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STATE OF WASHINGTON
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Supreme Court No. 200,521-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

JEFFREY G. POOLE,

Lawyer (Bar No. 15578).

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

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TABLE OF CONTENTS

- I. COUNTERSTATEMENT OF THE ISSUES..... 1
- II. COUNTERSTATEMENT OF THE CASE..... 2
 - A. PROCEDURAL FACTS 2
 - B. SUBSTANTIVE FACTS 5
 - 1. Facts Regarding Counts 1 and 2 (Failure to Provide Client Billings) 5
 - 2. Facts Regarding Counts 3 Through 5 and Additional Facts as to Count 1 (Probationary Audit and SO Billing File) 8
 - 3. Counts 6-8 and 10 (Client Funds and Accounting to Client)..... 11
- III. ARGUMENT 11
 - A. STANDARD OF REVIEW 11
 - B. THE FINDINGS SUPPORT THE HEARING OFFICER’S CONCLUSION THAT POOLE KNOWINGLY FAILED TO PRODUCE NUMEROUS BILLING RECORDS RESPONSIVE TO THE ASSOCIATION’S JULY 2003 REQUEST. 13
 - 1. Substantial evidence and the ELC support the Hearing Officer’s finding that Poole should have scoured his files for billing errors. 13
 - 2. The Association’s July 2003 Request was unambiguous..... 14
 - 3. Substantial evidence supports the Hearing Officer’s finding that many of the unproduced billings had been sent to clients. 15
 - 4. Substantial evidence supports the Hearing Officer’s finding that Poole knowingly failed and refused to produce the billings..... 19
 - 5. The Hearing Officer’s findings support her conclusion that Poole violated RPC 8.4(c), 8.4(d), and 8.4(l) (as charged in Counts 1 and 2)..... 23

6.	Alternative findings made by the Hearing Officer support the conclusion that Poole committed misconduct.....	24
C.	THE HEARING OFFICER’S CONCLUSION THAT POOLE KNOWINGLY REFUSED TO PROVIDE THE SO BILLING FILE WAS SUPPORTED BY THE FINDINGS.	26
1.	The Hearing Officer properly found that examination of the SO billing file was relevant to the probationary audit.....	26
2.	Substantial evidence supports the Hearing Officer’s finding that Poole did not object to production of the SO billing file in a timely fashion.....	28
3.	The Hearing Officer properly concluded that Poole’s refusal to provide the SO billing file violated RPC 8.4(c), 8.4(d), and 8.4(l).....	30
4.	Poole’s due process claims are waived and meritless.....	32
D.	THE COURT SHOULD AFFIRM AND ADOPT THE RECOMMENDED ONE-YEAR SUSPENSION.	34
1.	The Hearing Officer properly applied ABA Standards 6.12 and 7.2 to Poole’s failures to cooperate (Counts 1 through 5).	35
2.	The Hearing Officer properly applied the aggravating factors of Dishonest or Selfish Motive and Pattern of Misconduct.	38
3.	The Disciplinary Board erred in finding Poole’s “personal and emotional problem” was a mitigating factor on all counts. Even if it was, it should be accorded little weight.	40
4.	Six aggravating factors outweigh the mitigating factor.	47
5.	Poole has not demonstrated the sanction is disproportionate.	48
IV.	CONCLUSION.....	49

TABLE OF AUTHORITIES

Cases

<u>DeHeer v. Seattle Post-Intelligencer</u> , 60 Wn.2d 122, 372 P.2d 193 (1962)	24, 33
<u>In re Ansell</u> , 141 Wn.2d 593, 9 P.3d 193 (2000)	40
<u>In re Boelter</u> , 139 Wn.2d 81, 985 P.2d 328 (1999).....	12
<u>In re Bonet</u> , 144 Wn.2d 502, 29 P.3d 1242 (2001).....	11
<u>In re Carpenter</u> , 160 Wn.2d 16, 155 P.3d 937 (2007).....	41
<u>In re Christopher</u> , 153 Wn.2d 669, 105 P.3d 976 (2005).....	46
<u>In re Clark</u> , 99 Wn.2d 702, 663 P.2d 1339 (1983)	38
<u>In re Cohen</u> , 150 Wn.2d 744, 82 P.3d 224 (2004).....	47
<u>In re Dann</u> , 136 Wn.2d 67, 960 P.2d 416 (1998).....	16, 22, 35
<u>In re Egger</u> , 152 Wn.2d 393, 98 P.3d 477 (2004).....	12
<u>In re Guarnero</u> , 152 Wn.2d 51, 93 P.3d 166 (2004)	11
<u>In re Haley</u> , 157 Wn.2d 398, 138 P.3d 1044 (2006).....	12
<u>In re Halverson</u> , 140 Wn.2d 475, 998 P.2d 833 (2000)	47
<u>In re Hawkins</u> , 91 Wn.2d 497, 589 P.2d 247 (1979)	32
<u>In re Kronenberg</u> , 155 Wn.2d 184, 117 P.3d 1134 (2005).....	12, 18, 23, 28
<u>In re Kuvara</u> , 149 Wn.2d 237, 66 P.3d 1057 (2003).....	46
<u>In re Longacre</u> , 155 Wn.2d 723, 122 P.3d 710 (2005)	19, 23, 36, 37
<u>In re McMurray</u> , 99 Wn.2d 920, 655 P.2d 1352 (1983)	37
<u>In re Poole</u> , 156 Wn.2d 196, 125 P.3d 954 (2006)	5, 12, 49
<u>In re Selden</u> , 107 Wn.2d 246, 728 P.2d 1036 (1986).....	12
<u>In re Stoller</u> , 902 So. 2d 981 (La. 2005).....	46
<u>In re VanDerbeek</u> , 153 Wn.2d 64, 101 P.3d 88 (2004)	12, 18, 48
<u>In re Whitney</u> , 155 Wn.2d 451, 120 P.3d 550 (2005).....	23
<u>In re Whitt</u> , 149 Wn.2d 707, 72 P.3d 173 (2003)	16, 18, 38
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988)	25
<u>State v. Lough</u> , 70 Wn. App. 302, 853 P.2d 920 (Div. 1, 1993)	21

<u>State v. Valladares</u> , 99 Wn.2d 663, 664 P.2d 508 (1983)	33
<u>Sunderland Family Treatment Services v. City of Pasco</u> , 127 Wn.2d 782, 903 P.2d 986 (1995).....	11
<u>Washington State Bar Ass’n v. State</u> , 125 Wn.2d 901, 890 P.2d 1047 (1995)	34

Other Authorities

7 Am. Jur. 2d <u>Attorneys at Law</u> § 140 (2008).....	33
Annotated Model Rules of Prof’l Conduct, Rule 8.4(d) comment (6th Ed., 2007)	24
WSBA Formal Ethics Opinion 181	33

Rules of Professional Conduct (RPC)

1.14(a)	3, 4
1.14(b)	3, 14
1.5(a)	13
8.4(c)	3, 23, 26, 31, 32, 38
8.4(d)	3, 23, 24, 26, 31, 32, 38
8.4(l)	3, 23, 24, 26, 31, 32, 38

Rules for Enforcement of Lawyer Conduct (ELC)

1.5.....	34
10.11(g)	24
13.8.....	3, 24, 29, 34
5.3(a)	34
5.3(e)	1, 3, 9, 10, 24, 30, 34
5.3(f).....	24, 30
5.5(c)	24
7.2(a)	10, 32

Rules of Appellate Procedure (RAP)

2.5(a)	32
--------------	----

ABA Standards for Imposing Lawyer Sanctions (ABA Standards)

6.12.....	35
-----------	----

7.2.....	35
9.32 Commentary.....	46
9.32(c)	41
9.32(i)	40, 41, 46
Definitions	36

I. COUNTERSTATEMENT OF THE ISSUES

1. Rule 5.3(e)(3) of the Rules for Enforcement of Lawyer Conduct (ELC) requires lawyers to promptly respond to requests for information relevant to matters being investigated by the Washington State Bar Association (Association), and to furnish copies of requested records and files. During an investigation into improper client billing, the Association asked Poole to provide certain client billings. While he provided five such billings, the Association later discovered that he withheld many other relevant billings. The Hearing Officer found that Poole did so knowingly. Did the Hearing Officer properly find that Poole committed misconduct by failing to provide all the requested billings?

2. During a probation audit and subsequent investigation into trust account problems, Poole did not respond to several Association inquiries and refused to provide a client billing file related to a shortage in that client's trust funds. The Association was forced to petition the Court to get the file. It contained evidence of trust account misconduct and more billings that Poole withheld in the billing investigation. Did the Hearing Officer and Disciplinary Board properly find that Poole committed misconduct by failing to respond and refusing to provide the billing file?

3. The American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) require

that lawyers asserting the mitigating factor of mental disability establish that the disability “caused the misconduct.” Poole has a mental disability, but during hearing he conceded that he was not seeking to prove that it caused his misconduct. Instead, he relabeled his disability as a “personal and emotional problem,” argued it “contributed” to his misconduct, and now claims that the sanction must be reduced because of this “problem.” Should a disability that does not meet the requirements of the mental disability mitigating factor be given any weight when the lawyer recharacterizes it as a “problem”?

4. All Disciplinary Board members agreed that Poole be suspended for at least one year. The Board found six aggravating factors and only one mitigating factor, and Poole has been disciplined twice before for similar misconduct. Should the Court affirm the Board’s recommendation?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On November 29, 2005, the Association filed an 11-count amended formal complaint against Poole alleging as follows:

- Count 1: By knowingly and/or intentionally failing to provide a complete response to ODC’s July 24, 2003 request for information in the 2003 grievance and/or ODC’s requests for the SO billing file,¹

¹ SO is an acronym for the name of one of Poole’s clients. Several of his clients were referred to by acronym or initials during the hearing.

Poole violated RPC 8.4(c) and/or 8.4(d).²

- Count 2: By failing to provide a complete response to ODC's July 24, 2003 request for information in the 2003 grievance, Poole violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).
- Count 3: During the course of his probation audit between April 2004 and June 2004, by failing to comply with the auditor's and ODC's requests for the SO billing file, Poole violated RPC 8.4(l), by failing to comply with the terms of his probation (ELC 13.8).
- Count 4: By failing to comply with ODC's request of July 6, 2004 for the SO billing file and/or ODC's demand by subpoena duces tecum dated August 25, 2004 for the SO billing file, Poole violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).
- Count 5: By failing to provide timely responses to one or more of ODC's requests for information in the 2004 grievance, Poole violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).
- Count 6: By failing to maintain an accurate SO client ledger between October 2002 and September 2003, Poole violated RPC 1.14(b)(3).
- Count 7: By failing to keep all client funds in trust between May 2003 and September 2003, Poole violated RPC 1.14(a).
- Count 8: By failing to provide accurate accounts to client SO regarding SO's trust account funds between October 2002 and September 2003, Poole violated RPC 1.14(b)(3).
- Count 9: By failing to pay, in a timely fashion, audit costs as required by the terms of his disciplinary probation, Poole violated RPC 8.4(l), by failing to comply with the terms of his probation (ELC 13.8).
- Count 10: On one or more occasions between June 2004 and December 2004, by failing to wait for deposited items to clear the

² The Rules of Professional Conduct (RPC) were amended effective September 2006. All references are to the prior version of the RPC.

banking system prior to disbursing funds from the trust account, Poole violated RPC 1.14(a).

- Count 11: On or about September 20, 2004, by failing to deposit an advance fee payment directly to his trust account, Poole violated RPC 1.14(a).

Bar File (BF) 16.

After hearing, Hearing Officer Kimberly A. Boyce found by a clear preponderance of the evidence that Poole committed the misconduct alleged in Counts 1 through 8 and Count 10 of the formal complaint and recommended that he be suspended from the practice of law for one year. BF 54, Conclusions of Law (CL) 68 – 80, 82, Recommendation.

The Disciplinary Board modified the Hearing Officer's conclusions of law by deleting a finding regarding the failure to provide Volumes I and II of the SO billing file; applying the mitigating factor of personal and emotional problems, and adding a condition of probation. BF 66. The Board otherwise unanimously adopted the Hearing Officer's findings and conclusions and, by a vote of 7 to 2, recommended Poole be suspended for one year. Id. The two dissenting Board members thought the sanction should be higher.³

³ Board member Fine recommended that Poole be suspended for two years. BF 67. Board member Madden recommended that Poole be disbarred. BF 66 at 4 n.4.

B. SUBSTANTIVE FACTS

1. Facts Regarding Counts 1 and 2 (Failure to Provide Client Billings)

Events in three prior disciplinary proceedings were relevant to the issues in this matter. Those proceedings were referred to as the “Matson Grievance,” the “Trust Account Case,” and the “Moore Grievance.”

The Matson Grievance concerned Poole’s backdating of an invoice and failure to account properly to a client for eight months. Exhibit (EX) 74. The Matson Grievance was tried in September 2003 and resulted in a six-month suspension, imposed by the Court in January 2006. In re Poole, 156 Wn.2d 196, 125 P.3d 954 (2006).

The Trust Account Case concerned Poole’s improper trust account procedures and was tried in March 2003. In August 2003, the Hearing Officer recommended a reprimand and probation with audits, both of which were imposed after Poole opted not to challenge the recommendation. BF 54, Finding of Fact (FF) 5; EX 1.

Earlier in 2003, the Association began investigating the Moore Grievance, which concerned invoices Poole sent to clients in 2002 that billed at incorrect rates. Transcript (TR) 24-26. The Moore Grievance was dismissed after hearing after the Hearing Officer found that a single decision (the decision to bill old time on 2002 bills) resulted in multiple, inadvertent errors in billings to five clients, but was not a violation of the

RPC. EX 112 at 11. Although Poole failed to cooperate with the Association's investigation in the Moore Grievance, the Hearing Officer declined to find non-cooperation on the ground that most responses to the Association were handled by Poole's counsel. EX 112 at 5-6.⁴

As part of the investigation of the Moore Grievance, the Association sent Poole a letter (the "July 2003 Request") that asked him to provide "all 2002 billing statements that include charges for work performed prior to 2001...[and] all 2002 billing statements that include charges for work performed in 2001, when that work was performed at least six months prior to the date of the billing statement." EX 4. Poole timely replied by letter that said he was "enclosing the billing statements that are responsive to the [July 2003 Request]." EX 5. In the letter Poole said that he had reviewed his records to determine which clients he had worked for in the relevant time period, then personally reviewed the billing files of each of those clients to look for the requested billing statements. Poole included only five billing statements. Id.

After the hearing in the Moore Grievance, but before the hearing in this matter, the Association discovered many more 2002 billing statements, not previously produced by Poole, that were responsive to the

⁴ In the instant matter, Poole stipulated that any misconduct was not the result of acts or advice of his counsel. BF 43.

July 2003 Request. EX 10, 12-15. The Hearing Officer in this case found that, at a minimum, the following additional bills should have been produced by Poole in response to the Association's July 2003 Request:

- Seven bills in EX 10 that were discovered when the Association obtained Volume III of the billing file for Poole's client SO in October 2004, after Poole refused to produce the SO billing file and the Court ordered him to show cause why he should not be suspended under ELC 7.2(a)(3) for said refusal;
- One bill in EX 12 that was obtained in May 2005. TR 61;
- Three bills in EX 13 that were discovered in the billing file for client GB after Poole refused to produce it and the Association served him with a subpoena duces tecum. EX 8-9;
- One bill in EX 14 (Kennedy bill, Bates stamp 00120) that the Association learned of from Kennedy and discovered in March 2006 while inspecting Poole's files and records at his office under order of the Hearing Officer. TR 62-63, 68; BF 26; and
- Seventeen bills in EX 15 that were not produced until March 2006 during the Association's inspection of records at Poole's office under order of the Hearing Officer. BF 26. These bills were removed by Poole from hard copy billing files. TR 68-69, 82-83; BF 54, FF 15, 18. The Hearing Officer found that one bill in EX 15 was not sent out to the client (JG bill, Bates stamp 00313).

BF 54, FF 21, 23.

Poole claimed that his failure to produce these bills was inadvertent oversight. TR 783-84. But the Hearing Officer found this claim was not credible, and instead concluded that Poole knowingly and dishonestly failed to provide these bills to the Association. BF 54, FF 56-58. The Hearing Officer determined that Poole either misrepresented the

extent of his efforts to find responsive bills, or willfully failed to cooperate and look for them. BF 54, FF 56. A unanimous Disciplinary Board affirmed the Hearing Officer's credibility determinations.

2. Facts Regarding Counts 3 Through 5 and Additional Facts as to Count 1 (Probationary Audit and SO Billing File)

As part of the probation ordered in the Trust Account Case, Poole was required to cooperate with audits of his trust account. EX 1 at 22. During one of these audits, the Association's auditor noted issues with Poole's trust accounting for several clients, including client SO. She wrote to Poole and asked for, among other things, the SO billing file mentioned above. EX 17; BF 54, FF 24. She was questioning a \$540 shortage in the SO client trust ledger and a quick distribution to the firm from trust of a very large fee payment made by SO. BF 54, FF 26. Poole wrote back and asked why the SO billing file was relevant to the audit. EX 18. The auditor provided an explanation, and asked that Poole either provide the file or state the basis of any objection in writing. EX 19. Poole responded with a letter that purported to answer the questions raised by the auditor, but neither provided the SO billing file or any records from it nor stated any objection to providing it. EX 20; BF 54, FF 23, 25.

The Hearing Officer found that the SO billing file was relevant to the audit. Id. She found the auditor was not required to accept Poole's

explanations and was justified in seeking the SO billing file to see whether it supported them. BF 54, FF 26 n. 2.

The auditor notified Disciplinary Counsel Christine Gray that Poole had not provided the file. Gray then sent Poole a letter that again explained the basis for the auditor's request for the file and renewed the request. EX 21. Poole did not respond. TR 102-03. Gray then wrote Poole a letter indicating a new grievance would be opened if the file was not produced by a date certain. EX 23. Two emails were exchanged between Poole's counsel and Gray, after expiration of the deadline, about seeking review of the scope of the auditor's request, but no agreement was reached and no other response or objection was provided. EX 24; EX 25.

A month later, the Association opened a new grievance (the 2004 Grievance) regarding Poole's apparent refusal to turn over the SO billing file, and other issues, and asked Poole to respond. EX 27. He did not respond. BF 54, FF 29. The Association sent a "ten-day letter" under ELC 5.3(e) requiring a response. EX 28. Poole still did not respond. BF 54, FF 29. He then was served with a subpoena duces tecum that required him to attend a deposition and bring the SO billing file. EX 29. Poole never moved to quash the subpoena. TR 113.

Poole appeared at the deposition, but refused to produce the SO billing file and articulated for the first time his objection to producing it –

that it was large and pertained to many years. EX 31; BF 54, FF 30. Poole produced eight SO billing statements at the deposition. EX 32. Because Poole refused to produce the SO billing file, Gray notified him that she intended to recommend the Association file a petition for his interim suspension under ELC 7.2(a)(3). TR 121-22.

Knowing the Association would be filing an interim suspension petition, Poole filed a motion with the Disciplinary Board the day after the deposition seeking protection from the demand for the SO billing file. EX 105. But the ELC do not provide for such a remedy. The Association subsequently filed the interim suspension petition. EX 33. The Board Chair declined to consider Poole's motion for protective order as the issue was pending before the Court. EX 108. The Court scheduled a show cause hearing, but Poole ultimately produced Volume III of the SO billing file rather than appear before the Court. BF 54, FF 28; EX 36. The Association then withdrew its petition. EX 37. Poole never produced Volumes I and II. TR 139.

Gray reviewed Volume III of the SO billing file and found seven more bills responsive to the July 2003 Request (TR 141; EX 10) as well as evidence of trust account violations (TR 147-48). Consequently, Gray sought additional information from Poole. The Association sent Poole a request for response followed by an ELC 5.3(e) "ten day letter." EX 50;

EX 51. Poole did not respond to either letter. BF 54, FF 33. The Association again issued a subpoena duces tecum commanding Poole's appearance at a deposition. EX 52. The deposition was canceled when he finally responded and produced the requested documents. EX 53.

3. Counts 6-8 and 10 (Client Funds and Accounting to Client)

Poole has not challenged the Hearing Officer's findings or conclusions as to Counts 6-8 and 10. RB at 16. These counts pertain to his failure to maintain accurate accounts for client SO and failure to keep all client funds in trust.

III. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews findings of fact for substantial evidence. In re Guarnero, 152 Wn.2d 51, 58, 93 P.3d 166 (2004). "Substantial evidence" exists if the record contains "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." In re Bonet, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001). The "substantial evidence" standard of review is deferential and requires the reviewing body to view the evidence and the reasonable inferences therefrom "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). A lawyer

challenging factual findings on appeal must do more than "argue his version of the facts while ignoring testimony by other witnesses that supports each finding." In re Kronenberg, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005). Unchallenged findings of fact are verities on appeal. In re Boelter, 139 Wn.2d 81, 96, 985 P.2d 328 (1999).

The credibility or veracity of a witness is best determined by the hearing officer before whom the witness appeared and testified. In re Selden, 107 Wn.2d 246, 251, 728 P.2d 1036 (1986). Consequently, the Court will not substitute its evaluation of the credibility of witnesses for that of the hearing officer. See In re Egger, 152 Wn.2d 393, 406, 98 P.3d 477 (2004). Furthermore, the hearing officer is entitled to draw reasonable inferences from the documents and testimony. See, e.g., In re VanDerbeek, 153 Wn.2d 64, 82, 101 P.3d 88 (2004). Circumstantial evidence is as good as direct evidence for these purposes. Kronenberg, 155 Wn.2d at 191.

This Court will uphold the hearing officer's conclusions of law if they are supported by the findings of fact. In re Haley, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006).

The Court gives serious consideration to the Board's recommended sanction and will hesitate to reject a unanimous recommendation in the absence of clear reasons for doing so. Poole, 156 Wn.2d at 209-10.

B. THE FINDINGS SUPPORT THE HEARING OFFICER'S CONCLUSION THAT POOLE KNOWINGLY FAILED TO PRODUCE NUMEROUS BILLING RECORDS RESPONSIVE TO THE ASSOCIATION'S JULY 2003 REQUEST.

The Hearing Officer found that Poole knowingly and dishonestly failed to produce numerous billing records that were responsive to the July 2003 Request. EX 5, 103 at 39-44; BF 54, FF 56; BF 66. Poole argues, as he did below, that any failure was due to inadvertence, and he disputes many of the Hearing Officer's Findings of Fact. RB 19-27.

1. Substantial evidence and the ELC support the Hearing Officer's finding that Poole should have scoured his files for billing errors.

Poole challenges Finding 8, where the Hearing Officer found that after the hearing in the Moore grievance, Poole should have scoured his files for all similar billing mistakes. Poole argues this is simply the Hearing Officer's opinion as to what should have happened. RB at 19-20.

During the hearing in the Moore Grievance, Poole said that he was searching his records for additional billing errors. EX 112, FF 12. The Moore Hearing Officer dismissed the matter, relying in part on this contention, but was disturbed by delay in Poole's correction of errors and recommended that he continue carefully reviewing all his files for billing errors and correct them. *Id.*, FF 12, CL 20, 11. The recommendation was consistent with Poole's duties under the RPC and was never challenged by him. See RPC 1.5(a) (a lawyer shall not charge an unreasonable fee);

RPC 1.14(b) (a lawyer shall maintain complete records of all funds, render appropriate accounts to his clients, and promptly pay to the client funds that the client is entitled to receive).

The evidence showed that there were many billing errors of which the Association and the Moore Hearing Officer were unaware. EX 14, 15. Yet, with the exception of the Kennedy bill (see EX 16), there was no evidence at the time of this hearing to suggest that Poole had corrected these errors, despite his prior contention that he had been diligently searching for them. TR 93-94. This finding should be upheld.

2. The Association's July 2003 Request was unambiguous.

Poole challenges Finding 11, where the Hearing Officer found that the Association's July 2003 Request (EX 4) was "unambiguous." He argues that the request could be misunderstood in a number of ways, and claims the only basis for Finding 11 is the letter itself. RB at 20-21.

But substantial evidence showed that at the time the request was issued Poole had no difficulty understanding it; he never claimed confusion, and the requested bills were easily identified. For example, Poole responded to the July 2003 Request by providing five billings. EX 5. All of these billings fit the parameters of the July 2003 Request exactly. Poole did not question the request or indicate any difficulty understanding it. Id. When he was deposed in June 2004 in relation to this issue, he

again did not claim any difficulty understanding or responding to the July 23 Request; to the contrary, he testified he understood and had looked through all his 2002 bills for responsive bills. See EX 103 at 42-44. Gray testified that she could identify responsive billings in seconds and had no difficulty excluding non-responsive billings. TR 48, 70-71, 74.

Poole claims ambiguity about whether he was required to provide bills that were not sent out to clients. But the Association has not sought to discipline Poole for failing to provide unsent bills. BF 54, FF 12. The Hearing Officer's finding is supported by substantial evidence.

3. Substantial evidence supports the Hearing Officer's finding that many of the unproduced billings had been sent to clients.

While Poole concedes that the Hearing Officer was correct in identifying twelve bills that he should have, but did not, produce in response to the Association's request (RB at 23-24), he challenges her findings about the bills contained in EXs 14 and 15.⁵ Poole challenges Finding 17, where the Hearing Officer found that some of the bills contained in EX 14 were sent out to clients, and Findings 20, 21, and 23, where the Hearing Officer found that all but one of the bills in EX 15 were sent to clients. RB at 21-24. In doing so, he relies on his version of the

⁵ At hearing, Poole did not contest the Association's position that he sent the bills to clients SO (EX 10), JJ (EX 12), GB (EX 13), and Kennedy (EX 14).

facts and disregards evidence that supports the Hearing Officer's findings. But the Hearing Officer found Poole's explanations were based on speculation, contradicted his own testimony, and were repeatedly impeached. BF 54, FF 17, 20, 56. She did not credit his explanations, nor was she required to do so. In re Whitt, 149 Wn.2d 707, 722, 72 P.3d 173 (2003) (“[A] hearing officer is not bound by various explanations if he or she is not persuaded by them.”); In re Dann, 136 Wn.2d 67, 78-79, 960 P.2d 416 (1998) (Court will not disturb factual findings made by a hearing officer upon conflicting evidence).

As to EX 15, Poole's argument ignores the evidence considered by the Hearing Officer in reaching her conclusion that 17 of the 18 billing statements contained in this exhibit were sent to clients and should have been produced in response to the July 2003 Request. BF 54, FF 21.

First, all of the bills in EX 15 came from the billing files. Poole testified that billing files contained copies of billings that had been sent out to clients. TR 565, 707. This testimony was corroborated by the fact that most of the bills in EX 10 and EX 15, which came out of billing files, were stamped “FILE.” He then contradicted this testimony by testifying that none of the billings contained in EX 15 had been sent out, even though only one of them contained markings indicating it had not been sent. TR 720-28, 766-83; EX 15 at 313. Had the billings not been sent,

they would not be in the billing files and would not have been stamped as “FILE” copies.⁶

Second, Poole’s explanations for why these invoices may not have been sent to clients were impeached repeatedly. Some examples are:

- He testified that the January 25, 2002 Courtright billing (EX 15, Bates stamp 000297) would not have been sent out because the Courtright’s filed bankruptcy prior to that date. TR 772-73. But the Courtright’s did not file bankruptcy until March 2002 and included the amount billed by Poole in their petition, indicating this billing was sent. EX 83;
- He testified that he would not have sent out the KC bill (EX 15, Bates stamp 287) as KC were “long-term clients.” TR 770. But during Gray’s March 2006 inspection, she noted subsequent bills sent to KC showed this bill had been paid in full, indicating it was sent to the client;
- He testified that he would not have sent the MC bill (EX 15, Bates stamp 290) to the client and would not have disclosed it to the Association because he sent the bill to an insurer. TR 770-71. But Gray’s inspection again noted that subsequent bills to MC showed the amount of this bill had been paid. TR 1105-06. And by Poole’s own admission, he did send the bill out for payment; he just claimed it was sent to a third party. TR 770-71; and
- He testified that client CBE was a flat-fee client for whom he had only done one job, and that CBE’s bill, EX 15, Bates stamp 305, was not sent to the client, but just printed out just to keep track of time. TR 775. But additional bills for client CBE showed this client was being billed on an hourly basis and made payments during the relevant time period. EX 78.

The Hearing Officer was entitled to reject Poole’s self-serving

⁶ Poole’s office used various markings to identify invoices that had not been sent out. EX 15, Bates stamp 313, is an invoice marked “Hold.”

testimony and to rely on the other evidence that showed the bills in EX 15 had been sent out to clients. Whitt, 149 Wn.2d at 722; VanDerbeek, 153 Wn.2d at 82 (a hearing officer is entitled to draw reasonable inferences from the documents and testimony). The fact that some of the evidence on which the Hearing Officer relied is circumstantial is of no moment. Kronenberg, 155 Wn.2d at 191 (explaining that “circumstantial evidence is as good as direct evidence for these purposes”).

As to EX 14, which contains bills printed from Poole’s computer, the Hearing Officer’s finding that “some of the bills within were sent to clients and were responsive to the July Request” (BF 54, FF 17) was fully supported by the evidence.

Kennedy testified that his bill (EX 14, Bates stamp 000120) had been sent to him (TR 1079), and Poole admitted this (EX 16). Kennedy’s bill was not, however, found in EX 15; it was only in EX 14. This fact supports the inference that other bills from EX 14 were sent out as well. VanDerbeek, 153 Wn.2d at 81.

Gray testified that, when she reviewed Poole’s computer billing records at his office in March 2006, she identified the bills contained within EX 14. Significantly, some of the subsequent client bills that Gray reviewed reflected payments or carried balances forward from bills contained in EX 14. TR 70, 277-80. Thus, the later bills indicated that

some of the bills in EX 14 had been sent to clients. Poole refused to produce these later bills. BF 54, FF 16. The Hearing Officer relied on Gray's testimony in finding that some of the bills in EX 14 had been sent to the clients. BF 54, FF 16-17. In addition, all but one of the bills in EX 15 were also found in EX 14. TR 76. This further indicated that at least some of the bills contained in EX 14 had been sent out.

The Hearing Officer's findings that 17 of the bills in EX 15 and some of the bills in EX 14 were sent to clients and should have been produced in response to the July 2003 Request were supported by substantial evidence and should not be disturbed by the Court.

4. Substantial evidence supports the Hearing Officer's finding that Poole knowingly failed and refused to produce the billings.

Poole argues there is no substantial evidence to support the finding that his failure to produce the billings discussed above was more than "inadvertent oversight." RB at 24. But the Hearing Officer found that Poole's failure to provide these billings in response to the July 2003 Request was knowing. BF 54, FF 56-58. A hearing officer's factual finding regarding a lawyer's state of mind should be given great weight on review. In re Longacre, 155 Wn.2d 723, 744, 122 P.3d 710 (2005).

In his September 11, 2003 response to the July 2003 Request, Poole made the following claims:

I first reviewed our records to determine which clients I had worked for in the specific time period you indicated in your letter. I then personally reviewed each of those clients' billing files to determine whether those clients had been billed for work within the period that was also set forth in your letter....I checked the client files for these clients to review the work that had been recorded on the timesheets. . . .

EX 5 (emphasis added). Poole reaffirmed these statements when, at hearing, he testified that he looked through his client list, Outlook calendar, and other records to determine which clients he had worked for in the relevant time period, then looked in those clients' billing files. TR 705-07. But had he engaged in the process he described, he would have had a list of clients whose billings he needed to check. If a billing file was not in the filing cabinet, he would have known that he needed to look for the file or records elsewhere. Yet 85 percent of the known responsive billings were not produced. See BF 54, FF 23. Moreover, Poole's credibility was suspect because he contradicted the above assertions during his June 3, 2004 deposition, when he stated he had not gone through his client list and Outlook calendar but had only looked in files that were in the billing file cabinet at the time; he also repeatedly modified his statements about the search he conducted. EX 103 at 39-44. The Hearing Officer reasonably concluded that Poole misrepresented his efforts to find and disclose responsive bills. BF 54, FF 9, 56.

Poole claims that billing records he should have produced were

accidentally missed because the billing files they were contained in were not in the proper file cabinet. TR 794-98; RB at 23-24. But the Hearing Officer reasonably could reject this excuse because the bills were not hard to find, and there were too many instances of non-production for this defense to be credible. BF 54, FF 56. As the court observed in State v. Lough, 70 Wn. App. 302, 321-22, 853 P.2d 920 (1993):

At some point of recurrence, the similar repeated acts can no longer be viewed as coincidental. When the evidence reaches such a point, the recurrence of a similar unlawful act tends to negate accident, inadvertence, good faith, or other innocent mental states, and tends to establish by negative inference the presence of criminal intent.

The Hearing Officer reasonably concluded that had Poole executed the search he described in his September 2003 response (EX 5), he would necessarily have found these files and bills.

Also, several of Poole's explanations for why files were not in the proper filing cabinet were impeached. Poole testified that he did not find or produce the Jacobson billing dated April 4, 2002 (EX 12) because the file had been boxed up prior to September 2003 after Jacobson declared bankruptcy and Poole stopped working for him. TR 798-99. But Jacobson did not petition for bankruptcy until June 2004 and Poole billed him for hourly work up through October 2003. TR 1044-46; EX 79.

Poole testified that he did not find the Kennedy billing (EX 14,

Bates stamp 000120) because Kennedy's file was in a "collection-hold" status and so the billing file was not in the billing file cabinet, and that he had corrected this bill prior to filing a lawsuit against Kennedy for non-payment. TR 796-97; EX 16. But Kennedy testified that Poole had already sued him when the correction was made, and that his bill was only corrected after he told Poole he was meeting with an Association investigator. TR 1078-85. This evidence gave the Hearing Officer further reason to question Poole's credibility.

As to the SO billings that were not produced (EX 10), Poole said he forgot that he had worked for SO. TR 794-95. But this was contradicted by the evidence that SO was a special, long-term client of his whom he had billed continuously, both before and after the relevant time period. TR 648-49; EX 10, 38-40. Again, the Hearing Officer was not required to credit Poole's claim that he forgot about this client when he searched for responsive billing records. Dann, 136 Wn.2d at 78-79.

Poole also claimed that some bills may not have been filed when he looked for them in September 2003. TR 721. But the Hearing Officer reasonably could reject this claim as it had been a year or more since the responsive bills were generated and sent out to clients. See EX 15.

On appeal, Poole improperly relies on his own controverted and disbelieved testimony to challenge the Hearing Officer's findings.

Kronenberg, 155 Wn.2d at 191. Substantial evidence supports the finding that Poole acted knowingly. This determination should not be disturbed.

5. The Hearing Officer's findings support her conclusion that Poole violated RPC 8.4(c), 8.4(d), and 8.4(l) (as charged in Counts 1 and 2).

The Hearing Officer properly concluded that Poole's knowing failure to provide a complete response to the Association's July 2003 Request violated RPC 8.4(c), 8.4(d), and 8.4(l).

RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Poole violated this rule by misrepresenting his search efforts and knowingly failing to provide the billings to the Association.

RPC 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice. Conduct deemed prejudicial to the administration of justice includes conduct of a lawyer that might physically interfere with enforcing the law or that is a clear violation of accepted practice norms. Longacre, 155 Wn.2d at 741-42. A lawyer who fails to cooperate with bar counsel violates this rule. In re Whitney, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (holding that a lawyer violated RPC 8.4(d) by engaging in dishonest conduct during a disciplinary investigation); American Bar Association Annotated Model

Rules of Prof'l Conduct, 594 (6th Ed., 2007) (Rule 8.4(d) cmt.) (citations omitted). By so failing, Poole violated RPC 8.4(d).

RPC 8.4(l) provides that it is professional misconduct for a lawyer to violate a duty or sanction imposed by the ELC. Those duties include the duty to respond to inquiries or requests about matters under investigation, the duty to cooperate with discovery, and the duty to comply with conditions of probation. See ELC 5.3(e), 5.3(f), 5.5(c), 10.11(g), 13.8. Poole's failure to produce the billing records violated RPC 8.4(l).

6. Alternative findings made by the Hearing Officer support the conclusion that Poole committed misconduct.

In Finding 56, the Hearing Officer found that Poole "either misrepresented the extent of his efforts to find responsive bills, or he willfully failed in his duty to cooperate and to look for them." BF 54. Poole argues that alternative findings of fact made by the Hearing Officer invalidate the conclusion that he committed the misconduct charged in Counts 1 and 2. RB at 29-33.⁷ But Poole cites no authority for this proposition. As this argument is not supported by citation to legal authority, it need not be considered on appeal. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no

⁷ Poole raises the same argument with respect to other alternative findings made by the Hearing Officer, in particular those in Finding 59. RB at 30-32. Finding 59 relates to Poole's failure to produce the SO billing file.

authorities are cited in support of a proposition, the Court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”).

If the Court considers this argument, it should reject it. The Hearing Officer concluded that Poole committed misconduct by failing to cooperate with the Association’s investigation. It does not matter that the Hearing Officer did not specify by which method Poole committed the misconduct because substantial evidence supported each of the alternatives. The same is true in the criminal context, where a crime may be committed by alternative means:

In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means.

State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

Here, the evidence showed that Poole misrepresented his search for responsive billings and failed to provide 85 percent of the known responsive bills even though they were easily identified and even though he claimed to have conducted an organized search for them. The evidence supports a conclusion of failure to cooperate under either theory.

C. THE HEARING OFFICER'S CONCLUSION THAT POOLE KNOWINGLY REFUSED TO PROVIDE THE SO BILLING FILE WAS SUPPORTED BY THE FINDINGS.

Poole argues that Findings 25-27 and 30, where the Hearing Officer found that Poole knowingly failed to provide the SO billing file and did not timely object to the Association's request for that file, are not supported by substantial evidence and should be stricken. RB 24-26. He argues that the request for the SO billing file was irrelevant to the Association's investigation and that he properly challenged the request for this file by raising timely, legitimate objections to its production. Id.

But the Hearing Officer rejected Poole's arguments and instead found that his refusal to produce the SO billing file until the eve of a show cause hearing before this Court, despite being ordered to cooperate with trust account audits as part of his disciplinary probation in the Moore Grievance, was a knowing violation of RPC 8.4(c), 8.4(d), and 8.4(l). BF 54, FF 24, 28-29, 60, CL 71, 75, 76. Poole argues that there is nothing in the record to support these findings (RB at 25), but ignores the substantial evidence supporting them.

1. The Hearing Officer properly found that examination of the SO billing file was relevant to the probationary audit.

The Hearing Officer found that the SO billing file was relevant to the Association's investigation and that Poole had a duty to permit inspection of it. BF 54, FF 26, 27. Poole was sanctioned in the Trust

Account Case for violations of the RPC regarding his handling of client funds and his trust account; for these reasons he was required to submit to probationary audits. EX 1. During the first audit, the Association's auditor discovered that Poole's trust account had a shortage related to client SO that persisted for several months, and that he had quickly paid to his firm from trust a \$125,172.85 fee deposit from SO. EX 19; TR 420-21, 433-45. The auditor testified that the deposit of the large, uneven amount into Poole's trust account and the subsequent quick payment of it to Poole raised several red flags. TR 433-35. As noted by the Hearing Officer, by this time, "Poole's credibility regarding the contents of his own files and his ability to spot and correct errors in client accounts was seriously damaged" due to his prior failure to correct billing errors in the bills of his client GB, his prior refusal to produce the GB billing file to the Association, and the fact that the Association found three more bills in GB's file that had not been provided in response to the July 2003 Request. BF 54, FF 26 n.2; EX 13. These issues were similar to issues that had arisen in the Trust Account case. EX 1 at 7-12. Respondent's probation was designed to eliminate these types of problems. EX 17, 19.

In light of this evidence, the Hearing Officer found that the auditor was not required to accept Poole's unsupported explanations, but was entitled to examine his files and records to see if they supported his

explanations. BF 54, FF 26, 60. Poole's assertion that there was no "reason or need to demand" the file is unfounded.

2. Substantial evidence supports the Hearing Officer's finding that Poole did not object to production of the SO billing file in a timely fashion.

The Hearing Officer found that Poole did not articulate an objection to producing the SO billing file from the time it was initially requested on April 20, 2004 until a non-cooperation deposition on September 15, 2004. BF 54, FF 25, 30, 59. Poole argues that he properly challenged the request for the SO billing file by raising timely objections prior to the September 2004 deposition, and is now being punished for doing so. RB at 24-26, 36-37. But he merely restates his version of the facts, one that was rejected by both the Hearing Officer and the unanimous Disciplinary Board. See Kronenberg, 155 Wn.2d at 191 (lawyer challenging factual findings must do more than argue his version of the facts while ignoring testimony of other witnesses).

After the auditor wrote to Poole and requested the SO billing file, he responded and asked her to explain her request, but he did not object to producing the file. EX 17; EX 18. The auditor replied, noted the issues she had found with the SO trust account, and asked Poole to provide the SO billing file or to state the basis of any objection to providing it. EX 19. Poole replied and gave brief explanations, but he did not provide the

billing file or any documentation from it, nor did he raise any objection. EX 20; TR 320, 439-40. The auditor did not hear from Poole again about this and had to complete her audit without the file. EX 26 at 3.⁸

After the auditor failed to obtain the SO billing file, Gray sent two letters asking Poole to provide the file or state the basis of any objection. EX 21, 23. Poole did not reply at all or provide the file within the time periods set forth in those letters. TR 103-04. Contrary to Poole's argument, the evidence showed that had not yet raised an objection to producing the SO billing file.

Consequently, the Association notified Poole it would open a new grievance if it did not receive the SO billing file by a date certain. EX 23.⁹ Poole still did not reply. After the time for responding expired, Poole's counsel sent Gray an email discussing the SO billing file. EX 24. That email contained no objection to production of the file, though it did opine that an audit can be "an excuse to intrusively review any or all of his

⁸ Poole claims that he provided a number of SO bills in response to the auditor's request and cites to the record of the auditor's testimony in an attempt to support this claim. RB at 10 (citing TR 453-54). But the transcript citation does not support his view of the evidence. The auditor and Gray testified that Poole never provided the SO billing file nor any records pertaining to SO. TR 439-42, 119-20. And the Hearing Officer found that Poole had not provided any such records. BF 54, FF 23, 29.

⁹ The failure to produce the SO billing file was a violation of Poole's probation. BF 54, CL 75. The ELC do not provide any process for addressing a violation of probation other than opening a new grievance and proceeding with an investigation under ELC 5.3. See ELC 13.8 ("Failure to comply with a condition of probation may be grounds for discipline. . .").

files.” But the Association had requested production of only one file, and that file was directly related to the audit. TR 320-21. Moreover, “intrusiveness” is not a valid ground for objection. See ELC 5.3(e).

The Association, having still not received the SO billing file and having not been advised of any arguably legitimate objection to its production, opened the 2004 Grievance. EX 27. The Association requested responses to several questions about SO’s client ledger and management of Poole’s trust account, and renewed the request for the SO billing file. This request for response was not restricted solely to the SO billing file. Poole was required under ELC 5.3(e) to respond to all requests for information, but he did not respond at all, either to this request or to a subsequent 10-day letter sent under ELC 5.3(f). EX 28; TR 111-12. As a result, he was subpoenaed for a non-cooperation deposition under ELC 5.3(f). EX 29. Only at that deposition did he state the basis for his objection, namely that the SO billing file was large and went back to 1990. EX 31 at 6; BF 54, FF 30. The Hearing Officer’s finding that Poole did not raise timely objections to production of the SO billing file should not be disturbed.

- 3. The Hearing Officer properly concluded that Poole’s refusal to provide the SO billing file violated RPC 8.4(c), 8.4(d), and 8.4(l).**

The Hearing Officer found that Poole’s objections to producing the

SO billing file were untimely and untrue and that his refusal to turn it over was dishonest and violated RPC 8.4(c), 8.4(d), and 8.4(l). BF 54, FF 31, 59, CL 71, 72. These conclusions were supported by the findings.

Despite Poole's belated objection that the SO billing file was comprised of several volumes and covered many years (EX 31 at 6, EX 105 at Bates stamp 00003), Poole only produced one volume of the SO billing file, marked Volume 3. BF 54, FF 31. His objection was not valid in relation to this volume as it was only one volume and did not cover many years. Id. And, as noted, prior to the September 2004 deposition Poole had never told the Association that the SO billing file consisted of several volumes or covered many years. TR 116.

The evidence supported the Hearing Officer's conclusion that Poole's failure to provide the SO billing file violated RPC 8.4(c), 8.4(d), and 8.4(l). The SO billing file revealed ongoing problems with Poole's trust account management and his billing of SO; it also contained more billing records responsive to the July 2003 Request that Poole had not produced. BF 54, FF 35; TR 141, 147-48; EX 10. Gray testified that when she reviewed the billing file, it took her less than a minute to spot these previously undisclosed billing records. TR 141. Poole had reason to resist producing the file, just as he reason to resist production of the GB billing file. BF 54, FF 26 n.2. The Hearing Officer's conclusion that

Poole's conduct violated RPC 8.4(c), 8.4(d), and 8.4(l) should be affirmed.

4. Poole's due process claims are waived and meritless.

Poole claims that the Association's request for the SO billing file violated his due process rights and his right to privacy in his files. RB at 33-37. As he did not raise this issue before the Hearing Officer, it is waived. Rule 2.5(a) of the Rules of Appellate Procedure (RAP).

Poole also waived this issue by failing to raise it before this Court in response to the Court's order to show cause issued in November 2004. EX 35. The Court had scheduled a show cause hearing for the purpose of allowing Poole to argue that the Association's petition for interim suspension (EX 33) should not be granted. That was the time for him to raise any due process objection or argument against production of the SO billing file. Yet rather than argue, he chose to give Volume III of the file to the Association. EX 37.¹⁰ Since Poole had the opportunity to argue his due process issue at the show cause hearing before the Supreme Court in November 2004, but chose not to do so, he waived it. In re Hawkins, 91 Wn.2d 497, 502, 589 P.2d 247 (1979) (lawyer's failure to take exception to Association's discovery procedure at the proper time precluded

¹⁰ Poole claims it was extreme and unreasonable for the Association to file a petition for interim suspension, and that filing of the petition was a calculated effort to put him in a position where he could not risk continuing to object. RB at 33. But filing of such a petition is prescribed by the ELC as the next step to be taken when a lawyer fails to cooperate with an investigation, ELC 7.2(a)(3), and the Association followed that procedure.

consideration of his due process argument); see also State v. Valladares, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983) (defendant waived or abandoned his constitutional rights by withdrawing his pretrial motion to suppress evidence). Moreover, Poole never moved to quash the Association's subpoena duces tecum that demanded production of the file.

In any event, Poole's due process claims are meritless. He argues that the Association's request for the SO billing file amounted to a warrantless search of his files and violated his right to privacy. RB at 33-36. He has not, however, cited any case that holds a lawyer has such a right of privacy, or that the Fourth Amendment prohibition on warrantless searches applies to requests for information in lawyer discipline cases, or that a request for information in a discipline matter equates to such a search. The Court must conclude that no such authority exists. DeHeer, 60 Wn.2d at 126. Indeed, the idea that a lawyer has a personal right to privacy in client files is absurd. The client file, with limited exceptions, belongs to the client, not the lawyer. See generally, WSBA Formal Ethics Opinion 181 (“[T]he file generated in the course of representation, with limited exceptions, must be turned over to the client at the client's request”); 7 Am. Jur. 2d Attorneys at Law § 140 (2008) (“[A]nything in a client's file. . . belongs to the client, with the exception only of the attorney's notes or work product.”).

The Court adopted the ELC in the exercise of its exclusive jurisdiction over lawyer discipline. Washington State Bar Ass'n v. State, 125 Wn.2d 901, 908-09, 890 P.2d 1047 (1995). In furtherance of its mission to protect the public and the profession, the Court authorized the Association to investigate any alleged or apparent misconduct by a lawyer. ELC 5.3(a). Such investigation may include inspection and copying of the lawyer's files and business records. ELC 5.3(e). All that is required to trigger a lawyer's duty to permit such inspection is that the information requested be relevant to the investigation. Id. Here, the Hearing Officer properly found that the SO billing file was relevant to the issues under investigation at the time the Association sought it. BF 54, FF 26, CL 74. In addition, Poole was under disciplinary probation at the time, which placed an additional obligation of cooperation on him. ELC 13.8; ELC 1.5. Poole has identified no legitimate "due process" right to withhold the SO billing file from the Association, and waived the opportunity to raise the issue with the Court. His due process claim is meritless.

D. THE COURT SHOULD AFFIRM AND ADOPT THE RECOMMENDED ONE-YEAR SUSPENSION.

Application of the ABA Standards to arrive at a disciplinary sanction is a two-stage process. First, the presumptive sanction is determined by considering (1) the ethical duty violated, (2) the lawyer's

mental state, and (3) the extent of the actual or potential harm caused by the misconduct. Dann, 136 Wn.2d at 77. Second, the ultimate sanction is arrived at by considering any aggravating or mitigating factors that might alter the presumptive sanction. Id. The Hearing Officer and Disciplinary Board correctly applied the ABA Standards to arrive at a recommendation of a one-year suspension.

1. The Hearing Officer properly applied ABA Standards 6.12 and 7.2 to Poole's failures to cooperate (Counts 1 through 5).

The Hearing Officer applied ABA Standards 6.12 and 7.2 to Poole's failures to cooperate. These standards provide that:

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

Poole challenges the applicability of these standards, arguing that his conduct was negligent, not "knowing," and caused no injury. RB at 41.

As to state of mind, the ABA Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a

particular result;” and “negligence” as “the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” ABA Standards at 7 (Definitions). The Court grants great deference to the Hearing Officer’s finding regarding state of mind. Longacre, 155 Wn.2d at 744.

Here the Hearing Officer reasonably concluded that Poole acted knowingly in failing to produce bills responsive to the Association’s July 2003 Request. Poole wrote and testified that he had conducted an intensive search of his files for the requested and easy-to-find billing records, but the evidence established that he misrepresented the magnitude of his search and only turned over five responsive billings. EX 5. He failed to produce 85 percent of the known responsive bills, even though he knew he had billed many more than five clients in 2002 for “old time” (EX 112), and was on notice that his decision to bill for that time was problematic. Substantial evidence supported the Hearing Officer’s conclusion that this was knowing and dishonest behavior. The Hearing Officer also reasonably concluded that Poole acted knowingly when he refused to turn over the SO billing file. He made a conscious choice to withhold this file. He then continued his pattern of non-cooperation after the SO billing file was finally obtained. The Hearing Officer’s

determinations regarding state of mind should not be disturbed. Longacre, 155 Wn.2d at 744.

The Hearing Officer properly found that Poole's non-cooperation caused actual injury. The purposes of the lawyer discipline system include "protection of the public and preservation of confidence in the legal system." In re McMurray, 99 Wn.2d 920, 930, 665 P.2d 1352 (1983). Given the limited resources available to investigate allegations of lawyer misconduct, "such investigations depend upon the cooperation of attorneys." Id. at 931. Here Poole's failure to cooperate injured the disciplinary system and required the Association to expend a significant amount of its limited resources to obtain the requested documents. Moreover, the billing records Poole withheld went undiscovered for years, and may have significantly affected the result of the hearing in the Moore Grievance. BF 54, FF 65 The refusal to turn over the SO billing file injured the Association's ability to monitor Poole's probation and again caused expenditure of significant amounts of limited resources. Id.

"[A]n attorney who disregards his professional duty to cooperate with the bar association must be subject to severe sanctions. Moreover, unless non-cooperation brings such sanctions, attorneys who are guilty of unprofessional conduct might be tempted to stonewall to prevent serious violations coming to light." In re Clark, 99 Wn.2d 702, 708, 663 P.2d

1339 (1983). The Hearing Officer and Disciplinary Board properly found that the presumptive sanction for the violations charged in Counts 1 through 5 is suspension.¹¹

2. The Hearing Officer properly applied the aggravating factors of Dishonest or Selfish Motive and Pattern of Misconduct.

The Hearing Officer and Disciplinary Board found six aggravating factors. BF 54, CL 90. Poole challenges application of two of them: dishonest and selfish motive and pattern of misconduct. RB at 44-47.

a. Dishonest or Selfish Motive

Poole argues that dishonesty was a necessary factual element of Counts 1 through 5. He cites Whitt, 149 Wn.2d at 720, for the proposition that applying the dishonest or selfish motive aggravating factor would constitute improper “double dipping.” RB at 44-45. But this argument fails because only Count 1 charged Poole with a violation of RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and that count also charged violation of 8.4(d) (engaging in conduct prejudicial to the administration of justice). Counts 2 through 5 charge violation of RPC 8.4(l). Dishonesty is not an element of an 8.4(l) violation. And, even as to Count 1, Poole himself notes there

¹¹ Poole has not challenged the Hearing Officer’s recommended sanction of reprimand on Counts 6 through 8 or Count 10.

is a distinction between engaging in a dishonest act, and doing so with a dishonest motive. RB at 45-46.

Moreover, Poole overlooks the fact that this aggravating factor also applies when the lawyer acts selfishly. His repeated failures to cooperate with the Association's requests that he produce client billing records benefited no one but him; they delayed investigations against him, delayed disclosure that he had billed clients excessive amounts, and limited the evidence that could be presented against him in the Moore grievance. This aggravating factor is properly applied to Counts 1 through 5.

b. Pattern of Misconduct

Poole argues that "pattern of misconduct" does not apply because he says there were only two alleged events – failure to fully respond to the July 2003 Request and refusal to provide the SO billing file – and "two" is not a "pattern." RB at 46-47. But here, Poole repeatedly failed and refused to cooperate with Association requests for information and for disclosure of billing records relating to numerous clients over a period of three years. He ignored many initial requests for information and subsequent "10-day letters," refused to turn over the GB billing file until subpoenaed, refused to turn over the SO file until the eve of a show cause hearing, and subsequently refused to turn over another client billing file until ordered to do so by this Court. TR 317-318, 587-91. Each instance

of non-cooperation was another violation. This aggravator is properly applied. See In re Anschell, 141 Wn.2d 593, 615, 9 P.3d 193 (2000) (pattern of misconduct established by proof of multiple violations involving multiple clients over an extended period).

3. The Disciplinary Board erred in finding Poole's "personal and emotional problem" was a mitigating factor on all counts. Even if it was, it should be accorded little weight.

At hearing, Poole presented evidence that he is afflicted with bipolar disorder in an attempt to prove this was a factor that should mitigate the sanction to be imposed on some – but not all – of the charges. Poole specifically stated that he was not claiming this disorder mitigated any misconduct found in relation to his refusal to provide the SO billing file (as charged in Counts 1, 3, 4 and 5). TR 907-08. Thus, with regard to the sanction to be imposed for those violations, the evidence regarding Poole's bipolar disorder is irrelevant. Both the Hearing Officer and the Board found the presumptive sanction for this violation is suspension. To the extent Poole argues his disorder should mitigate the sanction to be imposed for the SO billing file violations, his argument must fail.

As to his other misconduct, it is a significant defect in Poole's position that he did not attempt to prove that his bipolar disorder was a mitigating factor under ABA Standard 9.32(i) (mental disability), which provides as follows:

- (i) [Mitigating factors include] mental disability or chemical dependency including alcoholism or drug abuse when:
 - (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

He conceded that he was not attempting to prove his disorder caused his misconduct, as required by ABA Standard 9.32(i)(2), and elected to waive consideration of it as a mental disability. TR 838-39, 852-53; BF 46.

Instead, Poole re-characterized his mental disorder as a "personal and emotional problem" and sought mitigation under ABA Standard 9.32(c). The Hearing Officer concluded, however, that Poole failed to prove this mitigating factor. BF 54, CL 91; See In re Carpenter, 160 Wn.2d 16, 30, 155 P.3d 937 (2007) (respondent lawyer bears the burden of proving mitigating factors). The Disciplinary Board found this "personal and emotional problem" should be considered as a mitigating factor, but accorded it little weight in determining the ultimate sanction to be imposed and adopted the Hearing Officer's recommendation of a one-year suspension without change. BF 66.

Poole argues that the Board's finding of a personal and emotional

problem mitigator “demands that [his] recommended sanction be substantially reduced.” RB at 49. To the contrary, the Board erred as a factual matter in finding Poole’s “personal and emotional problem” was a mitigating factor as to all counts. But, even if it is, the Court should affirm the Disciplinary Board’s judgment that it be given little weight.

- a. The personal and emotional problem mitigator does not apply to the conduct charged in Counts 1 through 5.

First, the Disciplinary Board failed to identify the counts to which the mitigator should apply and those to which it did not apply. BF 66. And the Board failed to note that Poole never claimed or presented evidence that the mitigator applied to his refusal to produce the SO billing file. Id.; see TR 907-08.

Second, the Board relied on three out-of-context excerpts of the testimony of the doctors who testified in this matter (BF 66 at 2-3), but disregarded other evidence that indicated Poole’s disorder did not contribute to the misconduct proven in Counts 1 through 5. The Board initially noted that Dr. Reichler testified that Poole’s failure to provide all documents responsive to the July 2003 Request was “certainly” related to his personal and emotional problems. BF 66 at 2 (citing TR 871). But that is not what Dr. Reichler said. The question and answer were:

Q. We know that in the fall of 2003 Mr. Poole provided documents in response to a July 2003 inquiry from the Bar

Association. Could his having failed to find all possible responsive documents in response to the Bar's July 2003 inquiry be related to his emotional and personal problems at that time?

A. Certainly.

TR 871. Dr. Reichler merely was agreeing that there was a possible relation, not concluding that there was in fact a contributing connection between Poole's mental disorder and this particular misconduct. The Board next quoted the following question and answer of Dr. Reichler in support of its conclusion:

Q: Can we say that the bipolar disorder is causing the problem?

A: Well, you focused only on bipolar disorder. I think it's a combination of that and, you know, his both being depressed and sometimes not paying attention to some of the details as well as an enormous amount of anxiety. So, I don't know, because I don't know the specific events and the specific conditions under which they occurred, but certainly those kinds of things will occur with these underlying problems, yes.

BF 66 (citing TR 900). But this answer was given in response to a series of questions about the trust account violations charged in Counts 6 through 8, not the failures to cooperate charged in Counts 1 through 5.

See TR 898-900. The Board also quoted an answer given by Dr.

Jacobson:

A: I can conclude on a more probable than not basis that the disorder of Bipolar Disorder II as described by Dr. Reichler in '03 with variable moodiness, some problems with impulse control early on, but continuing mood difficulties and anxiety disorder, that that could contribute to this, but to what degree I don't know.

BF 66 (citing TR 956). But again, the doctor was specifically discussing

the trust account issues charged in Counts 6 through 8, not the misconduct charged in Counts 1 through 5. See TR 954-56.

The expert witnesses did not provide evidence that supports a conclusion that Poole's bipolar disorder substantially contributed to his more serious misconduct – that charged in Counts 1 through 5. In fact, neither expert could testify that Poole's disorder contributed to the misconduct at issue in Counts 1 through 5. While Dr. Jacobson stated in her pre-hearing written report that the mental disorder “substantially contributed to the misconduct alleged” (EX 111 at Bates stamp 00012), she also failed to differentiate between counts in the report and testified that her statement did not mean that the disorder caused the misconduct (TR 982-83). At hearing, she testified that she could not conclude that Poole's failure to produce billings responsive to the July 2003 Request was the result of his mental disorder. TR 961-62. Dr. Reichler appeared to agree. TR 904-06. Dr. Jacobson also testified that she could not conclude that Poole's failure to cooperate and respond to other Association requests for information was caused by his mental disorder. TR 961-63. She even testified that his failures to cooperate “may not have been caused by the bipolar disorder at all.” TR 962-63 (emphasis added).

Other evidence supported the Hearing Officer's conclusion that Poole failed to prove this mitigating factor. The five billings he submitted

in response to the July 2003 Request were sent in a timely fashion and were of the type that was sought. EX 5. The auditor's original request for the SO billing file included three other requests for records related to other clients and issues. EX 17. Poole timely and accurately provided all the requested records, except for the SO billing file. TR 438. Prior to sending that request, the auditor had no trouble timely obtaining documents and records from Poole. TR 436-37. This evidence indicated Poole was capable of timely and appropriately responding to Association requests and providing requested records when he so chose, but at other times chose not to cooperate.

In light of this evidence, and without a medical conclusion connecting Poole's disorder to his misconduct in failing and refusing to cooperate with Association requests for information, the Court should conclude that this mitigating factor does not apply to the misconduct proven in Counts 1 through 5.

- b. The personal and emotional problem mitigating factor should be accorded little weight.

Even if the Disciplinary Board properly found Poole's bipolar disorder was a mitigating factor, the factor should be given little weight.

The ABA Standards require that, in order for a mental disability to be considered in mitigation, the lawyer must establish direct causation

between the disability and the misconduct. Commentary to ABA Standard 9.32; In re Kuvara, 149 Wn.2d 237, 249, 66 P.3d 1057 (2003) (lawyer with alcoholism required to meet the requirements of ABA Standard 9.32(i) to prove it a mitigating factor). In cases where the disability is not shown to be at least a substantial contributing cause of the offense, the disability should be given little weight. Commentary to ABA Standard 9.32. It follows that a personal or emotional problem that lacks any causal connection, as Poole conceded here, is entitled to even less weight.

The Louisiana Supreme Court adopted this reasoning when it applied the ABA Standards to a case where, as here, a lawyer with depressive disorder was unable to establish a causal link between his mental disorder and his misconduct and instead argued the disorder should be considered as a personal and emotional problem:

[I]t would be an exercise in absurdity if we were to hold that a medical condition which does not satisfy the requirements to be considered in mitigation as a mental disability could be entitled to the same weight if simply re-labeled as a personal and emotional problem. Thus, while we accept respondent's medical condition as a personal or emotional problem, we determine it carries very little weight in mitigation.

In re Stoller, 902 So. 2d 981, 989 (La. 2005). This result is consistent with Washington caselaw. In In re Christopher, 153 Wn.2d 669, 105 P.3d 976 (2005), the lawyer's emotional problems did not rise to the level of a mental disability, and she was unable to demonstrate a connection

between her problems and the intentional falsification of documents. While the Court did not strike the personal and emotional problems mitigating factor, it refused to adopt the Disciplinary Board's conclusion that these problems, combined with mental disability or impairment, constituted a significant mitigating factor. Id. at 684. Here, the Court should conclude that Poole's "personal and emotional problem" deserves little or no weight when determining the appropriate sanction.

4. Six aggravating factors outweigh the mitigating factor.

Even if the Court applies the mitigating factor of personal and emotional problems, it does not outweigh the six aggravating factors of prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of the conduct (in relation to the refusal to provide the SO billing file), and substantial experience in the practice of law.

Generally, the minimum suspension is six months. In re Cohen, 150 Wn.2d 744, 762, 82 P.3d 224 (2004). A minimum suspension is warranted "where there are either no aggravating factors and at least some mitigating factors, or where the mitigators clearly outweigh any aggravating factors." In re Halverson, 140 Wn.2d 475, 497, 998 P.2d 833 (2000). Here, the aggravating factors clearly outweigh the mitigating factor. The Disciplinary Board was unanimous that the sanction should be

a one-year suspension. The Court should adopt that recommendation.

5. Poole has not demonstrated the sanction is disproportionate.

In proportionality review, the Court compares the case at hand with “similarly situated cases in which the same sanction was either approved or disapproved.” VanDerbeek, 153 Wn.2d at 97. The lawyer bears the burden of proving that the recommended sanction is disproportionate. Id.

Poole cites several cases in an attempt to prove that the recommended one-year suspension is “grossly disproportionate.” RB at 50-58. He claims that the cases of Unger, Salazar, Means, and Germano indicate that the recommended sanction in this matter is disproportionate. RB at 51-55. But these cases are distinguishable. Unger was not found to have acted knowingly or dishonestly. Salazar’s failure to cooperate was found to be negligent. Means accepted an admonition from a Review Committee with no finding regarding her mental state. While Germano was found to have knowingly failed to cooperate, he was charged with only one count of non-cooperation, there was no finding of dishonesty, and the aggravating and mitigating factors were substantially different. Also, Unger and Means had no prior discipline and Salazar and Germano had no discipline greater than censure. Poole, however, acted both

knowingly and dishonestly, six aggravating factors were applied against one mitigator, and he previously was reprimanded for trust account violations identical to those in this case and suspended for six months for engaging in dishonest behavior in connection with a disciplinary investigation. EX 1; Poole, 156 Wn.2d at 196. Thus, Unger, Salazar, Means, and Germano are not similar to this case. In the other cases cited by Poole (Bell, Pack, Lehinger, and DeRuiz), the respondent lawyer was suspended for at least one year. Poole has not demonstrated that a one-year suspension is disproportionate.

IV. CONCLUSION

The Court should affirm the conclusions of both the Hearing Officer and the unanimous Disciplinary Board that Poole committed the misconduct charged in Counts 1 through 8 and 10 of the formal complaint, and adopt the recommendation that he be suspended for one year.

RESPECTFULLY SUBMITTED this 25th day of March, 2008.

WASHINGTON STATE BAR ASSOCIATION

/S/

M Craig Bray, Bar No. 20821
Disciplinary Counsel

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TO E-MAIL**

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re

Supreme Court No. 200,521-7

JEFFREY G. POOLE,
Lawyer (Bar No. 15578)

DISCIPLINARY COUNSEL'S
DECLARATION OF SERVICE BY
MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that he caused a copy of the Answering Brief of the Washington State Bar Association to be mailed by regular first class mail with postage prepaid on March 25, 2008 to Mr. Poole's lawyer, Richard Todd Okrent, at the following address:

Richard Todd Okrent
Attorney at Law
1610 Broadway
Everett, WA 98201-1724

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

3/25/2008; Seattle, WA
Date and Place

/S/
M Craig Bray, Bar No. 20821
Disciplinary Counsel
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**FILED AS ATTACHMENT
TO E-MAIL**

OFFICE RECEPTIONIST, CLERK

To: Craig Bray
Subject: RE: In re Poole, Supreme Court No. 200,521-7, Answering Brief of the WSBA

Rec. 3-25-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Craig Bray [mailto:craigb@wsba.org]
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To: OFFICE RECEPTIONIST, CLERK
Cc: Chandler, Desiree R.; rokrent@aol.com; owwdockets@gmail.com
Subject: In re Poole, Supreme Court No. 200,521-7, Answering Brief of the WSBA

Dear Clerk:

Attached for filing are the following documents in the case of In re Jeffrey G. Poole, Supreme Court No. 200,521-7, Bar No. 15578:

1. Answering Brief of the Washington State Bar Association; and
2. Declaration of Mail Service.

I would appreciate receiving confirmation that these documents have been received. Thank you.

Craig Bray
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