 P.3d 166 (2004).....	14, 23
<u>In re Disciplinary Proceeding Against Halverson</u> , 140 Wn.2d 475, 998 P.2d 833 (2000).....	26
<u>In re Disciplinary Proceeding Against Haskell</u> , 136 Wn.2d 300, 962 P.2d 813 (1998).....	17
<u>In re Disciplinary Proceeding Against Kronenberg</u> , 155 Wn.2d 184, 117 P.3d 1134 (2005).....	18, 31, 33, 37, 38
<u>In re Disciplinary Proceeding Against Marshall</u> , ___ Wn.2d ___, 157 P.3d 859 (2007).....	15, 27
<u>In re Disciplinary Proceeding Against Petersen</u> , 120 Wn.2d 833, 846 P.2d 1330 (1993).....	40
<u>In re Disciplinary Proceeding Against Poole</u> , 156 Wn.2d 196, 125 P.3d 954 (2006).....	14, 15, 38
<u>In re Disciplinary Proceeding Against Romero</u> , 152 Wn.2d 124, 94 P.3d 939 (2004).....	27
<u>In re Disciplinary Proceeding Against VanDerbeek</u> , 153 Wn.2d 64, 101 P.3d 88 (2004).....	15, 21
<u>In re Disciplinary Proceeding Against Whitney</u> , 155 Wn.2d 451, 120 P.3d 550 (2005).....	15, 16, 35
<u>In re Disciplinary Proceeding Against Whitt</u> , 149 Wn.2d 707, 72 P.3d 173 (2003).....	17, 41
<u>In re Estate of Lint</u> , 135 Wn.2d 518, 957 P.2d 755 (1998).....	16
<u>In re Mills</u> , 539 S.W.2d 447 (Mo. 1976) .....	31
<u>Mansour v. King County</u> , 131 Wn. App. 255, 128 P.3d 1241 (2006).....	39
<u>Nebraska State Bar Ass'n v. Roubicek</u> , 225 Neb. 509, 406 N.W.2d 644 (1987).....	39
<u>Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.</u> , 152 Wn.2d 387, 97 P.3d 745 (2004).....	14
<u>Romero-Barcelo v. Acevedo-Vila</u> , 275 F.Supp.2d 177 (D. PR 2003) .....	31
<u>Rosenthal v. Justices of the Supreme Court of California</u> , 910 F.2d 561 (9 <sup>th</sup> Cir. 1990).....	31

<u>State v. Avendano-Lopez</u> , 79 Wn. App. 706, 904 P.2d 324 (1995) .....	30
<u>State v. Clausing</u> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	20
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	23
<u>State v. Perez-Cervantes</u> , 141 Wn.2d 468, 6 P.3d 1160 (2000).....	18, 30
<u>State v. Rivers</u> , 129 Wn.2d 697, 921 P.2d 495 (1996) .....	22
<u>State v. Smith</u> , 155 Wn.2d 496 , 120 P.3d 559 (2005) .....	30
<u>United States Dist. Ct. v. Sandlin</u> , 12 F.3d 861 (9 <sup>th</sup> Cir. 1993) .....	38
<u>United States v. Logan</u> , 717 F.2d 84 (3d Cir. 1983).....	23
<u>Washington State Physicians Ins. Exchange &amp; Ass'n v. Fisons Corp.</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	20

**Rules for Enforcement of Lawyer Conduct (ELC)**

ELC 1.3(r)(3) .....	37
ELC 5.3(c)(1).....	6
ELC 10.13(f).....	28
ELC 10.14(b) .....	38
ELC 10.14(d)(1).....	13, 31
ELC 10.15(b)(1).....	28
ELC 10.16(a).....	36, 37

**Rules of Appellate Procedure (RAP)**

RAP 2.5(a) .....	30
RAP 10.3(a)(3).....	15
RAP 10.3(g) .....	15

**ABA Standards For Imposing Lawyer Sanctions (ABA Standards)**

ABA <u>Standards</u> § 3.0 .....	29
ABA <u>Standards</u> § 4.42 .....	11
ABA <u>Standards</u> § 6.11 .....	11

ABA <u>Standards</u> § 7.1 .....	11, 12
ABA <u>Standards</u> § 8.1(a).....	11
ABA <u>Standards</u> § 8.1(b).....	12
ABA <u>Standards</u> § 9.22(a).....	28
ABA <u>Standards</u> § 9.22(b).....	29
ABA <u>Standards</u> § 9.22(c).....	28

**Rules of Evidence (ER)**

ER 103 .....	30
ER 403 .....	26
ER 404(a).....	23
ER 404(a)(1) .....	32
ER 404(b).....	24, 26, 28
ER 404(b)(1).....	13, 31, 32
ER 704 .....	20

**Rules of Professional Conduct (RPC)**

RPC 1.3.....	11, 40
RPC 1.4.....	40
RPC 1.4(b) .....	11, 33, 39, 40
RPC 1.5(a).....	12, 21, 40
RPC 1.5(b) .....	11, 33, 40
RPC 1.14(b)(3).....	33, 40
RPC 1.15(b) .....	12
RPC 1.15(d) .....	39, 40
RPC 3.1 .....	11
RPC 3.2.....	40
RPC 3.3(a).....	11
RPC 3.4(c).....	11, 40

RPC 3.4(d) .....	40
RPC 8.4(c).....	11
RPC 8.4(d) .....	40
RPC 8.4(l).....	11

**Washington Practice**

5 Karl B. Tegland, <i>Washington Practice: Evidence Law and Practice</i> § 404.1 .....	23
5 Karl B. Tegland, <i>Washington Practice: Evidence Law and Practice</i> § 404.5 .....	22
5 Karl B. Tegland, <i>Washington Practice: Evidence Law and Practice</i> § 405.6 .....	23
5 Karl B. Tegland, <i>Washington Practice: Evidence Law and Practice</i> § 704.5 .....	20

**APPENDICES**

Appendix 1 (Findings, Conclusions, and Recommendations).....	2
Appendix 2 (Payments Made to Burtch In McGuin Case).....	3, 35
Appendix 3 (Calculation of Amount Owed To McGuin by Burtch Under Contingent Fee Arrangement).....	3, 4, 5, 19, 35

## I. OVERVIEW

In 2002, the Disciplinary Board (Board) ordered respondent Jack Burtch (Burtch) to pay restitution to a former client in a disciplinary matter. All of Burtch's misconduct in this matter occurred after the Board's 2002 decision. Burtch intentionally refused to pay restitution ordered by the Board. The client sued Burtch in State district court to collect the restitution ordered by the Board. Although Burtch knew that the client owed him no money, he asserted a frivolous claim that the restitution ordered by the Board should be offset by over \$11,000 in unpaid legal fees. During the proceeding, Burtch falsely testified about his fee arrangement with the client to avoid having to pay restitution.

In an unrelated case, Burtch accepted \$2,000 from a poor, disabled client and then failed to perform legal services for her. The client was forced to terminate Burtch and find other counsel to represent her because the statute of limitations was due to expire and Burtch was not working on the matter. Burtch refused to return unearned fees.

Burtch has an extensive history of similar ethical misconduct spanning over 20 years and involving 14 other clients, resulting in a suspension, a reprimand, and multiple admonitions. Burtch has continued to engage in unethical conduct despite being given multiple opportunities

to change his conduct. Disbarment is the only effective means to protect the public from Burtch.

## **II. COUNTERSTATEMENT OF ISSUE**

Burtch intentionally testified falsely and presented false evidence to a court, asserted a frivolous counterclaim to avoid paying restitution ordered by the Board, willfully refused to pay restitution ordered by the Board, refused to return unearned fees to a client after failing to diligently represent her, and falsely testified and submitted false evidence during disciplinary proceedings. A unanimous Board recommended disbarment. Should this Court affirm?

## **III. COUNTERSTATEMENT OF CASE<sup>1</sup>**

### **A. DONNA MCGUIN MATTER**

#### **1. Burtch's Representation of McGuin**

From 1988 through the end of 1996, Burtch represented Donna McGuin in related legal matters. FOF 6.<sup>2</sup> By October 1993, Burtch was representing McGuin on a contingent fee basis. FOF 43. On October 11, 1993, a court imposed \$2,000 in sanctions against Burtch. FOF 13.

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<sup>1</sup> Burtch's Statement of the Case relies mostly on his own testimony. The Hearing Officer found that Burtch was not credible, that his testimony often conflicted with documentary evidence and his prior testimony, and that he intentionally provided false testimony during the disciplinary proceeding. FOF 2 - 3, 11-12, 17, 113 - 114, 129, 132, 137, 142 -143, 149.

<sup>2</sup> This references paragraph 6 of the Hearing Officer's Findings, Conclusions, and Recommendations (FOF), which is attached as Appendix 1. Bar File (BF) 54.

Burtch required McGuin to pay the sanctions. FOF 16. McGuin complied with this condition in October 1993. FOF 43. In 1996, the same court sanctioned Burtch again in the amount of \$877.86. FOF 14. Burtch again required McGuin to pay the sanctions, which she did. FOF 16.

Burtch eventually tried McGuin's case in December 1996. During the course of the trial, McGuin rejected a settlement offer made by the defendants. FOF 18. The jury returned a verdict adverse to McGuin. FOF 18. Accordingly, Burtch was not entitled to any fees under the contingent fee arrangement he had with McGuin. FOF 55. During the period that Burtch represented McGuin, she overpaid him for fees and/or costs. FOF 58-62; Appendix 2, Appendix 3. At the conclusion of the case, Burtch owed McGuin \$3,847.53 in net overpayments. FOF 61-62, 64; Exhibit (EX) A-50; Appendix 3.

On January 8, 1997, McGuin filed a grievance against Burtch with the Washington State Bar Association (Association). FOF 19. Burtch sent McGuin a billing invoice, dated January 29, 1997, claiming that she owed his firm an outstanding balance of \$11,738.24 based on billing her at an hourly rate. FOF 20; EX A-7. The invoice did not credit any of the sanctions paid by McGuin against the claimed hourly fees. EX A-50. On January 30, 1997, the Association sent Burtch a copy of McGuin's grievance. See EX A-58.

## 2. 2000 Disciplinary Hearing

The relationship between Burtch and McGuin was the subject of a disciplinary hearing conducted on September 11, 2000. FOF 21. During the course of the 2000 disciplinary proceedings, Burtch repeatedly and unequivocally testified and argued that he had an hourly fee agreement with McGuin, which was converted into a contingent fee agreement in October 1993.<sup>3</sup> FOF 22; EX A-11 at 50-51, 184-185, 191-92, 199-201, 210-211, 253, and 264-265. He also testified under oath that the January 29, 1997 invoice had been sent to McGuin in error, that sending it “was not proper,” that McGuin was right in complaining about the invoice, and that “she didn’t owe me any money. I had agreed to that.” FOF 23; EX A-11 at 51-52, 191-192, 193.

On April 13, 2001, Burtch presented oral argument to the Board. During argument, Burtch again stated that his agreement with McGuin

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<sup>3</sup> In his brief, Burtch incorrectly states that he has “testified consistently” that “at the last moment it was changed to a conditional contingent fee agreement.” RB at 5. At the 2000 disciplinary hearing, Burtch testified that he converted the fee agreement into a contingent fee after the October 6, 1993 hearing provided that McGuin pay enough outstanding fees to pay the sanction. EX A-11 at 210-211. But at that time, McGuin had already paid sufficient advanced fees to pay all outstanding fees and/or sanctions and still should have had unearned fees in Burtch’s trust account. EX A-50; Appendix 3. Burtch later changed his testimony contending that he converted the fee agreement into a contingent fee agreement before the trial in December 1996. TR 515, 525-526, 543. But this testimony contradicts Burtch’s later testimony in district court that it had “never been true” that he had agreed to take the case on a contingent fee basis, the fee agreement was “always [at] an hourly rate.” TR 95-96, 98-99. The tape of the district court trial was transcribed as part of the present proceedings. TR 93-122.

was converted into a contingent fee agreement. FOF 26-27; EX A-42 at 8.

Burtch received an admonition for, *inter alia*, requiring McGuin to pay sanctions that were assessed against him personally and failing to provide McGuin with clear billing statements. EX A-34, EX A-35. The Board ordered Burtch to pay McGuin restitution of \$2,640.15<sup>4</sup> with 12% interest on the amount from January 29, 1997 until the amount was paid. FOF 29; EX A-5.<sup>5</sup>

The Association informed Burtch that the restitution payment of \$4,097.52, which represented the restitution amount plus interest, was to be paid within 30 days or by September 5, 2002. FOF 31; EX A-45. Burtch intentionally did not pay restitution as ordered by the Board. FOF 103-107.

### 3. McGuin's District Court Proceeding

When Burtch did not pay restitution to McGuin, she commenced a

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<sup>4</sup> It is unclear why the hearing officer in the 2000 disciplinary proceedings calculated restitution at \$2,640.15 instead of \$2,877.86, the amount of sanctions actually paid by McGuin.

<sup>5</sup> Burtch knew he was required to pay restitution. On August 1, 2002, Burtch filed an exception to costs and expenses with the Board arguing that "in view of the Board's decision requiring restitution to McGuin in the amount of \$2,640.15 with 12% interest from January 29, 1997, the additional burden of paying expenses and costs creates a substantial financial burden on me." FOF 30; EX A-44 at 1. Nonetheless, Burtch later testified that it was "debatable" whether the Board ordered him to pay restitution because the topic was never raised during oral argument before the Board. EX A-47 at 41-43; see TR 106.

lawsuit against him in district court in 2004. FOF 75. The trial was held on July 29, 2004.<sup>6</sup> See EX A-6.

Despite Burtch's prior multiple unequivocal statements that he and McGuin had a contingent fee agreement and that she did not owe him any money, at the trial in district court Burtch testified falsely under oath that he had an hourly fee agreement with McGuin "at all times."<sup>7</sup> FOF 94; TR 95. Burtch falsely testified that "no attorney in his right mind would ever take it on a contingent fee basis" and that it had "never been true" that he had agreed to take the case on a contingent fee basis. FOF 95; TR 98 – 99.

Burtch falsely claimed to the district court that he did not have to pay restitution because he was entitled to an offset for fees that McGuin owed to him based on the invoice for \$11,738.24 (Exhibit A-7). FOF 46, 87. This is the same invoice that Burtch previously testified was improper because he handled the matter on a contingent fee, not on an hourly fee, and McGuin did not owe him anything. FOF 77; EX A-11 at 191-192.

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<sup>6</sup> On May 5, 2004, McGuin filed a grievance against Burtch for failing to pay restitution. The Association deferred its investigation under Rule 5.3(c)(1) of the Rules for Enforcement of Lawyer Discipline (ELC) until the litigation was concluded (EX A-60), consistent with this Court's decision in In re Disciplinary Proceeding Against Gillingham, 126 Wn.2d 454, 458, n.3, 896 P.2d 656 (1995).

<sup>7</sup> The transcript of the trial by the court reporter does not include Burtch's oath to swear to tell the truth. TR 93. Burtch's oath is included on the tape of the proceedings (EX A-6) and the transcript by Delia Maraire (EX A-46 at 1).

Burtch falsely testified at the district court trial that “it was always our understanding that I was charging on an hourly basis and that we sent her [McGuin] many, many, statements and she never contested those statements.” FOF 96; TR 110.

The district court judge was not aware of the substance of Burtch’s previous testimony that Burtch and McGuin had a contingent fee agreement. FOF 84. Burtch’s conduct caused the district judge to conduct research that would not have been needed had this fact been revealed during the hearing. FOF 85. Had Burtch revealed that he and McGuin had a contingent fee agreement, the judge would have summarily disposed of Burtch’s claim to an offset. FOF 86. The district court judge eventually concluded that Burtch was obligated to pay the amount ordered as restitution but inadvertently neglected to include interest as part of the decree. FOF 88 - 89. Burtch paid McGuin \$2,640.15 in restitution, but never paid any accrued interest as ordered by the Board. FOF 90.

**B. ROXIE MORELAND MATTER**

On August 16, 2004, Burtch entered into an attorney-client relationship with Roxie Moreland. FOF 124. Moreland hired Burtch to bring a bad faith claim against Farmers Insurance (Farmers) and to take action regarding a lien that had been filed against Moreland’s property. FOF 128. Burtch was aware that he needed to act promptly to deal with

the remediation of the toxic mold problem in Moreland's residence, which caused unhealthy living conditions. FOF 130. In addition, the statute of limitations for Moreland's claim against the insurance company was set to expire at the end of 2004. FOF 130.

During the course of the initial interview, Burtch agreed that he would be available to handle the claim in a timely fashion. FOF 131. He indicated that he would have the lien taken care of in a week and that he would file the lawsuits within two weeks. FOF 131. Moreland provided Burtch with documents and information sufficient to commence the litigation against Farmers and against the contractor during the initial interview. FOF 132. Burtch did not visit Moreland's home or send an investigator or an expert there to document the damage. FOF 133.

Burtch prepared and Moreland signed a fee agreement that purportedly documents the agreement between the parties (Exhibit A-12). FOF 134. Paragraphs 1, 2, 3, 5, 6, and 7 of the agreement describe an hourly fee agreement. FOF 134. Paragraphs 10 and 11 contain references to a two thousand dollar nonrefundable retainer and a contingent fee agreement. FOF 134. The retainer agreement is unclear as to the obligations of the parties. FOF 134. Moreland has difficulty reading and simply signed where Burtch instructed her to sign and provided Burtch with the \$2,000 he demanded before he would take the case. FOF 135.

Moreland contacted Burtch on September 10, 2004 and September 14, 2004 expressing concerns about whether Burtch made efforts to remove the lien. FOF 137. Moreland informed Burtch by September 27, 2004 that she wanted her file returned and that she felt he was “misrepresenting her.” FOF 138. Burtch did not honor this request to terminate the attorney/client relationship and, instead, falsely informed Moreland that he was working on the case and assured her that he would complete the promised services within a week. FOF 139, 162.

Burtch did not perform work on Moreland’s case in a timely fashion, even though he knew of the need for immediate action and had promised to promptly handle the matter. FOF 140. Between the dates Burtch was retained and the date Moreland first requested her file be returned, Burtch did not contact any parties to ascertain their positions, take any steps to begin the lawsuit, or investigate how to lift the lien on Moreland’s house. FOF 141. Moreland contacted Burtch in late November 2004 and set a December 3, 2004 deadline for Burtch to contact her about working on the case. FOF 141; EX A-13. Burtch did not contact Moreland or complete any work within the deadline.<sup>8</sup> FOF 144.

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<sup>8</sup> Burtch’s claim that he “was preparing the complaint against the insurance agency” (RB at 8) is not supported by any documentation, including his billing statement and billing time entries. EX A-16; EX A-18.

On December 6, 2004, Moreland decided to terminate Burtch because the statute of limitations was about to expire and Burtch had consistently failed to fulfill his promises regarding when services would be provided. FOF 145. Moreland requested a “reasonable” refund of \$1,600 but Burtch refused to refund any fees. FOF 146, 147. Instead, Burtch produced an accounting documenting services in excess of \$2,000. FOF 147. Burtch’s file, as received by Moreland’s subsequent counsel, contained no research, no correspondence with parties, and no work product. FOF 149. Burtch provided no services of value to Moreland. FOF 150. The Hearing Officer determined that the accounting “appears to be fabricated for the purpose of justifying retention of the [\$2,000] retainer” Moreland paid to Burtch. FOF 148.

**C. PROCEDURAL HISTORY AND DECISION**

On September 1, 2005, the Association filed a Formal Complaint charging Burtch with seven counts of misconduct relating to his false testimony and frivolous defense during the district court trial in the McGuin matter and his misconduct in handling Moreland’s claim. BF 2. The hearing was held on May 1 - 5, 2006. On September 12, 2006, the Hearing Officer filed FOF concluding that the Association proved six of the seven counts by a clear preponderance of evidence and recommending disbarment, as follows:

**Count 1.** Burtch violated Rule 3.1 (asserting a frivolous defense) of the Rules of Professional Conduct (RPC) by asserting the right of an offset based on the billing statement for \$11,738.24. FOF at 37. Disbarment is the presumptive sanction for Count 1 under the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (“ABA Standards”) § 7.1. FOF at 38-39.

**Count 2.** Burtch violated RPC 3.3(a) and RPC 8.4(c) by (1) falsely testifying during the district court proceedings about his fee agreement with McGuin, and (2) submitting the invoice for \$11,738.24 (EX A-7) to the court as proof that McGuin owed him outstanding fees when Burtch knew that no fees were owed by McGuin. FOF at 37. Disbarment is the presumptive sanction for Count 2 under ABA Standards § 6.11. FOF at 40-41.

**Count 3.** Burtch violated RPC 3.4(c) and RPC 8.4(l) by intentionally violating the Board’s order to pay restitution to McGuin. FOF 103-11, FOF at 37. Disbarment is the presumptive sanction for Count 3 under ABA Standards § 7.1 and § 8.1(a). FOF at 42-44.

**Count 5.** Burtch violated RPC 1.3 by failing to diligently represent Moreland. FOF at 37. Suspension is the presumptive sanction for Count 5 under ABA Standards § 4.42.

**Count 6 and Count 7.** Burtch violated RPC 1.4(b), RPC 1.5(b),

RPC 1.5(a), and RPC 1.15(b) by charging unreasonable fees to Moreland and failing to explain the terms of the fee agreement. FOF at 37-38. Disbarment is the presumptive sanction under ABA Standards § 7.1 and § 8.1(b) for Burtch's violations in Count 6 and 7. FOF at 51-53. The Hearing Officer recommended that Burtch be disbarred. FOF at 61.

On September 25, 2006, Burtch appealed the Hearing Officer's decision. BF 58. On March 15, 2007, the Board entered an order unanimously adopting the Hearing Officer's decision. BF 80. On March 26, 2006, Burtch filed a notice of appeal of the Board's decision. BF 81.

#### **IV. SUMMARY OF ARGUMENT**

Burtch appeals the Board's unanimous recommendation for disbarment, arguing that the findings of fact are not supported by substantial evidence and that he failed to receive a fair hearing.

Burtch's challenges to the findings of fact are deficient because he has failed to identify which specific findings he is challenging and failed to brief the reasons that the specific findings he is challenging are not supported by substantial evidence.

Burtch was provided with a fair hearing in all respects. He was provided with a full opportunity to present "expert witness" testimony on the interpretation of the RPC. The Hearing Officer considered the expert testimony and correctly determined that it was of limited assistance

because Burtch failed to lay a proper foundation and because he elicited testimony through incomplete hypothetical questions. In any event, such “expert witness” testimony on the interpretation of the RPC is improper.

The Hearing Officer properly allowed the Association to cross-examine Burtch’s character witness, Judge Kirkwood, on the issues of sanctions and honesty because Burtch opened the door on these issues.

The Hearing Officer properly admitted evidence regarding Burtch’s prior misconduct because it shed light on issues regarding Burtch’s state of mind, lack of mistake, and the aggravating factors of “prior discipline” and “pattern of misconduct.” Due process does not require the Association to charge in the complaint aggravating factors, such as “pattern of misconduct.”

The Hearing Officer did not err by considering McGuin’s prior testimony during the district court proceedings because Burtch waived the issue by not objecting to its admission, and it is admissible in a disciplinary hearing under ELC 10.14(d)(1) and Rule 404(b)(1) of the Rules of Evidence (ER).

The unanimous Board correctly adopted the Hearing Officer’s recommendation that disbarment is the appropriate sanction because disbarment is the presumptive sanction for five of the six counts of misconduct. Ten applicable aggravating factors and the lack of mitigating

factors further warrant disbarment. Burtch's misconduct in this case and his extensive disciplinary history and pattern of misconduct demonstrate that he is a threat to the public.

## V. LEGAL ARGUMENT

### A. STANDARD OF REVIEW

This Court gives considerable weight to the hearing officer's findings of fact, especially in regard to the credibility of witnesses, and will uphold those findings so long as they are supported by "substantial evidence." In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 209, 125 P.3d 954 (2006). "Substantial evidence exists if a rational, fair-minded person would be convinced by it. Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding." Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C., 152 Wn.2d 387, 391, 97 P.3d 745 (2004) (citations omitted); In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 59-60, 93 P.3d 166 (2004).

Burtch contends that all of the Hearing Officer's findings of fact are reviewed "de novo" because they "regard issues of interpretation of the Rules of Professional Conduct." RB at 8. He cites no legal authority for this proposition. The Hearing Officer's Findings of Fact are reviewed under the "substantial evidence" standard of review. Poole, 156 Wn.2d at

209.

This Court reviews conclusions of law de novo, which must be supported by the factual findings. Poole, 156 Wn.2d at 209.

This Court reviews evidentiary rulings for abuse of discretion. In re Disciplinary Proceeding Against Marshall, \_\_\_ Wn.2d \_\_\_, 157 P.3d 859, ¶ 47 (2007). “An abuse of discretion occurs only when no reasonable person would take the view adopted.” In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 510, 29 P.3d 1242 (2001).

**B. BURTCH FAILED TO DEMONSTRATE THAT ANY OF THE FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Rule 10.3(g) of the Rules of Appellate Procedure (RAP) provides that the “appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 81, n.14, 101 P.3d 88 (2004). When challenging findings of fact, it is incumbent on the appellant to present argument to the Court why specific findings of fact are not supported by the evidence and to cite to the relevant portion of the record to support that argument. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing RAP 10.3(a)(3)).

Here, Burtch’s brief fails to make separate assignments of error for

each challenged finding of fact and fails to identify the specific findings of fact he is challenging. Nor has he supported his scattershot challenge to the findings with argument or authority as to the reasons why any specific findings are not supported by substantial evidence. Instead, Burtch's brief identifies approximately thirty findings of fact that he is not challenging. RB at 16. Given that there are 184 findings, by implication Burtch is apparently challenging 154 findings, but this is not clear.

An appellant's brief is insufficient if it contains merely a recitation of the facts that are favorable to the appellant while ignoring other testimony. In re Disciplinary Proceeding Against DeRuiz, 152 Wn.2d 558, 572, 99 P.3d 881 (2004); In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (Court declined to scour the record and construct arguments for counsel). The failure to sufficiently brief challenged findings makes those findings verities on appeal. Whitney, 155 Wn.2d at 467.

Burtch challenges the Hearing Officer's evaluation of the credibility of witnesses, but fails to brief the reasons that any of the Hearing Officer's specific credibility findings are not supported by substantial evidence. RB at 12. This Court gives great weight to the hearing officer's evaluation of the credibility of witnesses. In re

Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 717, 72 P.3d 173 (2003).

**C. BURTCH RECEIVED A FAIR HEARING**

Burtch claims that he did not receive a fair hearing. In determining if a proceeding appears to be fair, the critical concern is how it would appear to a reasonably prudent and disinterested person. In re Disciplinary Proceeding Against Haskell, 136 Wn.2d 300, 313-14, 962 P.2d 813 (1998).

Burtch was given a full opportunity to present his case and all admissible evidence was allowed. FOF at 8. The Hearing Officer put additional precautions into place to ensure that Burtch received a full and fair hearing and had all available resources available to him, including (1) allowing Burtch to act as co-counsel (TR 187-190, 580-581); (2) providing Burtch ample time to consult with co-counsel to make decisions (see, e.g., TR 882-886); and (3) delaying the proceedings to allow Burtch and his attorney an opportunity to interview witnesses (TR 195). FOF at 8. Where any doubt existed regarding the admissibility of evidence, those doubts were resolved in favor of Burtch. FOF at 8. See, e.g., TR 177. The Hearing Officer “bent the rules of disclosure” by permitting Burtch to present two additional “expert witnesses,” after previously ruling that Burtch would be limited to calling the two expert witnesses disclosed in

Burtch's Pretrial Witness Disclosure (BF 46). TR 182-185; TR 773; FOF at 4.

Burtch's charge that the Hearing Officer was prejudiced against him (RB at 8) is not supported by any citation to the record. See, e.g., State v. Perez-Cervantes, 141 Wn.2d 468, 483, 6 P.3d 1160 (2000) ("claim that trial court was biased against [defendant] deserves no discussion because it is totally unsupported by any citation to the record").

In the event that there was some error by the Hearing Officer, it does not demonstrate unfairness. If there is error, it is harmless error that will not change the outcome, given the unrebutted findings and conclusions warranting disbarment. See, e.g., In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 194, 117 P.3d 1134, 1139 (2005) (where facts supported by disputed evidence is supported by other evidence, any error in admission was harmless). In any event, as set forth below, Burtch has failed to demonstrate any abuse of discretion by the Hearing Officer.

**1. Burtch Was Given Ample Opportunity to Present "Expert Witness" Testimony**

Burtch claims that the Hearing Officer "denied me the opportunity to call expert witnesses to establish the standard of care in the legal industry and the interpretation of the RPCs as charged against me." RB at

9. This argument ignores the facts and law.

First, the Hearing Officer allowed Burtch to present all four of his “expert” witnesses: John Kirkwood (TR 33-72); William Morgan (TR 718-754); John Farra<sup>9</sup> (TR 755-772), and Steve Johnson (TR 895-906). FOF at 4-6; TR 773. Burtch mischaracterizes the record when he states that Judge Kirkwood was “not allowed to give an opinion.” RB at 9. Judge Kirkwood could have given an opinion had Burtch laid a proper foundation. FOF at 4-5, TR 47; 48-49.

Burtch claims that the Hearing Officer did not consider the expert testimony and give it any weight. Burtch is incorrect. See, e.g., FOF 134. Moreover, the trier of fact has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of the

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<sup>9</sup> The Hearing Officer initially stated that she would “strike” Farra’s “expert” testimony when it was disclosed during cross-examination that he previously stated that “it was obvious that the rules of lawyer discipline are only general guidelines.” TR 770; EX A-52 at 14. In addition, Farra’s testimony was based on his assuming incorrect facts. For example, he assumed that McGuin never paid any of the sanctions (TR 759-760), when it is undisputed that she paid \$2,877.86 in sanctions. Burtch also had Farra assume that McGuin never kept current with her payments (TR 748), when Burtch’s billing statement (EX A-7) reflects that during all material times McGuin had a positive balance in Burtch’s trust account. Appendix 3, EX A-50. Finally, Burtch did not disclose to Farra the exigent circumstances regarding the toxic mold in Moreland’s residence and Burtch’s statements that he would promptly handle the matter. Farra concluded that Burtch’s noncompliance with the Board’s order to pay restitution “did not violate any ethics rules that I am aware of.” TR 760. The Hearing Officer correctly determined that Farra’s testimony was based on incomplete hypotheticals and was of “limited utility as it contradicted legal authority.” FOF at 5.

evidence. Group Health Cooperative v. Washington Dept. of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986); Brewer v. Copeland, 86 Wn.2d 58, 74, 542 P.2d 445 (1975). Although Burtch was provided with a full opportunity to present expert testimony, the Hearing Officer determined that the testimony of Burtch's expert witnesses was not helpful because Burtch failed to lay a proper foundation or ask hypothetical questions that resembled the facts of this case. FOF at 4-6; FOF 5, FOF 156.

Assuming arguendo that the Hearing Officer did not consider the "expert testimony," there is no error because it is improper to consider expert testimony on interpreting the RPC. Under ER 704, "[n]o witness is permitted to express an opinion that is a conclusion of law, or merely tell the jury what result to reach." 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 704.5, at 237 (4<sup>th</sup> ed. 1999) (Tegland). In State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002), this Court noted that "[e]ach courtroom comes equipped with a 'legal expert', called a judge." This Court has held that it is improper to consider legal opinions on the ultimate legal issue under the guise of expert testimony. Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 344, 858 P.2d 1054 (1993).

The rule that expert witnesses cannot express an opinion on a conclusion of law applies with equal force when the "law" in question is

one of the RPC.<sup>10</sup> Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). Other jurisdictions have determined that expert testimony on the interpretation of the RPC is not admissible in disciplinary proceedings. Disciplinary Action Against Boulger, 637 N.W.2d 710, 714 (N.D. 2001); Disciplinary Action Against McKechnie, 656 N.W.2d 661, 666-667 (N.D. 2003); Conduct of Leonard, 308 Or. 560, 570, 784 P.2d 95, 100 (1989).<sup>11</sup>

Finally, Burtch's brief fails to demonstrate that the "expert witness" testimony presented would have any significant impact on the outcome of this case, especially the findings and conclusions that Burtch intentionally presented false testimony. The testimony of Burtch's "expert witnesses" supported the Hearing Officer's decision, notwithstanding that the Hearing Officer found the testimony to be of little help. See, e.g., TR 732 – 743, 748, 750-754, 764-765, 902-903.

## **2. Hearing Officer Properly Allowed Impeachment and Rebuttal Evidence On Burtch's Character After Burtch Opened the Door**

Burtch objects to testimony admitted during the Association's

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<sup>10</sup> Expert witness testimony may be admissible in disciplinary hearings to assist the trial of fact in determining the reasonableness of fees under RPC 1.5(a), which includes weighing factors such as "the fee customarily charged in the locality for similar legal services." See, e.g., VanDerbeek, 153 Wn.2d at 72. But that was not the subject of the proffered testimony in this case.

<sup>11</sup> Presenting expert testimony at a disciplinary proceeding is distinguishable from attorney malpractice cases where expert testimony is often presented for the purpose of informing the trier of fact as to the standard of care. In a disciplinary proceeding, the standard of care is not the issue. See Hizey v. Carpenter, 119 Wn.2d 251, 262, 830 P.2d 646 (1992).

cross-examination and impeachment of Burtch's character and reputation witness, Judge Kirkwood. Burtch's argument is based upon his false assertion that "Judge Kirkwood was not called as a character witness" and that "there was no character evidence presented by Judge Kirkwood."<sup>12</sup> RB at 9.

Burtch listed Judge Kirkwood as a "character and reputation" witness in his prehearing submission of summary of anticipated testimony. BF 46. Burtch's counsel elicited character and reputation testimony from Judge Kirkwood including testimony that Judge Kirkwood never had reason to question Burtch's representations to the court and never sanctioned Burtch for inappropriate conduct and that Burtch was honest. TR 36, 56, 71-72. This testimony was elicited to leave the impression that Burtch behaved in a manner in which sanctions were not warranted and that he was honest. TR 36, 56, 71-72.

A trial judge has wide discretion in balancing probative value against the prejudicial impact of testimony. State v. Rivers, 129 Wn.2d 697, 710, 921 P.2d 495 (1996); see also Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003) ("considerable discretion" in administering the

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<sup>12</sup> Burtch argued to the Board that "character and reputation" was a mitigating factor supported by the hearing transcript. BF 74 at 29. Since Judge Kirkwood was Burtch's only character and reputation witness, Burtch's argument was presumably based on his character and reputation testimony.

open-door rule).<sup>13</sup> “The calling of character witnesses (other than the defendant) will nearly always open the subject of the defendant’s character.” Tegland, supra § 404.5, at 391; United States v. Logan, 717 F.2d 84, 88 (3d Cir. 1983) (“By introducing evidence of his good character, the defendant ‘throw[s] open the entire subject’ of his character, and, consequently, allows the prosecutor to penetrate a previously proscribed preserve, to produce contradictory evidence, to cross-examine the defendant’s character witnesses and to probe the extent and source of their opinions”);<sup>14</sup> ER 404(a); Guarnero, 152 Wn.2d at 62 (lawyer’s testimony regarding his prestigious employment with the United States Attorney’s Office opened the door to the reasons for leaving his employment). “The scope of cross-examination is sufficiently broad to make it dangerous for a defendant to call character witnesses unless the defendant has led an exemplary life.” Tegland, supra § 405.6 at 13. A party’s character witnesses “may be cross-examined about specific

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<sup>13</sup> “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.” State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

<sup>14</sup> Washington’s version of rule 404(a) is the same as the corresponding federal rule. Tegland, supra § 404.1 at 382.

instances of defendant's past misconduct, including misconduct that would otherwise be barred by Rule 404(b)." Id.

When Judge Kirkwood testified about Burtch's character and reputation, Burtch opened the door to allow the Association to ask Judge Kirkwood about Burtch's being sanctioned by other judges for deliberately disobeying rules and orders and being dishonest in court. TR 54 – 69. When Judge Kirkwood testified that he could not recall other sanctions issued against Burtch in one specific case, he was impeached about a specific case, Vissers v. Coastal Community Church, that was dismissed due to Burtch's "misconduct [and] deliberate violations of court orders throughout the case." EX A-3. Judge Kirkwood later admitted to reading a specific newspaper article about the case. TR 54-60; EX A-3.

The Hearing Officer did not abuse her discretion by ruling that Judge Kirkwood's testimony on the issue of sanctions and honesty opened the door to inquire about the topic of sanctions and honesty. TR 636-639. In addition, it was proper to admit rebuttal testimony regarding Burtch's character and reputation from Gary Randall after Burtch opened the door on the issue. Burtch's brief objects to some of Randall's "character and reputation" rebuttal testimony. RB at 13. This testimony came in because Burtch objected that the Association did not lay sufficient foundation on the factual basis for Randall's opinion. TR 292-298.

3. **Hearing Officer Properly Admitted Evidence of Prior Misconduct Because It Shed Light On Burtch's Claims That His Misrepresentations Were Unintentional Mistakes, and Supported the Aggravating Factor "Pattern of Misconduct"**

Burtch objects to evidence admitted regarding his misconduct in Vissers v. Coastal Community Church, where the court found that Burtch made misrepresentations to the court on a regular basis and intentionally violated the court's orders. EX A-48 at 18 - 19; EX A-49.<sup>15</sup>

During the current proceeding, Burtch claimed that his false statements during the 2000 disciplinary proceedings were unintentional "mistakes." TR 537-539, 543, 545, 547. He claimed other misrepresentations were also unintentional mistakes. TR 583, 586, 599, 604, 611, 613. During the September 2000 disciplinary hearing, Burtch testified that "As far as candor towards the tribunal, I don't think I ever said anything in my life that wasn't honest and straightforward." EX A-11 at 197. At that time, Burtch was appealing the decision in Vissers.

As discussed above, the subject of Burtch's misconduct in Vissers was initially admitted during the cross-examination of Judge Kirkwood. The Hearing Officer admitted evidence regarding Burtch's conduct in

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<sup>15</sup> As in this case, Burtch alleged that the judge in Vissers was biased and prejudiced against him. The Court of Appeals affirmed the decision and found that the "trial judge was most tolerant in light of the violations of its orders." EX A-49 at 5.

Vissers for two additional reasons. First, it was admissible under ER 404(b) because it shed light on the issue of intent, knowledge, and lack of mistake. Second, it was relevant in demonstrating the aggravating factor “pattern of misconduct.”<sup>16</sup> FOF at 6, 45. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 496, 998 P.2d 833 (2000) (in a case where the lawyer was charged with having sex with one client, Court found that a pattern of misconduct was an aggravating factor because the lawyer had previous sexual relations with five other clients).

Burtch erroneously contends that the “the transcript is silent as to any ER 403 balancing test.” RB at 12. The Hearing Officer considered and rejected Burtch’s argument under ER 403 that the prejudice outweighed the probative value. TR 638-639.

Burtch’s brief suggests that he was prejudiced by the admission of evidence supporting the aggravating factor “pattern of misconduct,” including his conduct in Vissers. RB at 11. Certainly, the Hearing Officer’s findings make clear that she did not believe Burtch. But that is a far cry from showing that the testimony regarding Vissers, which comprised several minutes during a five-day hearing, so affected the

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<sup>16</sup> Burtch’s brief cites to disciplinary counsel’s statement he had not yet researched the issue on whether the misconduct in Vissers could be considered as a “pattern of misconduct.” RB at 11-12. Disciplinary counsel subsequently addressed the issue in the Association’s Closing Argument. BF 49 at 22.

Hearing Officer that she could not objectively evaluate the evidence. The Hearing Officer's decision reflects that it was Burtch's inconsistent testimony, shifting stories, implausible explanations, and outright falsehoods that influenced the Hearing Officer's evaluation of his credibility as a whole. FOF 2 – 3, 11, 17, 28, 37 - 39, 78 -79, 83, 97,101 - 102, 107, 114, 129, 131, 142 - 143, 148 - 149, 153, and 162.

**4. Aggravating Factors Such as “Pattern of Misconduct”  
Need Not Be Charged In the Complaint**

Burtch erroneously contends under the principles of due process that the Hearing Officer could not consider evidence on the aggravating factor “pattern of misconduct.” RB at 9.

Due process requires that the attorney “be notified of clear and specific charges and . . . be afforded an opportunity to anticipate, prepare, and present a defense.” In re Disciplinary Proceeding Against Romero, 152 Wn.2d 124, 137, 94 P.3d 939 (2004). This Court has stated that “[w]e have consistently and repeatedly adhered to the principle that presumptive sanctions may be increased due to aggravating factors. [citations omitted] Imposition of the appropriate sanction under the ABA Standards does not violate an attorney's due process rights.” Id.; Marshall, 157 P.3d at \_\_, ¶¶ 41- 45 (due process does not require the Association to allege a lawyer's state of mind in the complaint). “Pattern of Misconduct” is one of the

aggravating factors in the ABA Standards that may justify an increase in the degree of discipline imposed. ABA Standards § 9.22(c). It is not a separate charge of misconduct and, therefore, does not need to be alleged in the complaint.

**5. Burtch's Prior Disciplinary Record Was Properly Admitted**

Burtch objects to the admission of his prior disciplinary record, citing to ELC 10.15(b)(1). RB at 10. ELC 10.15(b)(1) is the rule covering bifurcated hearings. Burtch could have requested, but did not request, a bifurcated hearing in this case. FOF at 6.

ELC 10.13(f) requires Burtch's records of prior disciplinary action to be made part of the record before the Hearing Officer. Burtch's prior disciplinary record is considered under the aggravating factors for "prior disciplinary record" and "pattern of misconduct."<sup>17</sup> In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 761, 82 P.3d 224 (2004); ABA Standards § 9.22(a), (c).

In addition, Burtch's prior disciplinary record was properly considered under ER 404(b) to prove intent, knowledge, and absence of

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<sup>17</sup> Burtch has previously stipulated that the aggravating factor "pattern of misconduct" applied to his prior discipline for delaying and neglecting client matters in his Stipulation to Reprimand. EX A-33 at 8. This Court previously applied "pattern of misconduct" as an aggravating factor in connection with Burtch's suspension. In re Disciplinary Proceeding Against Burtch, 112 Wn.2d 19, 27, 770 P.2d 174 (1989).

mistake. FOF at 6. Burtch contends that intent, knowledge, and absence of mistake are not at issue. RB at 10. Burtch is incorrect. Burtch's mental state is always considered in determining the appropriate sanction. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998); ABA Standards § 3.0; ABA Standards § 9.22(b).

**6. Hearing Officer Properly Considered McGuin's Prior Testimony**

Burtch objects to any consideration of McGuin's prior testimony in the district court proceedings (FOF at 7) on the grounds that it violated his right to confrontation. RB at 14.

McGuin currently suffers from advanced Parkinson's disease, the symptoms of which are aggravated by stress. FOF at 6-7. During the course of the disciplinary hearing, it became evident that further participation in the hearing was detrimental to McGuin's physical and emotional health. FOF at 7. The Hearing Officer interrupted the testimony and all parties agreed that she should not be required to testify further. FOF at 7. Because these events occurred before cross-examination had been completed, the Hearing Officer struck McGuin's entire testimony during the proceedings. FOF at 7. The Hearing Officer ruled that since McGuin had previously testified under oath in matters involving the same parties, her testimony was relied upon to support

factual findings, but that the findings “are further supported by documentary evidence, Respondent’s testimony and unchallenged Findings of Fact and Conclusions of Law entered in the previous disciplinary action.” FOF at 7.

The Hearing Officer did not err in considering McGuin’s prior testimony for the following reasons.

First, Burtch waived any claim on appeal to exclude McGuin’s testimony by failing to object to it at the hearing. TR 89-92. RAP 2.5(a); ER 103. State v. Perez-Cervantes, 141 Wn.2d at 483; State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005); State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995) review denied 129 Wn.2d 1007, 917 P.2d 129 (1996) (a party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence). “These rules are intended ‘to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. They are also supported by considerations of fairness to the opposing party: ‘the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.’” Avendano-Lopez, 79 Wn. App. at 710.

Second, this Court has held that it will decline to address new constitutional issues raised for the first time on appeal unless the claim reflects a manifest error affecting a constitutional right. In re Disability Proceeding Against Diamondstone, 153 Wn.2d 430, 443, 105 P.3d 1 (2005). Here, Burtch claims for the first time on appeal that he was denied the right to confrontation. Courts have consistently ruled that there is no right to confrontation in disciplinary proceedings. Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 565 (9<sup>th</sup> Cir. 1990), cert. denied, 498 U.S. 1087 (1991) (“The confrontation clause is a criminal law protection. As such, it does not apply to an attorney disciplinary proceeding”); In re Cupples, 952 S.W.2d 226, 233 (Mo. 1997); In re Mills, 539 S.W.2d 447, 450 (Mo. 1976); Romero-Barcelo v. Acevedo-Vila, 275 F.Supp.2d 177, 203 (D. PR 2003); Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986).

Third, McGuin’s testimony is admissible under ELC 10.14(d)(1) and ER 404(b)(1). Under ELC 10.14(d)(1), evidence, including hearsay evidence, is admissible if in the hearing officer’s judgment, it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Hearsay may be considered if it is “best evidence reasonably obtainable, having due regard for its necessity, availability, and trustworthiness.” Kronenberg, 155 Wn.2d at 193

[citations omitted]. The essence of McGuin's testimony had already been admitted, without objection, through correspondence (EX A-8) and through findings of fact from the 2000 disciplinary proceeding (EX A-34 at 13-14). McGuin's testimony at the district court was admissible because it was the best evidence reasonably obtainable.

In addition, McGuin's testimony was admissible under ER 404(b)(1) because she was "unavailable" during the course of the hearing when it became evident that further participation in the hearing was detrimental to her physical and emotional health. FOF at 7. ER 404(a)(1). Although Burtch did not directly cross-examine McGuin during the district court proceedings, he was allowed to provide the judge with questions to ask McGuin. TR 95; EX A-46 at 2. In addition, the findings of fact from the 2000 disciplinary proceeding reflect that McGuin's testimony at district court echoed her prior testimony at the 2000 disciplinary proceeding, where Burtch had a full opportunity to cross-examine her. Compare TR 93-95, 107-109 with EX A-34 at 14-15.

Fourth, as reflected in the Hearing Officer's decision, Burtch was not prejudiced by the inclusion of McGuin's testimony at the district court proceedings because her testimony was established by other evidence, including documentary evidence, Burtch's testimony, and the findings from the previous disciplinary action. FOF at 7. Thus, any error was

harmless. Kronenberg, 155 Wn.2d at 194 (“Because all of the facts supported by the disputed evidence were also established by other evidence, we conclude any error in their admission was harmless.”). The only disputed testimony offered by McGuin during the district court proceedings was her testimony that (1) she did not owe any money to Burtch because they had a contingent fee arrangement (TR 93, 108); (2) the January 29, 1997 billing invoice (EX A-7) was the only invoice that was ever sent to her by Burtch (TR 93-95, 108); and (3) Burtch never had a signed fee agreement (TR 109). McGuin’s testimony at the district court was further supported by other evidence, including the following:

- McGuin’s February 20, 2007 letter (EX A-8) asserts that no fees were owed because Burtch agreed to handle the matter on a contingent fee basis. The letter also reflects that the January 29, 1997 invoice (EX A-7) was the only billing invoice Burtch ever provided to McGuin.
- Burtch repeatedly testified that McGuin did not owe him any money because the fee arrangement was converted into a contingent fee arrangement. EX A-11 at 50-52, 191-193. EX A-47 at 51-52. FOF 9.
- The findings of fact from the 2000 disciplinary proceeding found that “there is no record of Mr. Burtch ever providing a written billing statement, itemized or otherwise, to Ms. McGuin prior to the one that bears the date of January 27, 1997.” The Board concluded that Burtch violated RPC 1.5(b), RPC 1.4(b), and RPC 1.14(b)(3) by failing to provide clear billing statements and information to McGuin. EX A-34 at 14; EX A-35 at 1.
- Other client billing invoices support the testimony that Burtch did not send McGuin billing invoices. FOF 82. Compare EX A-7

with EX A-9. This was further corroborated by Janice LaVelle's testimony.<sup>18</sup> TR 681-683, 704-707.

- Burtch has never been able to produce any of the “many many” billing statements that he contends he sent to McGuin (FOF 99), which would ordinarily be kept in Burtch's file. TR 608, 705, 707.
- Burtch testified that he told his secretary to not waste her time sending billing statements to McGuin. EX A-11 at 198-199; FOF 100.
- Burtch stated that he did not know if he had a written hourly fee agreement for McGuin and could not find one in his records. EX A-42 at 7; see FOF 10-12. In his brief, Burtch states “even to this day it is not clear in my memory whether it [the fee agreement] was in writing.” RB at 6.

As demonstrated above, even if there was error in considering McGuin's testimony, it was harmless error because her testimony was cumulative.

#### **7. Amount Owed By Burtch to McGuin Has Not Been Re-litigated**

At the 2000 disciplinary proceeding, disciplinary counsel prepared an exhibit to summarize the billing to McGuin. EX R-54. At that hearing, Burtch testified that the exhibit was accurate. EX A-11 at 200. During this proceeding, disciplinary counsel discovered that the exhibit was not accurate because it excluded a \$2,500 payment by McGuin to Burtch and mischaracterized payments made by McGuin as costs paid by Burtch. Consequently, the Hearing Officer admitted a corrected exhibit, EX A-50,

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<sup>18</sup> The Hearing Officer and Judge Goelz determined that LaVelle was not credible when she testified that Burtch sent billing statements to McGuin and that Burtch had a written fee agreement. FOF 2; TR 82.

which demonstrated that McGuin overpaid Burtch by \$3,847.53. FOF 61. Appendix 2 and Appendix 3.

Burtch erroneously contends that the calculation of the amount of fee overpaid to Burtch by McGuin had already been litigated and could not be relitigated under the doctrine of collateral estoppel. RB at 15.

The doctrine of collateral estoppel applies only when there are (1) identical issues, (2) a final judgment on the merits, (3) identical parties or party in privity with a party to the prior litigation, and (4) application of the doctrine would not work an injustice to the nonmoving party. Whitney, 155 Wn.2d at 463-464.

Here, the doctrine of collateral estoppel does not apply for the following reasons. First, there are no identical issues because all of Burtch's misconduct in the present disciplinary matter occurred after the prior disciplinary matter was concluded.<sup>19</sup> At the July 29, 2004 trial in district court, Burtch claimed that McGuin owed him \$11,738.24 (EX A-7) when, in fact, Burtch owed McGuin \$3,847.53. EX A-50; Appendix 3. The prior disciplinary matter did not determine the amount of fees Burtch owed to McGuin or vice versa. FOF 35 – 38; FOF 45 - 47; EX A-34. Burtch admitted this fact during the 2004 trial in district court and during

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<sup>19</sup> Count 4 of the complaint charged that Burtch falsely testified at the prior disciplinary proceeding. This count was dismissed. FOF at 37.

his March 30, 2005 deposition. TR 107; EX A-47 at 56.

Second, there is no final judgment on the amount of fees Burtch owes to McGuin. The Board's prior order was confined to making Burtch pay restitution for sanctions that he required McGuin to pay.<sup>20</sup> EX A-34; EX A-5.

Finally, it would work an injustice for Burtch to avoid returning unearned costs and/or fees to McGuin, especially given his fiduciary responsibilities to her. For the reasons stated, the doctrine of collateral estoppel does not affect the Hearing Officer's determination of the amount of restitution owed to McGuin.

**8. Other Miscellaneous Objections By Burtch Are Baseless**

Burtch's brief contains other objections and allegations that are addressed below.

a. Hearing Officer Complied with ELC 10.16(a). Burtch erroneously claims that the Hearing Officer failed to comply with ELC 10.16(a) because she did not file a decision within 20 days after the

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<sup>20</sup> In October 1993, Burtch agreed to convert the hourly fee agreement into a contingent fee agreement if McGuin paid enough attorney fees to pay costs and sanctions. FOF 43; TR 185. On October 11, 1993, McGuin complied with the request and paid \$5,000 to Burtch. TR 185; FOF 16. According to Burtch's billing statement, Burtch's trust account should have contained sufficient unearned funds to pay all of outstanding fees in full with \$1,355 in advanced fees remaining. EX R-53 at 2; EX A-50; Appendix 2. Nevertheless, Burtch had McGuin pay his sanctions. Burtch's billing invoice (EX A-7) reflects that he did not credit McGuin for the payment of sanctions.

hearing concluded. RB at 3. ELC 10.16(a) provides that “within 20 days after the proceedings are concluded, the hearing officer should file with the Clerk a decision. . . .” (emphasis added). The term “should” means “recommended but not required.” ELC 1.3(r)(3). Therefore, the Hearing Officer is not required to file a decision within 20 days.

b. Judge Goelz was a fact witness. Burtch erroneously complains that Judge Goelz was “allowed to testify as an expert.” RB at 14. Judge Goelz was a fact witness, not an expert witness. He presided over the trial where Burtch falsely testified that he had never had a contingent fee arrangement with McGuin. His testimony demonstrated that he was misled by Burtch and showed the harm caused by Burtch’s misconduct. FOF 88, 89, 90, 98, 101, 123; TR 75-83, 85-86, 90-91, 122-123, 131-133, 135. Judge Goelz testified that he would not have spent any time on the case had he known about Burtch’s prior testimony that the fee arrangement with McGuin became a contingent fee arrangement. TR 78, 82-83, 86, 134-135.

c. “Failure to Acknowledge Wrongdoing” is an Aggravating Factor. Citing to Kronenberg, Burtch appears to contend that “failure to acknowledge wrongdoing” should not be an aggravating factor because he denies the wrongdoing. RB at 2. In Kronenberg, the Supreme Court distinguished between a lawyer who denies engaging the activity from a

lawyer who admits to engaging in the activity but claims that it was not wrongful. Kronenberg, 155 Wn.2d at 184, n.8. The aggravating factor for “refusal to acknowledge wrongdoing” applies to a lawyer who admits to the activity but claims that it is not wrongful. See, e.g., Poole, 156 Wn.2d at 224. The Hearing Officer correctly determined this aggravating factor applies because Burtch refused to acknowledge any wrongdoing in (1) altering his fee agreement with McGuin based on whether or not she brought a matter to the attention of the Association (FOF at 46-47), and (2) providing Moreland with an internally inconsistent fee agreement after receiving prior discipline for failing to provide clients with sufficient information in fee agreements (FOF at 55). Since Burtch has not denied engaging in these activities, the aggravating factor applies.

d. “Clear Preponderance of Evidence” is the Burden of Proof.

This Court has consistently held that “clear preponderance of evidence” is the burden of proof in lawyer disciplinary proceedings. In re Disciplinary Proceeding Against Allotta, 109 Wn.2d 787, 792, 748 P.2d 628 (1988); see United States Dist. Ct. v. Sandlin, 12 F.3d 861, 865 (9<sup>th</sup> Cir. 1993); ELC 10.14(b). Burtch asks this Court to change the burden of proof to “clear, cogent and convincing evidence.” RB at 16. Burtch provides no reason to change the longstanding burden of proof. Indeed, there does not appear to be any significant difference between “clear

preponderance of evidence” and “clear cogent and convincing evidence.” Mansour v. King County, 131 Wn. App. 255, 266, 128 P.3d 1241, 1247, (2006); Nebraska State Bar Ass’n v. Roubicek, 225 Neb. 509, 406 N.W.2d 644, 651 (1987) (“The two phrases [‘clear and convincing evidence’ and ‘clear preponderance of evidence’] set out the same standard.”).

e. “Non-refundable” retainer/fee. Burtch appears to contend that he could keep the \$2,000 “non-refundable” retainer/fee from Moreland whether or not he performed services. RB at 7. This Court held that the failure to perform the agreed legal services and failure to return unearned money violated RPC 1.5(a) and RPC 1.15(d), regardless of the lawyer’s characterization of the fee as nonrefundable. DeRuiz, 152 Wn.2d at 574-575.

**D. DISBARMENT IS THE APPROPRIATE SANCTION FOR BURTCH’S MISCONDUCT**

The Hearing Officer’s decision, as unanimously adopted by the Board, establishes that the Association proved six counts of misconduct and that disbarment is the presumptive sanction for five of the six counts. Although Burtch’s brief challenges all of the conclusions of law, it fails to brief any of them. RB at 13. Burtch has not assigned any error to the presumptive sanctions applied to the six counts of misconduct.

This Court has found that where there are multiple ethical violations,

the “ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct.” In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993) (quoting ABA Standards at 6). Here, the ultimate sanction is disbarment because the presumptive sanction for five of the counts is disbarment.

The Hearing Officer’s decision, as adopted by the Board, found that no mitigating factors applied and that the following ten aggravating factors applied to Burtch’s misconduct: (1) prior disciplinary record,<sup>21</sup> (2) dishonest and selfish motive, (3) pattern of misconduct, (4) multiple

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<sup>21</sup> Burtch has an extensive disciplinary record. In 1989, he was suspended for (1) failing to communicate fees to clients in violation of RPC 1.5(b) in three matters, (2) failing to exercise reasonable diligence in violation of RPC 1.3 and RPC 3.2 in six matters, (3) failing to keep clients informed in violation of RPC 1.4 in two matters, (4) failing to return client documents and unearned fees in violation of RPC 1.15(d) in two matters, (5) failing to timely file a trust account declaration, and (6) failing to cooperate with the disciplinary investigation. EX A-31. In 1991, Burtch received a reprimand for (1) disobeying an obligation under the rules of a tribunal in violation of RPC 3.4(c), (2) refusing to comply with discovery requests in violation of RPC 3.4(d), (3) failing to communicate with a client in violation of RPC 1.4, and (4) failing to act with reasonable diligence in violation of RPC 1.3 and RPC 3.2. EX A-33. In 2002, Burtch received an admonition for (1) failing to remind a judge that sanctions were ordered against him, not his client, in violation of RPC 1.3, (2) requiring his client to pay sanctions meant for him in violation of RPC 1.5(a) and RPC 8.4(d), and (3) failing to provide clear billing statements and information to his client in violation of RPC 1.5(b), RPC 1.4(b), and RPC 1.14(b)(3). EX A-34; EX A-35. During the 1980s, Burtch received three other admonitions or letters of admonition for neglect and failure to communicate. EX A-33 at 10.

offenses, (5) bad faith obstruction of disciplinary proceeding,<sup>22</sup> (6) submission of false evidence,<sup>23</sup> (7) refusal to acknowledge wrongful nature of conduct, (8) vulnerability of victims, (9) substantial experience in the practice of law, and (10) indifference to making restitution.<sup>24</sup> FOF at 44-47, 53-55.

Of these ten aggravating factors, Burtch's brief only addresses "pattern of misconduct" and "refusal to acknowledge wrongful nature of conduct" (RB at 2), which are discussed above. The other applicable aggravating factors are particularly egregious, especially (1) Burtch's extensive disciplinary record, (2) his dishonest and selfish motive, (3) his submission of false testimony and evidence during these proceedings,<sup>25</sup> and (4) the vulnerability of his victims. Even if this Court disregarded the aggravating factors challenged by Burtch, disbarment would still be the

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<sup>22</sup> The Hearing Officer found that Burtch engaged in conduct disruptive of the legal process, including proclaiming that certain testimony was "bullshit" (TR 282), advancing frivolous arguments, and presenting false testimony and exhibits. FOF 178; FOF at 46, 54.

<sup>23</sup> The Hearing Officer found that Burtch intentionally provided false evidence, including false time records, during the disciplinary proceeding and that his testimony changed depending on what result he intended to achieve without regard to the actual facts of the case. FOF 114, 178; FOF at 54.

<sup>24</sup> The Hearing Officer correctly applied this aggravating factor only to the Moreland matter, since failure to pay restitution is a charge in the McGuin matter. FOF at 47, 55. Whitt, 149 Wn.2d at 720.

<sup>25</sup> This Court has stated that "falsifying information during an attorney discipline proceeding is one of the most egregious charges that can be leveled against an attorney. . . . Even if the misconduct was considered as an aggravating factor . . . it would still justify increasing the sanction from suspension to disbarment." Whitt, 149 Wn.2d at 720.

appropriate sanction under the presumptive sanctions and remaining aggravating factors.

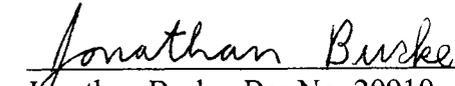
## **VI. CONCLUSION**

Burtch has repeatedly demonstrated that he is a threat to the public and should not be licensed to practice law. He deliberately disregarded this Board's order to pay restitution to a client. FOF 106-107. He intentionally submitted false testimony during the district court proceedings. FOF 97. He intentionally provided false testimony in these proceedings. FOF 114. He took money from a disabled client who needed immediate assistance and then made misrepresentations to her and failed to perform any valuable legal services. FOF 162. He "exhibits a callous disregard for truth and his obligation of candor as a lawyer." FOF at 56. "He consistently exhibits a cavalier attitude regarding the Bar Association and his obligation to comply with disciplinary orders." FOF 111. Burtch's conduct in this matter and his extensive history of prior discipline demonstrates that he will never change. This Court should follow the recommendations of the Hearing Officer and unanimous Board to disbar Burtch and order him to pay restitution to McGuin (FOF 68) and

Moreland (FOF at 61).

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of June, 2007.

WASHINGTON STATE BAR ASSOCIATION

  
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Jonathan Burke, Bar No. 20910  
Disciplinary Counsel

# APPENDIX 1

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**DISCIPLINARY BOARD**

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

**In RE:**

**RESPONDENT  
JACK L. BURTCH**

Lawyer (Bar No. 4161)

Public No. 05#00084

**FINDINGS, CONCLUSIONS  
AND RECOMMENDATIONS**

**I. INTRODUCTORY MATTERS**

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC") a hearing was held before the undersigned Hearing Officer on May 1, 2, 3, 4 and 5<sup>th</sup>, 2006. Respondent appeared and was represented by Ms. Therese Wheaton. Respondent was granted special permission to assist as co-counsel on the second day of the hearing and continued in that capacity through the end of the hearing. Disciplinary counsel Jonathan Burke appeared for the Association.

The record in this case was held open for preparation of the transcript and for presentation of written closing arguments. The record closed in this case upon receipt of the Association's rebuttal argument.

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## II. FORMAL COMPLAINT

The Respondent was charged by Formal Complaint dated September 1, 2005, with seven counts of violation of the Rules of Professional Conduct.

**Count 1** alleges Respondent violated RPC 3.1 by claiming in district court that former client, Ms. Donna McGuin, owed Respondent outstanding fees of \$11,738.24 and/or by claiming that the billing statement reflected an actual debt owed by Ms. McGuin that could offset restitution previously ordered by the Disciplinary Board.

**Count 2** alleges Respondent violated RPC 3.3(a) and/or RPC 8.4(c) by testifying falsely about the obligation owed by Ms. McGuin and/or by submitting the billing statement to the district court as evidence of the obligation owed to Respondent by Ms. McGuin.

**Count 3** alleges Respondent violated RPC 3.4(c) and or 8.4(1) and/or former RLD 1.1(n) by refusing to pay restitution to Ms. McGuin as required by the Disciplinary Board's order, ELC 13.7 and/or former RLD 5.3(b).

**Count 4** alleges that in the event that Respondent represented Ms. McGuin on an hourly fee basis, Respondent violated RPC 8.4(c) by testifying falsely at the September 11, 2000 disciplinary board hearing that he had represented Ms. McGuin on a contingent fee basis, and/or by falsely stating during his oral argument before the Disciplinary Board on April 13, 2001 that he represented Ms. McGuin on a contingent fee basis.

**Count 5** alleges Respondent violated RPC 1.5 by not diligently pursuing either or both of Ms. Roxie Moreland's claims.

**Count 6** alleges Respondent violated RPC 1.4(b) and/or RPC 1.5(b) by failing to explain, adequately and accurately, the fee agreement, and/or by failing to inform Ms. Moreland about his inability to pursue her legal matters in a timely manner.

1           **Count 7** alleges Respondent violated RPC 1.5(a) and or RPC 1.15(d) by failing to  
2 return unearned fees to Ms. Moreland and/or by failing to withdraw in a timely manner  
3 from representing her.  
4

5                           **III. EVIDENTIARY AND PROCEDURAL RULINGS**

6           This highly contentious hearing involved multiple procedural and evidentiary rulings  
7 that were resolved as follows:

8                   **A. Testimony of Michael D. Norman**

9           Following the initial disclosure of witnesses, the Association identified Attorney  
10 Michael D. Norman, the lawyer who subsequently represented Ms. Moreland following  
11 her termination of Respondent. Although Respondent had conducted no other pre-hearing  
12 discovery, he moved to exclude Mr. Norman's testimony. He argued that the Association  
13 did not disclose this witness in a timely fashion and he was therefore prejudiced because  
14 the witness was disclosed after the time for taking of depositions.

15           At the pre-hearing conference, the Association was instructed to make Mr. Norman  
16 available for either deposition or to be interviewed by Respondent's attorney before the  
17 hearing. Through no fault of the parties, this pre-hearing discovery did not take place.  
18 Respondent was therefore provided time to interview the witness immediately before the  
19 witness testified. Respondent was not prejudiced by the timing of this witness disclosure  
20 and the motion to exclude was denied.

21           Certain portions of Mr. Norman's testimony pertaining to disposition of the  
22 litigation were subject to a confidentiality agreement. All of Mr. Norman's testimony that  
23 was subject to the confidentiality agreement has been sealed by the court reporter and is  
24 not part of the public record in this matter. Only those matters subject to the  
25 confidentiality agreement are contained therein.

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**B. Association Motion to Exclude Testimony of “Expert” Witnesses**

**1. Admissibility of Expert Testimony Generally**

The Association moved to exclude Respondent’s expert witnesses based on the argument that the interpretation of the Rules of Professional Conduct were the sole province of the Hearing Officer. The initial ruling in this matter was that limited expert testimony would be allowed but only as to those witnesses whose identity as experts was revealed in Respondent’s Pretrial Witness Disclosure. Respondent’s witness disclosure only described former Judge John Kirkwood and attorney John Farra in this manner.

During the hearing Respondent objected to this limitation, arguing that the witness disclosure was completed by his attorney and did not comply with his intent regarding this issue. Because of the seriousness of the charges filed against Respondent, this remaining limitation was lifted during the hearing. Attorneys William Morgan and Stephen Johnson were also allowed to present testimony regarding the application of the Rules of Professional Conduct.

**2. Retired Judge John Kirkwood**

Retired Judge Kirkwood was Respondent’s law partner prior to 1966 and has appeared at prior disciplinary hearings involving Respondent. Judge John Kirkwood last practiced law in 1966 and retired from the judiciary in 1984. Judge Kirkwood offered general testimony that the Respondent had a fine legal mind and that he, Judge Kirkwood, had never had occasion to impose sanctions upon him. Some specific lines of questioning during Respondent’s direct of Judge Kirkwood were restricted based on remoteness of experience, the failure to establish expert qualifications and the failure to lay proper

1 foundation establishing familiarity with the issues that counsel desired the judge to  
2 address. TR 47; 49.

3 Later in the proceedings, Respondent made an oral offer of proof stating that Judge  
4 Kirkwood would have testified that Respondent had not provided false testimony, that  
5 Respondent had not pursued a frivolous defense in asserting that he was entitled to offset  
6 outstanding fees against the restitution ordered by the Bar Association and that he did not  
7 violate the Rules of Professional conduct as to either Ms. McGuin or Ms. Moreland. TR  
8 892.

9 The offer of proof did not comply with the minimum requirements for a proper  
10 offer of proof and did not correct the foundation issues. More fundamentally, the  
11 proposed testimony purported to resolve factual issues, which are the province of the fact  
12 finder and would not have been helpful to resolution of the issues presented in this  
13 hearing. This Officer therefore chose not to alter the prior ruling regarding limitations on  
14 Judge Kirkwood's testimony.  
15

16 However, even considering the offer of proof as if Judge Kirkwood had presented  
17 such testimony, the Findings of Fact listed in Section IV below would not change. Had  
18 Judge Kirkwood so testified, his testimony would have been contradicted by documentary  
19 evidence, the testimony of other witnesses and the officer's independent resolution of  
20 credulity issues based on the totality of the evidence.  
21

### 22 3. John Farra

23 Respondent presented the expert testimony of attorney John Lester Farra. Mr.  
24 Farra's interpretation of current rules was based on incomplete hypotheticals. In addition,  
25 Mr. Farra's testimony was of limited utility as it contradicted applicable legal authority.

1 To expedite the hearing, cross-examination was not allowed of this witness. Respondent  
2 was allowed to present Mr. Farra's testimony in full and was offered an additional  
3 opportunity to make sure his record was complete. Respondent's direct of this witness  
4 appears in the record for purposes of appellate review.

5 **C. Testimony as to Other Incidents/ Bad Acts**

6 Respondent moved to exclude evidence relating to prior discipline and uncharged  
7 acts of misconduct. The motion regarding prior discipline was denied. Prior discipline is  
8 relevant to the sanction analysis unless Respondent requests a bifurcated hearing and the  
9 issue of sanctions is removed from the initial hearing. Respondent did not make a timely  
10 bifurcation motion.

11 Evidence pertaining to past misconduct was not considered as evidence that the  
12 Respondent had acted in conformity with such acts as to the present charges. Consistent  
13 with **ER 404**, this officer ruled that the evidence could be used for other purposes. The  
14 evidence was admitted for impeachment and/or to determine knowledge, intent, lack of  
15 mistake, and as evidence relevant to aggravating and mitigating factors.

16 Evidence relating to the Respondent's mental state and motive is always considered  
17 in determining appropriate sanctions. ABA Standard 9.22(a); 9.32(b). Evidence of prior  
18 discipline is relevant to two aggravating factors, prior discipline and pattern of  
19 misconduct. ABA Standard 9.22(a); 9.22(c).

20  
21 **D. Testimony of Complainant Donna McGuin**

22 Ms. Donna McGuin is an elderly woman whose interactions with Respondent date  
23 back to 1988. Ms McGuin testified in the prior disciplinary action and again when she  
24 brought her claim against Respondent for payment of restitution in district court. Ms.

25 McGuin currently suffers from advanced Parkinson's disease, the symptoms of which are

1 aggravated by stress. During the course of the present hearing, it became evident that  
2 further participation in the hearing was detrimental to Ms. McGuin's physical and  
3 emotional health. Ms. McGuin's testimony was interrupted and counsel conferred with  
4 the Hearing Officer. All parties agreed that Ms. McGuin should not be required to testify  
5 further.

6 Because these events occurred before cross-examination had been completed, Ms.  
7 McGuin's entire testimony during this proceeding has been struck and is not being  
8 considered for the substantive findings in this case.

9 As Ms. McGuin's disease process was apparently progressive, and because Ms.  
10 McGuin had previously testified under oath in matters involving the same parties, Ms.  
11 McGuin's testimony in the district court proceeding was relied upon to support the factual  
12 findings described below. The factual findings are further supported by documentary  
13 evidence, Respondent's testimony and the unchallenged Findings of Fact and Conclusions  
14 of Law entered in the previous disciplinary action.

15  
16 **E. Hearing Irregularities and Motions for Mistrial**

17 This hearing included various contentious arguments regarding evidence, proper  
18 scope of cross-examination and conduct of counsel.<sup>1</sup> Respondent made several motions  
19 for mistrial alleging that the Hearing Officer failed to allow his expert to testify fully,  
20 that he was being denied a fair hearing and that he was the subject of character

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23 <sup>1</sup> Bar counsel argues that Respondent obstructed the hearing by being "antagonistic and rude to the  
24 Hearing officer and repeatedly challenging her rulings." Association Closing Brief at 24. This officer does  
25 not agree that Respondent's conduct to her was "rude or antagonistic." While Respondent did challenge  
rulings and aggressively asserted his rights, his conduct, while not a model of professionalism, was not  
interpreted as being directed at the Hearing Officer.

1 assassination. These motions were denied. Respondent was given full opportunity to  
2 present his case and all admissible evidence was allowed.

3 Moreover, additional precautions were put in place to ensure that Respondent was  
4 receiving a full and fair hearing and had all available resources available to him.  
5 Respondent was allowed to act as co-counsel for days two through five of the hearings,  
6 essentially double-teaming the Bar Association. Respondent was provided ample time  
7 during the hearing to consult with co-counsel to make decisions. The proceedings were  
8 delayed to allow Respondent and his attorney an opportunity to interview witnesses.  
9 Finally, to ensure that Respondent received a fair hearing, where any doubt existed  
10 regarding the admissibility of evidence those doubts were resolved in favor of the  
11 Respondent.

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13 **IV. FINDINGS OF FACT**

14 **A. Findings Applicable All Charges**

15 After having considered the testimony of the witnesses, the exhibits admitted into  
16 evidence, reviewing written arguments of counsel and being fully advised, the Hearing  
17 Officer finds the following facts are either undisputed or were proven by a clear  
18 preponderance of the evidence.

19 1. Respondent was admitted to the practice of law in the State of Washington  
20 on September 14, 1955.

21 2. Respondent's testimony regarding his dealing with both clients often  
22 conflicted with documentary evidence such as time records, telephone records, billing  
23 invoices and other documents and conflicted with his prior testimony in related  
24 proceedings.

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3. As a result of the inconsistencies in testimony in comparison to written documentation and because the Respondent has provided conflicting testimony in several different proceedings, Respondent's testimony was generally not credible.

4. A former member of Respondent's staff, Janice LaVelle, testified concerning both client matters. Ms. LaVelle's testimony was also contradicted by documentary evidence and other testimony. Ms. LaVelle's testimony was not credible<sup>2</sup> on the issues of client contacts with Respondent and the existence of written fee agreements.

5. Expert testimony regarding Respondent's conduct in these cases was elicited through incomplete hypothetical questions and was therefore of limited assistance in interpreting the ethical rules applicable to the facts of the instant charges.

**B. General Findings of Fact Relevant To Donna McGuin Matter.**

6. Respondent represented Donna McGuin from approximately 1988 to the end of 1996 in separate, but related, matters.

7. Ms. McGuin consistently maintained that she understood that Respondent had agreed to a contingent fee agreement with payment of costs and sanctions.

8. Respondent has at various times confirmed that he had agreed to a contingent fee on the condition that Ms. McGuin pay some fees and provide him with funds sufficient to pay sanctions.

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<sup>2</sup> Judge Goelz also found that Ms. LaVelle was not credible in presented testimony in the district court proceeding. TR 82.

1           9.       Respondent's references to the contingent fee agreement were accompanied  
2 by statements that Ms. McGuin did not owe him anything after the trial and that the  
3 billing statement, Exhibit A-7, was sent in error. See Ex. 11, pp. 50-51; 193.

4           10.       In the present proceeding, Respondent claimed that he and Ms. McGuin at  
5 one time had a written fee agreement based on an hourly agreement. He asserted further  
6 that Ms. McGuin stole it at some unspecified time when she took the files home.

7           11.       The testimony that Ms. McGuin stole the fee agreement is not credible.  
8 There is no evidence that Ms. McGuin had access to the files after the fee dispute arose.  
9 Prior to the dispute Ms. McGuin would have had no motive for removing the document.

10           12.       Had the agreement been "stolen" nothing would have prevented the  
11 Respondent from preparing a new document from computer backups, which Ms. Lavelle  
12 testified were kept in the ordinary course of business. No explanation was given for why  
13 a new agreement was not drafted after the first allegedly disappeared.

14           13.       Twice during his representation of Ms. McGuin, Respondent incurred  
15 significant sanctions because of his conduct. The first set of sanctions occurred in 1993  
16 when Respondent informed the court that he was not ready to proceed to trial on the trial  
17 date. The court imposed sanctions of \$2,000 at this time.

18           14.       The second incident regarding sanctions occurred in 1996 when the  
19 Respondent disregarded the court's rulings regarding motions in limine. The court  
20 imposed sanctions of \$877.86.

21           15.       Respondent agreed that he would transform his hourly fee agreement into a  
22 contingent fee agreement if Ms. McGuin provide him hourly fees in an amount equal to  
23 the sanctions.  
24  
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1           16.    Ms. McGuin complied with this condition and provided funds equal to or  
2 greater than both sanctions at the time the sanctions were imposed.

3           17.    In the current proceeding, Respondent testified that the agreement to convert  
4 the hourly fee agreement to a contingent fee agreement occurred shortly before the 1996  
5 trial. This testimony is not credible. It is contradicted by Respondent's testimony in the  
6 prior disciplinary action, documentary evidence and by circumstantial evidence that the  
7 payment of sanctions would more likely be an issue for the larger sanctions imposed in  
8 1993 than the much smaller amount imposed in 1996.

9           18.    Respondent eventually tried Ms. McGuin's case in December 1996. During  
10 the course of the trial, Ms. McGuin rejected a settlement offer made by the defendants.  
11 Ms. McGuin, as the client, had the right to make the final decision on this issue. RPC 1.2.  
12 The jury returned a verdict adverse to Ms. McGuin.  
13

14           19.    On January 8, 1997, Ms. McGuin contacted the Bar Association. The Bar  
15 Association treated this contact as a grievance, although it is not clear that that was Ms.  
16 McGuin's original intent.

17           20.    On an invoice dated January 29, 1997, Exhibit A-7, Respondent claimed  
18 that Ms. McGuin owed his firm \$11,738.24 in addition to amounts paid during the 1988-  
19 1996 period. It is not clear whether this invoice was sent before or after Respondent  
20 learned that Ms. McGuin had contacted the WSBA regarding issues she had with  
21 Respondent. However, that uncertainty does not affect the conclusions contained herein.  
22

23           21.    The relationship between Respondent and Ms. McGuin was the subject of a  
24 prior disciplinary hearing conducted on September 11, 2000.  
25

1           22.     During the course of the prior disciplinary proceeding, Respondent testified  
2 and argued that he had an hourly fee agreement, which was transformed into a contingent  
3 fee agreement. This position is expressed in at least eight different places in the  
4 transcript. *See, e.g.*, Ex. 11, pp. 50-51; 184; 191-92; 199-200; 201; 210; 253; 264.  
5 Respondent's statements that the hourly fee agreement had been transformed into a  
6 contingent fee agreement were unequivocal.

7           23.     During the course of the hearing, Respondent also testified, under oath, that  
8 the invoice, Exhibit A-7, had been sent to Ms. McGuin in error, that sending it "was not  
9 proper," that Ms. McGuin was right in complaining about the bill and that, "she didn't  
10 owe me any money. I had agreed to that." Ex. A-11, pp. 184, 191, 193.

11           24.     Findings of Fact, Conclusions of Law and Recommendations were filed on  
12 October 12, 2000. The Hearing Officer's findings do not include a detailed discussion of  
13 the January 1997 invoice nor do they resolve the issue of whether a contingent fee  
14 agreement in fact existed between Ms. McGuin and Respondent. The Hearing Officer did  
15 conclude, however, that Respondent owed Ms. McGuin \$2640.15 in restitution because he  
16 had forced her to pay sanctions, which were levied against him. Ex. A-34 at p. 23.

17           25.     The Hearing Officer recommended that Respondent be suspended for a  
18 period of 6 months for misconduct associated with his representation of Ms. McGuin.  
19

20           26.     Respondent appealed and represented himself during the appeal of the  
21 Hearing Officer's Findings and Conclusions. The Disciplinary Board heard argument on  
22 April 13, 2001.  
23

24           27.     During argument on the appeal of the disciplinary recommendation,  
25 Respondent again stated that he had agreed to a contingent fee with Ms. McGuin.

1           28.     There is no reference in these prior proceedings to a “conditional”  
2 contingent fee agreement nor is there any claim that Ms. McGuin breached the contingent  
3 fee agreement by bringing Respondent’s conduct to the attention of the Bar Association.

4           29.     The Disciplinary Board reduced the Hearing Officer’s recommended  
5 sanction to an admonition based on its reversal of one count. It did not alter the Hearing  
6 Officer’s other Findings of Fact or his restitution requirement. Ex. A-5. The Board  
7 ordered that Respondent pay Ms. McGuin \$2,640.15 with 12% interest on that amount  
8 from January 29, 1997 until the amount was paid.

9           30.     Respondent filed an exception to costs and expenses on August 1, 2001.  
10 Ex. A-44. In that document, Respondent argued that costs and expenses should not be  
11 imposed because the restitution order created a significant financial burden and further  
12 costs and expense would exacerbate the financial hardship created by the restitution order.

13           31.     The Bar Association informed Respondent that the restitution payment of  
14 \$4,097.52, which represented the restitution amount plus interest, was to be paid within 30  
15 days or September 5, 2002. The Bar Association further informed Respondent that the  
16 money was to be paid unless he demonstrated in writing that he was unable to pay. Ex.  
17 45. The letter went on to state that unless arrangements were made, the Bar would assume  
18 that the Respondent would pay the full amount due Ms. McGuin.

19           32.     Respondent did not provide written proof of an inability to pay the  
20 restitution order nor did he take any other steps consistent with the position that he did not  
21 understand his obligations under the restitution order. Respondent did not appeal the  
22 order.  
23  
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25           33.     The restitution order became final on September 19, 2002.

1           34.     Respondent was angry with Ms. McGuin for filing the Bar complaint and  
2 intentionally did not comply with the Bar's order to pay restitution.

3           35.     The prior disciplinary hearing resolved the issue of whether the sanctions  
4 could be passed on to Ms. McGuin against Respondent.

5           36.     In the present proceeding, Respondent claims that Ms. McGuin owed him  
6 money in excess of the restitution amount because she had breached her agreement to pay  
7 sanctions by reporting the matter to the Bar Association.

8           37.     Respondent did not raise the defense during the prior hearing or his appeal  
9 that Ms. McGuin owed him money because she was litigating the issue of who was  
10 responsible for sanctions. He also did not claim that she was in breach of their fee  
11 agreement.

12           38.     At no time following the prior disciplinary hearing, the appeal or the  
13 restitution order, did Respondent inform Ms. McGuin or the Bar Association that Ms.  
14 McGuin owed him money over and above the amount of restitution. He informed no one  
15 associated with the case that he was not required to pay the restitution order because Ms.  
16 McGuin had breached a condition of their agreement to transform the hourly fee  
17 agreement into a contingent fee.

18           39.     Respondent's testimony in the prior proceedings along with his conduct  
19 following those proceedings is inconsistent with the claim that Ms. McGuin owed him  
20 money over and above the amount he owed her in restitution.

21           40.     The issues and the parties before the Hearing Officer on September 11, 2000  
22 and those before this Hearing Officer regarding the nature of the fee agreement between  
23 Respondent and Ms. McGuin are identical.  
24  
25

1           41.     Respondent's failure to challenge the restitution order precludes  
2 Respondent's argument that he did not owe Ms. McGuin restitution or that she owed him  
3 sums in excess of the restitution order and therefore he did not have to pay it.

4           42.     Respondent is estopped from challenging the fact that he owed Ms. McGuin  
5 at least the amount contained in the restitution order.<sup>3</sup>

6           43.     Alternatively, and in addition, this Hearing Officer finds overwhelming  
7 evidence that the Respondent's hourly fee agreement was converted to a contingent fee  
8 agreement upon the payment by Ms. McGuin of an amount equal to or greater than the  
9 sanctions imposed in October 1993. Ms. McGuin complied with this condition in October  
10 1993.

11           44.     The prior calculations contained in the Hearing Officer's Findings of Fact  
12 and Conclusions of Law do not coincide with the contents of Exhibit A-7. It appears that  
13 Bar Counsel in the previous matter inaccurately computed the amounts owed under that  
14 invoice and that the Hearing Officer relied upon those computations.

15           45.     In the present proceeding, Respondent has argued that all issues pertaining  
16 to Exhibit A-7 were resolved in the prior hearing and cannot be reexamined. However,  
17 issues relating to the exact amount of overpayment and the dates of the change from an  
18 hourly to contingent fee occurred were not resolved and res judicata does not apply.

19           46.     In subsequent proceedings before a district court judge, and in this hearing,  
20 Respondent claimed that he did not have to pay restitution because he was entitled to an  
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25           <sup>3</sup> As explained later in these findings, the restitution ordered in 2000 actually understated the total amount  
Respondent owed Ms. McGuin.

1 offset. He relied upon Exhibit A-7 to substantiate his claim that Ms. McGuin owed him  
2 more money than he owed her.

3 47. To assess whether the defense is frivolous it is necessary to analyze Exhibit  
4 A-7 independently in light of the testimony presented in this hearing and in the prior  
5 disciplinary proceeding.

6 48. Respondent's invoice and trust accountings document that Ms. McGuin paid  
7 Respondent a total of \$11,626.62.<sup>4</sup>

8 49. Respondent incurred reimbursable costs in the amount of \$1,976.23.

9 50. In 1993, the Court imposed sanctions of \$2,000, which Respondent  
10 subsequently paid with funds provided by Ms. McGuin.

11 51. Ms. McGuin fulfilled her part of the agreement to convert the hourly fee  
12 agreement into a contingent fee contract by paying \$2,500 towards sanctions prior to  
13 October 11, 1993 and an additional \$2,500. The hourly fee agreement was converted to a  
14 contingent fee agreement as of this date.  
15

16 52. Ms. McGuin also paid an additional \$890.00 for sanctions Respondent  
17 incurred in 1996.  
18  
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20  
21 <sup>4</sup> Ms. McGuin testified in prior hearings that her payments to Respondent were closer to \$18,000.  
22 Respondent has not retained supporting documentation relating to this invoice or his trust accountings.  
23 Respondent's inability to provide records was an issue in the 2000 hearing, even though Respondent was  
24 informed shortly after his representation of Ms. McGuin terminated that there was a dispute regarding fees.  
25 In responding to questions during his appeal, Respondent first attempted to assert that the complaint had  
come in long after the events and records were not kept. When the error of this claim was pointed out to  
Respondent, he stated that he didn't know why the records were not available and suggested it was because  
of a move. Ex. 42, pp. 42-43. Respondent's poor record keeping and a reference to the fact that he had an  
employee who embezzled from him suggests that Ms. McGuin's claim of having paid a greater amount  
may have merit. She has not pursued additional amounts, however, and there is no way of presently  
resolving this dispute.

1           53.    The payments of \$2,500 and \$890.00 fulfilled all obligations Ms. McGuin  
2 had to pay sanctions as a condition of Respondent performing his services on a  
3 contingent fee basis.

4           54.    Respondent was entitled to legal fees of \$2925.00 for services rendered  
5 prior to October 11, 1993.

6           55.    Respondent is not entitled to any hourly fees accrued after Ms. McGuin  
7 fulfilled the terms of the oral agreement converting the hourly fee agreement to a  
8 contingent fee agreement. As of October 11, 1993, Respondent's sole avenue of  
9 obtaining fees was the oral contingent fee agreement, which required him to successfully  
10 prosecute the action.

11           56.    Respondent was not successful in obtaining a verdict in favor of Ms.  
12 McGuin.

13           57.    Respondent is not entitled to any fees accrued after October 11, 1993.

14           58.    Ms. McGuin and those acting on her behalf paid Respondent \$6,725.39 in  
15 excess of the amount owed in fees and costs.

16           59.    As a condition of converting the fee agreement from an hourly agreement to  
17 the contingent fee agreement, however, Ms. McGuin agreed to pay fees in the same  
18 amount as the sanctions.

19           60.    Assuming that this agreement was valid, Respondent was entitled to an  
20 additional \$2877.86 in fees. As noted above, these amounts were paid as required.

21           61.    Deducting the \$2,877.86 from the total amount Ms. McGuin paid results in  
22 a net overpayment of fees by Ms. McGuin of \$3,847.53 as of January 1997.

1           62.     At the end of the attorney client relationship, Respondent owed Ms. McGuin  
2 \$3,847.53, which is the amount in excess of the fees Respondent earned under his oral  
3 agreement that Ms. McGuin paid to Respondent.

4           63.     Exhibit A-7 falsely stated that Ms. McGuin owed Respondent money. Even  
5 assuming that the facts are as Respondent represents in this hearing, Ms. McGuin did not  
6 breach the parties' agreement by asserting her right to have the Bar determine who  
7 should pay the sanctions. Ms. McGuin had fulfilled her obligation to pay an amount  
8 equal to sanctions independent of the restitution order. Respondent's reliance upon  
9 exhibit A-7 to document his argument that Ms. McGuin owed him money over and  
10 above the amount of restitution ordered by the Bar Association is frivolous.

11           64.     The prior restitution amount appears to be in error. The minimum amount  
12 of restitution Respondent owed Ms. McGuin was \$3,847.53. This is the amount of money  
13 Ms. McGuin paid in excess fees over and above the sanctions.

14           65.     The restitution order of July 2001, understated the amount of unearned fees  
15 due Ms. McGuin by a minimum of \$1207.38.

16           66.     The Respondent was obligated to return the excess payment of \$3847.53  
17 plus 12% interest to run from January 29, 1997.

18           67.     Respondent paid \$2640.15 but has paid no interest on that amount.

19           68.     Respondent owes Ms. McGuin the following; (1) the unpaid interest on the  
20 initial restitution order; (2) \$1207.38 which is the difference between what should have  
21 been ordered as restitution for unearned fees and what was actually awarded, and (3)  
22 interest from January 29, 1997 on the sum of \$1207.38. These sums do not include any  
23 amount toward payment of sanctions.  
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69. The agreement that Ms. McGuin pay fees equal to the amount of sanctions is not in and of itself a breach of the ethical rules if the purpose of the arrangement was to liquidate the amount of fees due in return for switching from an hourly to a contingent fee agreement. Both parties voluntarily agreed to this arrangement.

70. In the event that the purpose of the prior restitution amount was to return the fees, which Ms. McGuin paid to reimburse the Respondent for sanctions, and the agreement is deemed invalid, Respondent owes Ms. McGuin \$2,877.86 in addition to the amounts described in Finding of Fact 68.

71. Despite the agreement to convert the hourly fee agreement to a contingent fee, Respondent sent Ms. McGuin's account to a collection agency after Ms. McGuin contacted the Bar Association. This action was motivated by Respondent's anger with Ms. McGuin for having turned him into the Bar Association.

72. Respondent continued to attempt to collect the sums contained on Exhibit A-7 until 1998. On December 29, 1998 Respondent's office informed the collection agency that he was no longer interested in pursuing payment of the invoice. Ex. R-53. Respondent's reason for recalling the matter from collections was his apparent belief that he would be unsuccessful in collecting the money.

73. Respondent had an obligation to review Exhibit A-7 prior to sending it to collections to determine whether or not it accurately reflected an amount legally owed to him.

74. Respondent did not review his invoice. Had he done so, it would have been clear that the claim that Ms. McGuin owed him money was inaccurate and frivolous.

1                   **C. Findings Relating to Specific Charges Involving Donna McGuin**

2                                   **Count 1 Assertion of a Frivolous Defense**

3           75. In an attempt to collect the restitution as ordered by the Disciplinary Board,  
4 Ms. McGuin filed an action in district court in 2004.

5           76. Respondent defended this action by claiming that he was entitled to an  
6 offset of the amount of restitution against outstanding fees that Ms. McGuin owed him  
7 and by offering Exhibit A-7 to substantiate his claim.

8           77. At the time Respondent made this representation, Respondent knew that Ms.  
9 McGuin did not owe him fees. Respondent's own records establish that Ms. McGuin had  
10 paid Respondent all hourly fees she had incurred. The remaining fees were subject to the  
11 contingent fee agreement. He had previously testified that she did not owe him money  
12 and he had been ordered to pay her restitution.

13           78. Despite this previous testimony and Respondent's knowledge that Ms.  
14 McGuin did not owe him money, Respondent took a position directly contradicting his  
15 prior testimony. During the hearing before District Court Judge Douglas Goetz.  
16 Respondent informed Judge Goetz that Ms. McGuin owed him fees and claimed that he  
17 had documented fees in excess of \$11,000.

18           79. This testimony was false.

19           80. During this disciplinary hearing, Respondent testified that he was unable to  
20 explain the fees and costs documented in Exhibit A-7. Respondent had an obligation to  
21 understand and to explain completely that document as it was issued under his name and  
22 was an attempt to collect fees in his name. This Officer provided additional time for  
23 Respondent to work with his attorney and his staff, if needed, to ensure that Respondent  
24 had every opportunity to explain the invoice. Despite being provided such time,  
25

1 Respondent claimed he could not explain the invoice or why it justified his testimony  
2 before Judge Goelz that Ms. McGuin owed him money.

3 81. Even though Respondent asserts Exhibit A-7 justified his claim of entitlement  
4 to an offset against the restitution previously ordered by the Bar Association, he offered  
5 no credible testimony as to why the charges contained on that invoice justified an offset.

6 82. Exhibit A-7 differs in form from sample invoices offered by the Bar  
7 Association from the same period of time contained in Exhibit A-9. The sample invoices  
8 reflect that Respondent's office provided clients with monthly, detailed accountings  
9 typical of those maintained by other legal offices. These statements contained data  
10 regarding prior transactions, balances being carried forward and clear statements of  
11 outstanding charges. The invoice sent to Ms. McGuin contains no such documentation  
12 even though it covers eight years of attorney/client financial transactions.

13 83. In the district court proceeding, Respondent intentionally omitted the  
14 material fact that he had previously testified under oath that Ms. McGuin did not owe him  
15 money. The district court judge was not aware of the substance of Respondent's previous  
16 testimony and that Respondent and Ms. McGuin had had a contingent fee agreement.

17 84. Respondent's testimony during the district court proceeding was  
18 unequivocal that there had been no contingent fee agreement between Respondent and  
19 Ms. McGuin.

20 85. Respondent's failure to reveal the material fact that he and Ms. McGuin had  
21 previously entered into a contingent fee agreement caused the district court judge to  
22 conduct research that would not have been needed had this fact been revealed during the  
23 hearing.

24 86. Had Respondent revealed that he and Ms. McGuin had a contingent fee  
25 agreement, the judge would have summarily disposed of the claimed right to offset.



1           95.     Respondent testified that “no attorney in his right mind would ever take it  
2 on a contingent fee basis and that it had “never been true” that he had agreed to take the  
3 case on a contingent fee basis.<sup>5</sup>

4           96.     Respondent testified that “it was always our understanding that I was  
5 charging on an hourly basis and that we sent her (Ms. McGuin) many, many statements  
6 and she never contested those statements.”

7           97.     Respondent intentionally submitted this false testimony intending it to  
8 influence the district court and the outcome of Ms. McGuin’s claim against him.

9           98.     Respondent’s manner of litigating this issue was abusive. At one point in  
10 the proceedings, Ms. McGuin informed the district court that Respondent had not mailed  
11 statements to her. Respondent then stated: “Ms. McGuin, you are a liar.” Judge Goelz  
12 imposed a \$100.00 sanction as a result of this action. It is not clear whether or not  
13 Respondent has paid this sanction. According to Judge Goelz, at the time of the district  
14 court proceeding, Ms. McGuin appeared frail.

15           99.     Respondent was not able to produce the “many, many” statements referred  
16 to in his testimony before the district court. In fact, the only statement that has ever been  
17 produced appears to be Exhibit A-7, which was also used in the prior hearing.

18           100.    During this disciplinary hearing, Respondent testified that his firm did not  
19 send statements to Ms. McGuin because she would not pay them and would “cry” when  
20 she received them.

21           101.    Respondent’s statements to Judge Goelz intentionally misled the tribunal  
22 regarding the agreement between the parties.

23  
24  
25 <sup>5</sup> The tape of the District Court proceedings was played and transcribed as part of the present proceedings. See TR 93-122.

1           102. Respondent's false statements were motivated by the desire to avoid his  
2 financial obligation to Ms. McGuin and to retaliate against her for her complaint to the  
3 Bar Association.

4  
5                           **Count 3 Failure to Comply With Restitution Order**

6           103. Respondent was obligated to pay restitution and interest to Ms. McGuin on  
7 or before September 19, 2002.

8           104. Respondent was fully informed of his obligation to make this payment and  
9 the date by which payment was to be made.

10          105. Respondent's own records document the fact that Ms. McGuin had paid him  
11 amounts in excess of the amount she was required to pay.

12          106. Respondent intentionally did not pay restitution until after he was ordered to  
13 do so by a district court judge when Ms. McGuin forced the issue by bringing suit.

14          107. Respondent resisted the obligation to pay Ms. McGuin in bad faith from  
15 September 19, 2002 until June 8, 2004.

16          108. As a result of his failure to pay the restitution and interest, Ms. McGuin  
17 filed a second Bar complaint against the Respondent.

18          109. On June 8, 2004, Bar Counsel informed Respondent and Ms. McGuin that  
19 the Bar Association was not going to act upon the complaint until after the litigation was  
20 completed.

21          110. By responding to the grievance in this matter, the Bar Association confused  
22 the issue of whether or not restitution had to be paid under the prior order. Respondent  
23 would not have been confused, however, had he complied with the restitution order in a  
24 timely fashion.

1           111. Respondent asserts that the Bar Association could have obtained payment if  
2 it had reduced the matter to judgment. Respondent consistently exhibits a cavalier and  
3 hostile attitude regarding the Bar Association and his obligation to comply with  
4 disciplinary orders.

5  
6           **Count 4: False Statements to Disciplinary Board in First Proceeding.**

7           112. The testimony and exhibits offered before the Hearing Officer in September  
8 2000 and before the Disciplinary Board on April 13, 2001 were truthful. 113.

9           Respondent's testimony in the present proceeding relating to these same issues  
10 contradicts his testimony in the prior proceedings. Ms. McGuin did not owe Respondent  
11 money following the termination of their attorney/client relationship.

12           114. Respondent intentionally provided false testimony before the Hearing  
13 Officer in the present proceeding to avoid his obligations under the prior restitution order  
14 and to his former client. Respondent's testimony changed depending on what result he  
15 intended to achieve, without regard to the actual facts of the case.

16  
17           **D. Findings Regarding Harm**

18           115. After learning that Ms. McGuin had brought her concerns to the attention of  
19 the Bar Association, Respondent sent the invoice, which falsely stated that Ms. McGuin  
20 owed him additional funds to a collection agency.

21           116. Respondent testified that his motivation for attempting to claim the  
22 additional fees was that he viewed Ms. McGuin's actions in going to the Bar Association  
23 as a breach of their contingent fee agreement. Respondent claimed that as a result of Ms.  
24 McGuin's actions, including her complaints to the Bar Association, he was entitled to an  
25 hourly fee.

1 117. Respondent's actions were in retaliation for Ms. McGuin's exercise of her  
2 right to inquire as to whether or not an attorney has complied with his ethical obligations.

3 118. While Respondent did eventually recall the case from collections, the  
4 documents admitted at this hearing establish that this was done more than a year after the  
5 original referral to collections and solely because the Respondent did not believe further  
6 collection efforts would be successful.

7 119. Ms. McGuin, an elderly client with Parkinson's disease, is particularly  
8 vulnerable. To a lesser extent, Ms. McGuin was also vulnerable during 2004 when the  
9 district court proceeding occurred.

10 120. Ms. McGuin was seriously injured by Respondent's abusive litigation  
11 conduct in that she was denied access to restitution money that Respondent owed her.  
12

13 120. Ms. McGuin was seriously injured by Respondent's conduct. She was  
14 repeatedly subjected to the stress of litigation with her former attorney for issues that  
15 should have been resolved conclusively following the Board's final orders in the prior  
16 disciplinary hearing. Respondent's manner in questioning and responding to Ms. McGuin  
17 was demeaning, rude and unprofessional.

18 121. Ms. McGuin was seriously injured by Respondent's manner of asserting his  
19 rights, including the allegations of dishonesty and theft made against her during these  
20 multiple proceedings.  
21

22 122. The public and the legal system were seriously injured by Respondent  
23 repeatedly flaunting the disciplinary process and his refusal to fulfill his obligations under  
24 the ethical rules.  
25

1           123. Respondent's assertion of a frivolous defense in the district court injured the  
2 legal system by consuming resources that are better utilized for meritorious disputes. His  
3 claim of a right of offset involved Judge Goelz in research that would not have been  
4 necessary had Respondent been truthful regarding the nature of the prior proceedings, his  
5 prior testimony and the contingent fee agreement between he and Ms. McGuin.

6  
7                           **E. General Findings Regarding Roxie Moreland Matter.**

8  
9           124. Respondent entered into an attorney client relationship with Roxie Moreland  
10 on August 16, 2004.

11           125. Respondent's normal course of business was to take notes during the initial  
12 client interview.

13           126. No notes were produced which document the initial interview between  
14 Roxie Moreland and Respondent.

15           127. Ms. Moreland brought a contractor, Gary Randall, who had pertinent  
16 information regarding Ms. Moreland's claim with her to this initial interview.

17           128. Mr. Randall corroborated Ms. Moreland's testimony that Respondent was  
18 hired to bring a bad faith claim against Farmer's Insurance and to take action regarding a  
19 lien that had been filed against Ms. Moreland's property.

20           129 Respondent's testimony contradicted that of Ms. Moreland and the  
21 independent witness, Mr. Randall, regarding the purpose of the representation and the  
22 ability to provide services in a timely fashion described below. Respondent testified that  
23 he was initially hired only to bring a claim against the contractor. Respondent's testimony  
24 was not credible.

1           130. Respondent was aware of the need to act promptly. Ms. Moreland informed  
2 him of her need to have things done rapidly. Mr. Randall's testimony corroborated that of  
3 Ms. Moreland. He testified that he discussed the need for prompt remediation of the toxic  
4 mold problem in Ms. Moreland's house during the initial interview with Respondent. In  
5 addition, the statute of limitations for Ms. Moreland's claim against the insurance  
6 company was set to expire at the end of 2004.

7           131. During the course of the initial interview, Respondent volunteered that he  
8 would be available to handle the claim in a timely fashion. He indicated that he would  
9 have the lien taken care of in a week and would file the lawsuits within two weeks.

10           132. Respondent testified that he could not bring the lawsuit earlier because he  
11 needed documents relating to Ms. Moreland's damages. This testimony is not credible.  
12 Ms. Moreland provided Respondent with documents and information sufficient to  
13 commence the litigation against Farmers and against the contractor during the initial  
14 interview.

15           133. Despite his claim that he needed additional information in order to start the  
16 lawsuits, Respondent took no action to obtain further information regarding damages until  
17 several months after Ms. Moreland hired him. Unlike the subsequent attorney, Mr.  
18 Norman, Respondent did not visit the subject home or send an investigator or an expert  
19 there to document the damage.

20           134. Respondent prepared and had Ms. Moreland sign a retainer agreement that  
21 purportedly documents the agreement between the parties. Exhibit A-12. Paragraphs one,  
22 two, three, five, six and seven of the agreement describe an hourly fee agreement.  
23 Paragraph ten and eleven contain references to a two thousand dollar nonrefundable  
24 retainer and a contingent fee agreement. The retainer agreement is unclear as to the  
25 obligations of the parties. At least one of the Respondent's experts confirmed that the

1 agreement was internally inconsistent and would have to be construed against the  
2 Respondent.

3 135. Ms. Moreland has difficulty reading. She testified that she simply signed  
4 where Respondent instructed her to sign and provided Respondent with the \$2,000 he  
5 demanded before he would take the case. Ms. Moreland's testimony was credible.  
6 During the hearing her demeanor, her response to questions and her ability to follow the  
7 proceedings indicated that she had impaired abilities.

8 136. Paragraph six of the agreement provided that the client would receive  
9 monthly or other periodic billings from the Respondent. Respondent did not provide  
10 periodic statements to the client. The only invoice or accounting prepared for this client is  
11 that which Respondent sent on December 8, 2004 following Ms. Moreland's termination  
12 of the attorney/client relationship.

13 137. Respondent's telephone message records document that Ms. Moreland  
14 contacted Respondent on September 10, 14 and 27, 2004. The first two messages  
15 establish that Ms. Moreland expressed concern regarding whether Respondent had made  
16 efforts to remove the lien. These messages contradict Respondent's testimony that he was  
17 not hired to remove the lien.

18 138. The evidence established that Ms. Moreland informed Respondent no later  
19 than September 27, 2004<sup>6</sup> that she wanted her file returned and that she felt he was  
20 "misrepresenting her."  
21

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22 <sup>6</sup> Ms. Moreland testified that according to her notes, she requested the file back on September 13,  
23 2004. As there are irregularities in Respondent's time records that suggest fabrication, it is possible that  
24 other records, including the telephone messages were also fabricated, that the one for September 13, 2004  
25 was not provided or that Respondent's office simply did not record this message. The evidence on this issue  
does not meet the clear preponderance test, however. It is therefore assumed that the first clear decision to  
terminate Respondent occurred on September 27, 2004. Respondent's own records document that it  
occurred no later than that date.

1           139. Respondent did not honor this request to terminate the attorney/client  
2 relationship. Instead, he assured Ms. Moreland that he would complete the promised  
3 services within a week.

4           140. Respondent did not perform work on Ms. Moreland's case in a timely  
5 fashion given the need for immediate action and his promises to the client. His time  
6 records document that he did not review the file until approximately one month had  
7 elapsed and Ms. Moreland had called to inquire about the status of her case. The first  
8 time entry documenting services by Respondent is dated four days after Ms. Moreland's  
9 September 10, 2004 telephone message.

10           141. Between the date he was retained and the date Ms. Moreland first requested  
11 her file be returned, Respondent did not contact any parties to ascertain their positions,  
12 take any steps to begin the lawsuit or investigate how to lift the lien on Ms. Moreland's  
13 house.

14           142. Respondent did not work on Ms. Moreland's file again until October 25,  
15 2004. Respondent's time records document he researched the issues regarding the house  
16 lien on this date, more than two months after Ms. Moreland hired him. These records  
17 contradict Respondent's testimony that he did not act on the lien matter because he was  
18 waiting, as a litigation tactic, to see if the lien was perfected within the eight-month  
19 window.

20           143. Respondent's testimony that he waited to act on the lien dispute as a  
21 litigation tactic is not credible. The timing of his research on the issue suggests he did not  
22 analyze the issues until much later. In addition, the lien was filed by an attorney on behalf  
23 of the contractor, a fact Respondent knew, or should have known from the documents.  
24 The presence of an attorney representing the contractor makes it substantially unlikely that  
25 the lien would not be perfected in a timely fashion.

1           144. Ms. Moreland contacted Respondent in late November setting a deadline for  
2 completion of the work. Respondent did not complete the work within the deadline.

3           145. The statute of limitations for filing and service of the complaint against the  
4 insurer was set to run less than thirty days from the date Ms. Moreland set for  
5 Respondent to act.

6           146. Ms. Moreland's decision to terminate Respondent's services on December  
7 6, 2004 and request a refund of \$1,600 was reasonable. The statute of limitations was  
8 about to expire and Respondent had consistently failed to fulfill his promises regarding  
9 when services would be provided.

10           147. Respondent refused to refund fees. Instead, Respondent produced an  
11 accounting, which allegedly documented provision of services valued in excess of the  
12 \$2,000 Ms. Moreland had provided to Respondent.

13           148. The accounting, Exhibit A-16, is based on incomplete data, conflicts with  
14 documented phone messages between the parties and appears to have been fabricated for  
15 the purposes of justifying retention of the retainer.

16           149. Respondent's file, as received by Mr. Norman, contained no research, no  
17 correspondence with parties, and no work product. While Respondent asserts he did work  
18 on this file, there is no evidence other than his testimony that he did anything other than  
19 make one call to Mr. Randall in late October and make some rough notes regarding the  
20 case. Respondent's testimony regarding the services he allegedly provided to Ms.  
21 Moreland is not credible.

22           150. Respondent provided no services of value to Ms. Moreland.  
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1 **Findings Pertaining to Count 5**

2 151. Respondent was retained to provide immediate assistance regarding the lien  
3 filed on Ms. Moreland's house and to file two actions.

4 152. Respondent did not review the file immediately and did so only upon  
5 receiving complaints from Ms. Moreland.

6 153. Respondent did not research the lien placed on Ms. Moreland's house in a  
7 timely fashion. He took no actions to remove the lien. His testimony that his failure to act  
8 on the lien was a tactical decision is not credible. Expert testimony elicited on this topic  
9 did not include full disclosure of the facts relevant to the issue and was thus of little value  
10 in resolving the issue.

11 154. Respondent did not investigate the dispute between Ms. Moreland and her  
12 insurer in a timely fashion. He did not draft and file a complaint in a timely fashion given  
13 Ms. Moreland's need to have the issues resolved quickly. While Respondent's conduct  
14 did not result in loss of the cause of action because of statute of limitations issues, this was  
15 because Ms. Moreland took preemptive action and changed attorneys before the deadline.

16 155. Respondent's failure to research applicable lien statutes and/or take action  
17 regarding the lien, constitutes a failure to diligently complete the agreed upon services.

18 156. Under the facts of this case where Ms. Moreland specifically requested and  
19 required immediate legal assistance, Respondent's delay in reviewing Ms. Moreland's  
20 file, delay in researching the lien issues and delay in drafting the complaint constitutes a  
21 failure to provide diligent representation.

22 **Findings Regarding Count 6**



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**F. Harm Relating to Moreland Matter**

164. Roxie Moreland is disabled and has limited comprehension of the complexity of her legal situation.

165. Respondent knowingly engaged in this conduct and was motivated by desire for financial gain.

166. Respondent's conduct regarding Ms. Moreland caused her serious injury by preventing her access to needed funds and delaying resolution of her case.

167 Ms. Moreland was seriously injured by the delay associated with starting work on her case after being assured that such work would commence immediately. The delay extended the length of time Ms. Moreland was required to live in unhealthy conditions caused by the toxic mold.

168. Ms. Moreland was seriously injured by having to seek alternative representation in order to commence her legal action in a timely fashion. Ms. Moreland's injury was mitigated by the prompt, effective action of Mr. Norman who ultimately resolved the matter in a manner beneficial to Ms. Moreland.

169. The public and legal system were damaged by Respondent's failure to correct his callous disregard of his obligation to communicate clearly with his clients as to fee arrangements, to follow through with his promises to perform work in a timely fashion, and his failure to correct conduct for which he had previously been disciplined.

**G. Pattern of Misconduct**

The Bar Association argued that the Respondent engaged in a pattern of misconduct that justifies disbarment. Respondent argued that the pattern of misconduct allegation was not pled in the Formal Complaint and should not be considered. Under ABA Standard

1 9.22(c) pattern of misconduct is an appropriate factor to be considered as an aggravating  
2 factor.

3 170. Respondent's prior disciplinary record includes multiple incidents of failing  
4 to communicate fee agreements with clients and the charging of excess fees.

5 171. Respondent's dispute with Ms. Moreland appears to be essentially the same  
6 conduct for which he was suspended in 1989.

7 172. Respondent's conduct regarding Ms. McGuin and Ms. Moreland is  
8 consistent with the Respondent's prior pattern of failing to comply with an attorney's  
9 obligation to explain fully his charges for services and to retain only those fees that are  
10 reasonable.

11 173. Evidence exists that Respondent has a pattern of conduct prejudicial to the  
12 administration of justice.

13 174. In representing Ms. McGuin, Respondent was sanctioned at least twice.

14 175. In litigating his frivolous defense in district court, Respondent drew a  
15 sanction for calling Ms. McGuin a liar during the proceeding.

16 176. The Bar Association submitted a 1999 case, which resulted in dismissal of a  
17 client's case as a sanction for Respondent's actions in court. Exhibits A-48; A-49.

18 177. Respondent's prior disciplinary records indicate that he has drawn sanctions  
19 before courts in other instances. The number of sanctions imposed by different judicial  
20 officers on Respondent clearly exceeds that which could be anticipated during the course  
21 of the legal career of an attorney whose courtroom conduct was consistent with his ethical  
22 and legal obligations.

23 178. In the present hearing, Respondent engaged in conduct disruptive of the  
24 legal process, including proclaiming that certain testimony was "bullshit," advancing  
25 frivolous arguments and presenting false testimony and exhibits.

1           179. Respondent's conduct in handling client matters, failing to comply with  
2 court orders, disrupting court proceedings, failing to comply with a disciplinary order  
3 which required restitution to be paid in a timely fashion, presenting a frivolous defense  
4 and testifying falsely constitutes a pattern of misconduct which evidences disrespect for  
5 the legal system, indifference to his role as an officer of the court, and a failure to  
6 comprehend the impact of his actions on vulnerable clients.

7           180. Respondent has multiple incidents of prior discipline, including a 1989 45-  
8 day suspension arising out of conduct regarding fee disputes substantially similar to  
9 those that he experienced with Ms. Moreland in 2004.

10           181. Respondent's total disciplinary record includes one 45-day suspension, one  
11 reprimand, three admonitions and two-year probation. These disciplinary actions were  
12 the result of misconduct with 14 different clients.

13           182. Respondent's pattern of conduct has seriously injured his clients and the  
14 legal system. Respondent is directly responsible for dismissal of two cases because of  
15 his misconduct.<sup>7</sup>

16           183. Respondent's age is not a contributing factor to his conduct. Respondent's  
17 conduct at the disciplinary hearing was consistent with the description of his conduct  
18 dating back more than twenty years.

19           184. At this disciplinary hearing, Respondent's manner and demeanor indicated  
20 that he was fully competent, aware of the pertinent legal and factual issues and skilled at  
21 presenting and responding to arguments. He did not exhibit memory problems except at  
22 times when the claim of poor memory worked to his advantage.

23  
24 <sup>7</sup> Only one of these cases resulted in a bar complaint. However, the Bar Association submitted  
25 documentation establishing that Respondent's conduct in the case of *Visser v. Costal Community Church*  
resulted in dismissal of the client's case. Ex. A-49. The dismissal was affirmed by Division Two in an  
unpublished decision. Ex. A-50.

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**V. CONCLUSIONS OF LAW**

Based on the forgoing Findings of Fact, the Hearing Officer makes the following Conclusions of Law:

**Count 1.** By asserting the right to an offset for fees based on Exhibit A-7 and by claiming that Ms. McGuin owed him money during the course Ms. McGuin's litigation against him, Respondent violated RPC 3.1.

**Count 2.** Respondent violated RPC 3.3(a) and RPC 8.4(c) by testifying falsely regarding his fee agreement with Ms. McGuin and submitting Exhibit A-7 to the district court.

**Count 3.** Respondent refused to pay restitution as ordered by the Disciplinary Board's order and thereby violated RPC 3.4 and RPC 8.4(1).

**Count 4.** Respondent did not provide false testimony during the September 11, 2000 disciplinary hearing or the oral argument before the Disciplinary Board. A clear preponderance of the evidence supports the proposition that Respondent's testimony that he had a contingent fee agreement with Ms. McGuin was true. This charge is dismissed.

Respondent's testimony before this tribunal, however, was false. The falsity of Respondent's testimony during this proceeding is an aggravating factor discussed below.

**Count 5.** Respondent failed to provide diligent representation in handling Ms. Moreland's claims. The circumstances of her case required immediate action and Respondent had agreed to those terms. His conduct violated RPC 1.3.

**Count 6.** Respondent failed to explain, adequately and accurately, his fee agreement and his ability to timely complete the requested services. Respondent's fee agreement is void as it violates RPC 1.4(b) and RPC 1.5(b) and because Respondent breached RPC 1.3 as established in Court 5.



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7.2 Suspension is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as professional and causes injury or potential injury to a client, the public, or the legal system.

Mental State:

Respondent presented the offset argument to the small claims court intending to obtain the benefit of not having to pay Ms. McGuin restitution to which the Disciplinary Board had previously ruled she was entitled.

Injury:

Respondent's conduct seriously injured Ms. McGuin and seriously injured the legal system. Ms. McGuin was and is a vulnerable, fragile elderly woman who had to resort to litigation in order to obtain her money. Forcing her to defend against a frivolous claim exacerbated her frustration with the legal system and delayed final resolution of the matter more than four years after the matter should have concluded.

Respondent's conduct injured the legal system by diverting scarce resources to a frivolous claim. The district court judge would not have had to conduct research had he known that Respondent did not have a factual basis for his claim for an offset.

Presumptive Sanction:

Disbarment is the presumptive sanction for Respondent's violation of RPC 3.1 by advancement of a meritless claim.

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2. **Count 2: False Statements to District Court Judge Goelz.**

Respondent violated RPC 3.3's duty to be truthful and RPC 8.4 by engaging in conduct involving dishonesty. Respondent's conduct was prejudicial to the administration of justice in that it was an attempt to thwart a legitimate order of restitution. Absent mitigating or aggravating factors, the presumptive sanction appropriate for cases involving conduct that involves dishonesty, fraud, deceit or misrepresentation and/or intentional or knowing misstatements to a court are as follows:

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

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

Mental State:

Respondent's false statements and presentation of Exhibit A-7 to Judge Goelz were done with the intent to deceive the court. Respondent previously testified that Ms. McGuin did not owe him money and that the bill should not have been sent during the prior disciplinary hearing. His testimony before Judge Goelz to the contrary four years later is incompatible with those statements and is not the result of memory problems. Respondent had an obligation to inform Judge Goelz that his fee arrangement with Ms. McGuin was a contingent fee, and that he had previously so testified under oath.

1 Respondent intentionally offered Exhibit A-7 as justification for a claimed offset  
2 although his prior testimony, under oath, established that Exhibit A-7 had been sent to  
3 Ms. McGuin in error and that she did not owe him anything. His testimony before Judge  
4 Goelz was intended to avoid his obligation to pay restitution and interest, and to avoid his  
5 obligations to Ms. McGuin.

6  
7 Injury:

8 Respondent's conduct seriously injured Ms. McGuin by forcing her to defend  
9 against his frivolous, false claims. It caused significant harm to the legal system. An  
10 attorney who presents false testimony and tampers with the legal system engages in  
11 conduct that strikes at the heart of the rule of law. To do so for a client is serious  
12 misconduct. An attorney who engages in dishonest conduct in order to advance the  
13 lawyer's own ends takes that harm one-step further because the intended beneficiary of  
14 the misconduct is the lawyer, not the client. Under such circumstances, there can be no  
15 claim that the attorney was simply being zealous in defense of the rights of another. Here,  
16 Respondent was dishonest in protecting his own interests. The ABA Standards reserved  
17 the highest sanctions, usually disbarment, for misconduct intended to benefit the lawyer.  
18

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21 Presumptive Sanction:

22 Disbarment is the presumptive sanction for Respondent's dishonest conduct in  
23 violation of RPC 3.3 and 8.4(c).  
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**3. Count 3: Failure to Pay Restitution.**

Failure to pay the restitution as ordered by the Disciplinary Board implicates two sections of the ABA Standards, Sections Seven and Eight. Those standards applicable to this count are:

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to the client, the public or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as professional and causes injury or potential injury to a client, the public, or the legal system.

The second applicable section is Section Eight.

- 8.1 Disbarment is generally appropriate when a lawyer:
  - (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system or the profession, or
  - (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system or profession.
- 8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Mental State:

Analysis of count three differs from the other McGuin charges because the Bar Association's letter informing the parties that it would not act until after litigation was completed may have affected Respondent's mental state regarding his obligations under

1 the prior disciplinary order. Respondent's obligation to pay restitution attached on  
2 September 19, 2001. Between that date and the date of the Bar's letter of June 8, 2004,  
3 Respondent intentionally and willfully violated the Disciplinary Board's order that he pay  
4 restitution to Ms. McGuin.

5 The Bar's letter confused the issue as it did not refer the Respondent to its prior  
6 order or direct him to pay the restitution. Instead, the letter stated that the Bar was going  
7 to remain neutral in the matter until litigation was complete. After this letter, the mental  
8 state of intent is not present by a clear preponderance of the evidence. Respondent's  
9 conduct was at least negligent however, because a reasonable lawyer would have followed  
10 up on the Bar letter to clarify his obligations. Respondent did not do so, and therefore his  
11 mental state for the period after June 8, 2004 was negligent. However, because  
12 Respondent intentionally disregarded the restitution order for nearly three years, the  
13 change in his mental state after June 8, 2004 does not affect either the presumptive  
14 sanction or the recommended sanction.  
15

16  
17 Injury:

18 Respondent's intentional failure to pay the restitution denied Ms. McGuin, an  
19 elderly woman on a fixed income, the use of the money from the date the order became  
20 final until Respondent paid the judgment of the district court. This conduct also forced  
21 Ms. McGuin to bring litigation to obtain payment.  
22

23 Respondent's conduct caused serious injury to Ms. McGuin by denying her money  
24 to which she was entitled and by forcing her to litigate a matter that had previously been  
25 resolved in her favor. Although Respondent paid the restitution principal as a result of

1 Judge Goelz's order, he has yet to come forward with interest on the principal as the  
2 original disciplinary order required.

3 This conduct caused serious injury to the public trust in the legal system as a system  
4 of amicably resolving disputes. Respondent intentionally ignored a directive of the  
5 Disciplinary Board and seriously undercut the public's trust that the Bar can effectively  
6 govern its members.

7  
8 Presumptive Sanction:

9 Disbarment is the appropriate sanction for Respondent's intentional violation of his  
10 obligation to pay restitution to Ms. McGuin.  
11

12  
13 **B. Aggravating and Mitigating Factors Relevant to McGuin Charges.**

14 **1. Aggravating factors**

15 **a. ABA Std. 9.22 (a) Prior Discipline Record**

16 Respondent has substantial prior discipline, including a forty-five day suspension.  
17 This discipline record documents multiple instances where Respondent's conduct caused  
18 serious injury to the interests of his clients.  
19

20 **b. ABA Std. 9.22 (b) Dishonest or Selfish Motive**

21 Respondent's conduct includes the implicit intent to retaliate against Ms. McGuin  
22 for bringing his conduct to the attention of the Bar Association. Respondent testified  
23 repeatedly that he engaged in certain conduct, including changing his fee agreement,  
24 because he felt that Ms. McGuin had violated the terms of their agreement by seeking  
25

1 repayment of the money she paid him in sanctions. Essentially, this testimony is an  
2 admission that Respondent acted because Ms. McGuin turned him into the Bar  
3 Association. While Respondent denies intent to retaliate, his testimony is not credible.  
4 The evidence establishes that had Ms. McGuin not contacted the Bar Association,  
5 Respondent would have considered her to have paid her obligations to him in full.  
6 Because she took action, he testified that she was in breach of their agreement and that he  
7 was justified in trying to collect more money from her.

8 His anger with Ms. McGuin prompted him to send her an invoice alleging that she  
9 owed him in excess of \$11,000 and to send that invoice to a collection agency. The  
10 retaliation against a client because she has exercised her right to bring misconduct to the  
11 attention of the Bar Association is reprehensible.  
12

13  
14 **c. ABA Std. 9.22 (c) Pattern of Misconduct**

15 Respondent has engaged in a pattern of misconduct that includes multiple instances  
16 of fee disputes with clients, misrepresentations during the course of litigation and other  
17 misconduct affecting the administration of justice.  
18

19 **d. ABA Std. 9.22 (d), Multiple offenses**

20 Respondent has been found to have committed misconduct establishing multiple  
21 violations of the Rules of Professional Conduct and caused serious harm to two disabled  
22 clients  
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1                                   e.     **ABA Stds 9.22 (e); (f)**  
2   **Bad Faith Obstruction of Disciplinary**  
3   **Proceeding/Submission of False Evidence**

4           Respondent has interfered with the disciplinary process by submitting false  
5 evidence during this disciplinary proceeding and engaging in conduct disruptive to the  
6 proceedings.. This aggravating factor is not based on the conduct that was the subject of  
7 the charges, but rather on Respondent's submission of false testimony during the present  
8 disciplinary hearing.

9           Respondent's attitude toward the disciplinary process appears to be of long  
10 duration. In the disciplinary hearing, which culminated in his suspension from the  
11 practice of law, the hearing officer specifically commented on Respondent's "cavalier  
12 attitude". The Supreme Court was also concerned by this issue and cited to the hearing  
13 officer's comments.

14           In concluding, the hearing officer was particularly troubled by what he described as  
15 Burtch's

16                                   rather cavalier attitude toward the Bar Association when all these  
17 things were brought to his attention. That in my opinion is the most  
18 damning evidence you have here on the problem whether or not the  
19 circumstances that brought on all these difficulties are now behind  
20 him and he will not be plagued again with a series of complaints from  
21 his clients.

22           *In Re Burtch*, 112 Wn.2d 19, 25, 770 P. 2d 174 (1989).

23                                   f.     **ABA Std. 9.22 (g) Refusal to Acknowledge Wrongful**  
24   **Nature of Conduct**

25           Respondent specifically testified that he believed he treated both clients "fairly."  
His standard of conduct for representing clients appears to be so low as to consider

1 nothing wrong with the notion that a lawyer is entitled to alter fee agreements based on  
2 whether or not a client has brought a matter to the attention of the Bar.

3  
4 **g. ABA Std. 9.22(h) Vulnerability of Victim**

5 As noted in the discussion of procedural issues relevant to the hearing, Ms. McGuin  
6 was so fragile of a victim that her testimony had to be halted during cross-examination  
7 because of its obvious impact on her emotional and physical well-being. While Ms.  
8 McGuin is in fact younger than Respondent, her physical condition is much weaker as a  
9 result of her Parkinson's disease. Judge Goelz confirmed that Ms. McGuin appeared  
10 frail during the 2004 hearing, which is the subject of this proceeding.

11  
12 **(h) ABA Std. 9.22(i) Substantial Experience in the Practice**  
13 **of Law**

14 Respondent has been practicing law since 1955. He has diverse litigation  
15 experience and still actively litigates cases. Alert and confident, his age and experience  
16 inspire confidence in potential clients.

17  
18 **(i) ABA Std. 9.22(j) Indifference to Making Restitution**

19 As this topic is the subject of one of the sustained charges, it cannot also be  
20 considered an aggravating factor. *In re Whitt*, 149 Wn. 2d 707, 720, 72 P.3d 173 (2003).

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23 **2. Mitigating Factors:**

24 There are no mitigating factors specific to Ms. McGuin's case, which justify  
25 departure from the presumptive sanction.

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Respondent asserts his age, his reputation and the confusion created by the Bar Association's letter are mitigating factors. Age, in and of itself, is not a mitigating factor recognized by the ABA Standards. Respondent's age reflects his substantial experience. If Respondent's age were combined with evidence of frailty or competency issues, this factor might mitigate his behavior. ABA Std. §9.32(h). At this hearing, Respondent exhibited no characteristics compatible with a finding of frailty based on age.

The evidence relating to Respondent's reputation was insufficient to constitute a mitigation of his conduct.

Most troublesome is the allegation that there was confusion created by the prior decision. The confusion that existed, however, either benefited the Respondent or occurred after the misconduct.

It is true that the Findings of Fact did not resolve the question of whether a contingent fee agreement existed and when that agreement existed. On the other hand, those were not issues in the prior case. The Respondent provided clear, unequivocal testimony that there was a contingent fee agreement in place as of October 1993 and that Ms. McGuin did not owe him any money because of that agreement. The only issue was whether or not Ms. McGuin could be forced to pay the sanctions. As a result of those issues not being at issue, a detailed accounting, though desirable, did not seem to be necessary. That fact worked to Respondent's advantage as had a detailed accounting been done, it would have been discovered that he owed Ms. McGuin even more money than what was ordered.

Confusion was created when the Bar Association notified Respondent that it would take no action until the conclusion of the civil proceeding. As noted above, however,

1 had Respondent promptly complied with the obligation to make restitution, there would  
2 have been no confusion. The restitution would have been paid and there would have  
3 been no complaint. The Bar's conduct therefore does not mitigate Respondent's failure  
4 to pay restitution.

5  
6 **C. Recommended Discipline Counts One, Two and Three:**

7 Respondent has failed to identify mitigating factors that would justify departure  
8 from the presumptive sanction. Moreover, multiple aggravating factors justifying  
9 disbarment exist. Most troubling of these is the Respondent's false testimony during this  
10 proceeding concerning the nature of his agreement with Ms. McGuin. The presentation of  
11 false testimony by a lawyer strikes at the core values of our legal system and substantially  
12 undermines the disciplinary process. Our courts have wisely concluded:  
13

14 Falsifying information during an attorney discipline proceeding is one of the  
15 most egregious charges that can be leveled against an attorney. Ms Whitt  
16 harmed her client by casting doubt on his claims, harmed the public by  
17 jeopardizing the reputation and perception of the legal system as a whole and  
18 harmed the legal system by attempting to circumvent the disciplinary process  
19 to evade responsibility for her misconduct. As such, disbarment is justified  
20 for count III. Even if the misconduct was considered as an aggravating  
21 factor to counts I and II, it would still justify increasing the sanction from  
22 suspension to disbarment.

19 *In re Whitt*, 149 Wn. 2d at 720. (Internal citations omitted)

20  
21 It is hereby recommended that the appropriate sanctions for counts one, two and  
22 three be disbarment.  
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25

1                   **D. Presumptive Sanctions Regarding Roxie Moreland Matter**

2                   **1. Count Five: Lack of Diligence**

3                   The issues regarding diligence in Ms. Moreland’s case differ from a typical  
4 diligence case because of her unique situation. Ms. Moreland was a vulnerable client who  
5 had a special need for prompt action, which Respondent stated he would provide. Failure  
6 to provide prompt services under these circumstances justifies the finding of lack of  
7 diligence.

8                   ABA 4.42 provides:

9                   Suspension is generally appropriate when:

10                   (a) a lawyer knowingly fails to perform services for a client and causes  
11 injury or potential injury to a client, or

12                   (b) a lawyer engages in a pattern of neglect and causes injury or potential  
13 injury to a client.

14                   Mental State:

15                   Respondent knowingly failed to act diligently in providing services for Roxie  
16 Moreland. Gary Randall, an independent witness, confirmed that Respondent had been  
17 informed of the need to act quickly and that Respondent had volunteered to Ms. Moreland  
18 that he had the time to act on her behalf in a timely fashion. Despite his knowledge, and  
19 repeated pleas by the client, Respondent failed to provide the promised services in a timely  
20 fashion.

21                   Injury:

22                   The delay in Ms. Moreland’s case prolonged the time she lived in a home  
23 contaminated by toxic mold. Ms. Moreland, like Ms. McGuin, has serious disabilities and  
24  
25

1 is vulnerable. Failure to act in a timely fashion caused Ms. Moreland serious injury by  
2 delaying the completion date of remedial measures on her home. It imposed additional  
3 stress on her by forcing her first to aggressively seek completion of the tasks from  
4 Respondent and then locate an alternative attorney.

5  
6 Presumptive Sanction:

7 Suspension is the presumed sanction for this allegation of misconduct.

8  
9 **2. Count Six and Count Seven Failing to Explain Adequately**  
10 **Fee Agreement, Charging Unreasonable Fees, Failure to**  
11 **Return Unearned Fees**

12 ABA Standard §7 governs violations of other duties as a professional.<sup>8</sup> Under RPC  
13 1.5(b), Respondent had an obligation to explain, clearly and precisely, the terms of his fee  
14 agreement with Ms. Moreland and to charge reasonable fees. The following sections of  
15 the ABA Standards apply to this misconduct:

16 §7.1 Disbarment is generally appropriate when a lawyer knowingly engages in  
17 conduct that is a violation of a duty owed as a professional with the  
18 intent to obtain a benefit for the lawyer or another, and causes serious  
19 or potentially serious injury to a client, the public or the legal system.

20 §7.2 Suspension is generally appropriate when a lawyer knowingly engages  
21 in conduct that is a violation of a duty owed as a professional and  
22 causes injury or potential injury to a client, the public, or the legal  
23 system.

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24 <sup>8</sup> Counsel for the Bar Association groups counts five and six together and analyzes both under  
25 Section Four, Violation of Duties to Clients. Counsel then analyzes count seven under Section Seven of the  
26 ABA Standards. This officer disagrees that the proper presumptive sanction is found in section four. The  
27 duty to explain fully fee agreements, although a duty to the client, also implicates fee issues, which have  
28 been analyzed under ABA Standards Section Seven. *In re Brothers*, 149 Wn. 2d 575, 585, 70 P.3<sup>rd</sup> 940  
29 (2003). While the choice of section may impact the presumptive sanction, because the charges in count six  
30 were a repeat of conduct for which the Respondent was previously sanctioned, the choice of section does not  
31 impact the ultimate recommendation.

1                   Mental State:

2                   Respondent knowingly engaged in the conduct contained in counts six and  
3 seven to obtain a financial benefit. Respondent cannot claim that he is unfamiliar  
4 with the obligation to explain fee agreements adequately to his clients as he was  
5 suspended in 1989 for failing to perform this duty as to other clients and for failing  
6 to return unearned fees. See *In Re Jack L. Burtch*, 112 Wn. 2d 19, 770 P. 2d 174  
7 (1989). Respondent is an experienced lawyer who should have been familiar with  
8 the acceptable form of contingent fee agreements and aware that his agreement did  
9 not comply with the minimum required under RPC 1.5. Respondent knowingly lied  
10 to Ms. Moreland about doing work on her case in September in order to avoid being  
11 terminated and to retain the \$2,000.  
12

13                   Respondent knowingly had his office create an invoice, which purported to  
14 document time spent valued in excess of the \$2,000 non-refundable retainer.  
15

16                   Injury:

17                   Respondent's conduct caused serious injury to a disabled client. Ms.  
18 Moreland lives on a limited income. Because of Respondent's conduct she was  
19 forced to live in her home under conditions that were detrimental to her health for a  
20 longer period than would have been necessary had he acted promptly. Respondent's  
21 decision to keep the \$2,000 retainer made it difficult for Ms. Moreland to obtain  
22 legal services elsewhere.  
23  
24  
25

1 Disbarment is the presumptive sanction for counts six and counts seven under  
2 this section because Respondent knowingly engaged in the conduct to obtain a  
3 financial benefit and because his conduct caused serious injury to the client.

4 Mr. Burtch's prior discipline also brings §8.1 of the ABA Standards into play.  
5 That section states:

6 §8.1 Disbarment is generally appropriate when a lawyer:

7 (b) has been suspended for the same or similar misconduct and  
8 engages in similar acts of misconduct that causes injury or potential  
9 injury to a client, the public, the legal system or the profession.

10 Comparison of the facts in *In re Burtch, supra*, and the present case reveals  
11 that there is no difference in the type of misconduct Mr. Burtch engaged in at that  
12 time and that which he exhibited in dealing with Ms. Moreland. Mr. Burtch agreed  
13 to provide services, which he did not perform and attempted to retain fees to which  
14 he was not entitled.

15  
16 Presumptive Sanction Counts Six & Seven

17 Respondent has been suspended for the exact conduct he engaged in with Ms.  
18 Moreland. Application of section seven and section eight results in a presumptive  
19 sanction of disbarment for counts six and seven.

20  
21  
22 **E. Aggravating Factors:**

23 **a. ABA Std. 9.22 (a) Prior Discipline Record**

24 See above.

1                   **b.      ABA Std. 9.22 (b) Dishonest or Selfish Motive**

2                   Respondent's motive was to maximize his income at the expense of the client.

3  
4                   **c.      ABA Std. 9.22 (c) Pattern of Misconduct**

5                   Respondent's conduct regarding fee disputes is well documented in his prior  
6 disciplinary actions and described fully in *In re Burtch, supra*. The fee dispute with Ms.  
7 Moreland is substantially similar to those described therein.

8  
9                   **d.      ABA Std. 9.22 (d), Multiple offenses**

10                  Respondent's conduct regarding Ms. Moreland involves three distinct breaches of  
11 the ethical rules and is aggravated by additional sustained counts regarding Ms. McGuin.  
12

13                   **e.      ABA Stds 9.22 (e) Bad Faith Obstruction of Disciplinary**  
14                   **Proceeding**

15                  This aggravating factor does not apply except as it relates to the submission of false  
16 evidence discussed below.

17                   **(f)     Submission of False Evidence**

18                  Respondent has submitted time records that appear to have been created for the  
19 purpose of justifying his fees regarding Ms. Moreland. In addition, his testimony  
20 regarding the scope of work he undertook for Ms. Moreland and the timing when he  
21 performed the work was false.  
22  
23  
24  
25

1                                   **(g) ABA Std. 9.22(g) Refusal to Acknowledge Wrongful**  
2                                   **Nature of Conduct**

3                                   Respondent specifically testified that he believed he treated both clients “fairly.”  
4                                   Respondent sees nothing wrong with his fee agreements and does not acknowledge his  
5                                   misconduct.

6                                   **(h) ABA Std. 9.22(h) Vulnerability of Victim**

7                                   Ms. Moreland, like Ms. McGuin, was a vulnerable client. She is disabled and lives  
8                                   on a limited income. Her living situation substantially aggravated her vulnerability as  
9                                   she needed the issue resolved for her own health. Respondent’s conduct interfered with  
10                                   her ability to resolve those issues in a timely fashion.

11                                   **(i) ABA Std. 9.22(i) Substantial Experience in the Practice**  
12                                   **of Law**

13                                   See prior discussion.

14                                   **(j) ABA Std. 9.22(j) Indifference to Making Restitution**

15                                   Respondent continues to maintain that he was entitled to the full \$2,000 and  
16                                   has made no attempt to make restitution or correct his conduct.

17                                   **G. Mitigating Factors**

18                                   No mitigating factors apply specifically to Ms. Moreland’s case. Although  
19                                   Respondent asserts delay in the proceedings as a factor, the misconduct occurred less  
20

1 than two years ago and a formal complaint was filed within the year. No delay in  
2 proceedings has occurred.

3  
4 **H. Recommendation Counts Five, Six and Seven**

5 Respondent's conduct reflects a pattern of misconduct that was the subject of  
6 a forty-five day suspension earlier in his career. Despite his knowledge of his ethical  
7 obligations regarding fee agreements, diligence and communication regarding fee  
8 agreements, Respondent continues to have disputes with his clients of the same type  
9 as those for which he was suspended. Two factors deserve specific consideration.  
10 First, Respondent's latest victims are both disabled individuals with limited incomes.  
11 Second, Respondent's testimony regarding his encounters with both clients exhibits  
12 a callous disregard for truth and his obligation of candor as a lawyer. Respondent  
13 simply testifies without regard to the facts or the evidence and creates evidence to  
14 substantiate his position. The legal system and the public's confidence in it are  
15 seriously damaged by such behavior.  
16

17  
18 **V. GENERAL DISCUSSION OF MITIGATING FACTORS**

19 Unlike the defense raised to the misconduct, which resulted in his suspension,  
20 in this proceeding Mr. Burtch has been unable to identify outside stressors that  
21 explain why he engaged in misconduct. He cites to his long career as a lawyer and  
22 his age, the lack of dishonest or selfish motive, full and fair disclosure to the Bar  
23 Association, his character or reputation, delay in proceedings, and the remoteness in  
24  
25

1 time of the events as mitigating factors which justify a more lenient disposition of  
2 his case.

3 There is insufficient evidence to establish mitigating factors.

4 There is insufficient evidence regarding Respondent's medical condition and  
5 how it related to these events. Respondent merely offered testimony that he had a  
6 heart condition sometime during the time he represented Ms. McGuin, but provided  
7 no specific dates of incapacity.

8 The more fundamental problem with Respondent's argument is that even if  
9 the Respondent had a physical disability, no medical condition justifies dishonest  
10 conduct.<sup>9</sup> This officer concludes that Respondent's prior medical condition is not a  
11 mitigating factor for the misconduct here in dispute.

12 Nor is age a mitigating factor in this case. Mr. Burtch's misconduct spans the  
13 last twenty years and predates his current advanced age. Moreover, either Mr.  
14 Burtch is competent to practice law, and his age reflects added experience that  
15 aggravates his misconduct, rather than mitigates it, or he is not. If he believes that  
16 his age affects his ability to represent clients competently, he should surrender his  
17 license to practice. If he is competent, he must face the full consequences of his  
18 dishonest acts.

19 Respondent also raised the age issue during the prior disciplinary proceedings  
20 with Ms. McGuin. He told the Bar that he was trying to sell his practice and argued  
21

22  
23  
24 <sup>9</sup> A medical condition that affected the lawyer's ability to act intentionally might justify mitigation.  
25 No evidence was presented to establish such a link between the heart and gall bladder conditions discussed  
during the hearing and the Respondent's ability to act intentionally.

1 that the recommended suspension would be fatal to his practice. Ex. 42, p. 6. The  
2 Board concluded that suspension was not appropriate under those facts.

3 As a result of the leniency shown at that time, Ms. McGuin has suffered  
4 further injury and Ms. Moreland has become yet another victim of the  
5 Respondent's unethical conduct. The failure to correct Respondent's behavior  
6 seriously undermined the credibility of the disciplinary system.

7 Respondent has not learned from his previous mistakes or taken advantage of  
8 the leniency previous given. Rather than reforming his conduct so that his last  
9 years as a lawyer could end honorably, Respondent flaunted the disciplinary  
10 process by refusing to pay restitution. He has defended his conduct with frivolous  
11 arguments and has been dishonest. This conduct models behavior to the public and  
12 other members of the Bar incompatible with the practice of law. Although  
13 disbarment of an attorney after 51 years of practice is indeed a harsh remedy,  
14 without such action the public has no protection.  
15

16 This Officer also rejects the argument that the events were either remote in  
17 time or unnecessarily delayed. Had Respondent paid the restitution order in 2001  
18 as required, this matter would have concluded at that time. Moreover, the most  
19 offensive misconduct occurred in 2004 when Respondent offered false testimony  
20 and a frivolous defense before the district court. Ms. Moreland's complaint also  
21 arises from Respondent's conduct in the latter half of 2004. Neither of these  
22 timeframes are remote.  
23

24 Nor is Respondent's prior discipline "remote." The record establishes that  
25 Respondent's conduct followed a consistent pattern abusive to the legal system.

1 From the early eighties through 2006, Respondent has been either committing  
2 ethical violations or defending against sanctions imposed as a result of them.

3 Respondent contends that he did not have a dishonest or selfish motive. He  
4 argues that the “allegedly falsity (sic) of statement depends upon the context and the  
5 time in which Mr. Burch presented his legal basis for requesting an offset.”

6 **Respondent’s Closing Brief at 20.** This argument is disingenuous. The only thing  
7 that changed between Respondent’s testimony in the 2000 hearing and his testimony  
8 before Judge Goelz is that he was ordered him to pay restitution.<sup>10</sup> No attempt to  
9 confuse the timing of events changes that specific fact or negates the clear inference  
10 that the motivation for Respondent’s conduct was his own selfish desires for revenge  
11 and to avoid the financial obligation imposed by the disciplinary order.  
12

13 The allegation that Respondent cooperated with the Bar Association is of little  
14 weight. Under these facts, it is outweighed by the Respondent’s failure to obey the  
15 disciplinary order directing him to make restitution or to testify truthfully in this  
16 proceeding.

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21 <sup>10</sup> Another example of the Respondent changing his testimony to avoid the consequences of his acts is  
22 his testimony before the disciplinary board. Before the Hearing Officer Respondent unequivocally testified  
23 that the change to a contingent fee occurred in 1993. As noted above, that testimony is supported by  
circumstantial evidence.

24 When the Hearing Officer ruled that he owed Ms. McGuin restitution, Respondent told the  
25 Disciplinary Board that the date the contingent fee agreement took effect was immediately before the 1996  
trial. Ex. 42, p. 8. This statement would support a finding that Respondent lied during the 2001 Disciplinary  
Review hearing.

VII. PROPORTIONALITY

Respondent asserts that if he were disbarred, his punishment would be disproportionate to that received by other lawyers.<sup>11</sup> He argues that his misconduct involved “an interpretation of a legal issue, not a material misrepresentation of fact to a tribunal.” **Respondent’s Brief at 19.** As indicated above, a clear preponderance of the evidence supports the charge of providing false factual testimony under oath to the district court judge as well as providing false factual testimony before this tribunal. Respondent’s testimony concerned the fact that he did or did not have a contingent fee and what date that the switch from hourly to contingent occurred. These are not issues of legal interpretation.

Respondent’s case differs from those where the court has ordered suspension for the presentation of false evidence or statements. Respondent’s case differs as to the type of injuries sustained by the victims and the mental states present when the offenses occurred. Here, Respondent’s actions caused serious injury to two disabled clients and to the legal system. Unlike *In Re Dynan*, 152 Wn.2d 601, 619, 98 P.3<sup>rd</sup> 656 (2004) or *In re Poole*, 156 Wn.2d 196, 222, 125 P.3<sup>rd</sup> 954 (2006), the injuries here are not “potential injuries” but actual serious injuries.

Respondent’s mental state also differs from the above cases. Here, Respondent acted with intent regarding the McGuin matter. Intentional falsification is the most egregious and merits the highest sanctions. *In re Whitt, supra.*

<sup>11</sup> Proportionality is probably an argument best made before the reviewing bodies. Since Respondent has raised it, however, a short discussion of the merits of the argument is in required.

Respondent has also raised various legal arguments including the allegation that the Bar’s conduct impairs his constitutional right to contract. These arguments are frivolous and will not addressed herein.

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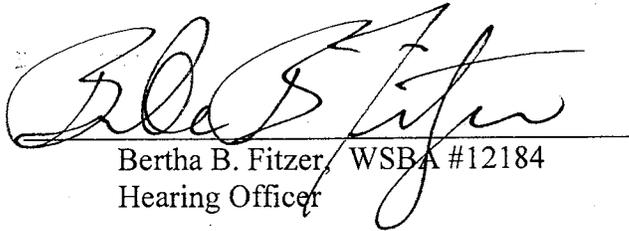
**VIII. OVERALL RECOMMENDATIONS**

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system and the legal profession. ABA Standards, §1.1. Respondent Jack L. Burtch is a lawyer who has not and will not properly discharge his duties. The Hearing Officer recommends that the Respondent be disbarred.

It is also recommended that Respondent be suspended pending final resolution of this matter. Respondent should be required to pay the interest awarded on the prior restitution order relating to Ms. McGuin and the outstanding excess fees plus interest.

Respondent should also be ordered to pay restitution in the amount of \$1900, plus interest, to Roxie Moreland.

Dated this 17<sup>th</sup> day of September 2006.

  
Bertha B. Fitzner, WSBA #12184  
Hearing Officer

# **APPENDIX 2**

**PAYMENTS MADE TO BURTCH IN MCGUIN CASE**

**PAID TO GENERAL ACCOUNT**

	<u>DATE</u>	<u>RECEIPT</u>	<u>AMOUNT</u>
P1	4/7/88	151153	\$ 175.00
P2	5/3/88	151203	\$ 50.00
P3	1/12/93	18640	\$ 175.00
P4	2/17/93	18760	\$ 200.00
P5	4/1/93	2026	\$ 200.00
P6	4/1/93	2201	\$ 100.00
P7	4/1/93	2026	\$ 100.00
P8	10/11/93	2276	<u>\$2,500.00</u>
			\$3,500.00

**PAID TO TRUST ACCOUNT**

P9	8/6/96	Re Bean	\$ 36.62
P10	1/23/89	4301	\$3,500.00
P11	10/11/93	8003	\$2,500.00
P12	12/6/04	00023	\$ 200.00
P13	12/6/04	00024	\$ 200.00
P14	11/29/95	00121	\$ 150.00
P15	11/29/95		\$ 150.00
P16	12/8/95	00124	\$ 500.00
P17	11/22/96	00182	<u>\$ 890.00</u>
			\$ 8,126.62

TOTAL PAYMENTS BY MCGUIN = \$11,626.62

# **APPENDIX 3**

**CALCULATION OF AMOUNT OWED TO MCGUIN BY BURTCH UNDER  
CONTINGENT FEE ARRANGEMENT**

Payments by McGuin Prior to 10/6/93		\$ 4,500.00
Less: Fees Charged pre-10/6/93	\$2,925	
Costs Incurred pre-10/6/93	<u>\$ 220</u>	
		< \$ 3,145.00 >
Trust Balance for McGuin 10/6/03		\$1,355.00
Payments by McGuin after 10/6/93		<u>\$7,126.62</u>
		\$8,481.62
Less: Costs post-10/6/93	\$1,756.23	
Sanctions paid for Burtch	<u>\$2,877.86</u>	
		< <u>\$4,634.09</u> >
Total owed to McGuin		<u>\$3,847.53</u>

2007 JUN 08 A 10:19  
SUPERIOR COURT  
ST. JAMES  
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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

In re  
  
Jack L. Burtch,  
Lawyer (Bar No. 4161)

Supreme Court No. 200,469-5  
  
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 and certified mail 7003 2260 0001 6610 4260 with postage prepaid on June 7, 2007 to:

Jack L. Burtch  
218 N. Broadway St.  
Aberdeen, WA 98520-0247

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

6/7/07 Seattle, WA  
Date and Place

Jonathan Burke  
Jonathan Burke, Bar No. 20910  
Disciplinary Counsel  
1325 4<sup>th</sup> Avenue, Suite 600  
Seattle, WA 98101-2539  
(206) 733-5916