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Supreme Court No. 200370-5


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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

TERRY J. PRESZLER,

Lawyer (Bar No. 13836).

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

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I. COUNTERSTATEMENT OF THE ISSUES

1. Preszler had his bankruptcy client sign a contingent fee agreement for a pre-existing personal injury claim after the client settled the claim herself, then withdrew his fee from trust without authorization from the bankruptcy court. The primary issue at hearing was Preszler's state of mind. The hearing officer rejected Preszler's defense that he believed his actions were reasonable. Preszler asks this Court to adopt the testimony that the hearing officer rejected. Should the Court retry the facts?

2. The hearing officer and Disciplinary Board found that Preszler knowingly charged an unreasonable fee and knowingly removed his fees from trust in violation of bankruptcy law. All Board members agreed that the presumptive sanction was disbarment and that Preszler should, at a minimum, be suspended for three years. Should the Court affirm the Board's recommendation?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

This case was tried twice. The first hearing occurred in May 2005. At the close of that hearing, the hearing officer disclosed in his oral ruling that he knew Preszler personally and had considered evidence outside the record. In March 2006, the Disciplinary Board remanded the matter for a

new hearing before a different hearing officer. Exhibit (EX) 128. The second hearing, which is the subject of this appeal, began in April 2007. Transcript (TR) 1.

The amended formal complaint charged Preszler with 17 counts related to his representation of Kinnie Gerrard in her bankruptcy and personal injury matters. Clerk's Papers (CP) 26-42. The Washington State Bar Association (Association) dismissed seven counts at the start of the hearing. TR 29. On May 26, 2007, following a five-day hearing, the hearing officer filed his Findings of Fact, Conclusions of Law and Recommendation (FFCL).¹ The hearing officer determined that Preszler had violated the following Rules of Professional Conduct (RPC):

- Count 1: RPC 1.5(a),² by charging an unreasonable fee to Kinnie Gerrard for the negligible work performed, with the intent of benefiting himself at the expense of the bankruptcy creditors;
- Count 3: RPC 1.4(b), by failing adequately to explain to Kinnie Gerrard the law regarding exemption of personal injury proceeds in bankruptcy;
- Count 14: RPC 3.4(c) and 8.4(d), by disbursing to himself from trust a portion of the personal injury proceeds, a violation of bankruptcy rules;

¹ The FFCL is attached as Appendix A.

² The relevant RPC are attached as Appendix B. All citations are to the RPC in effect at the time of the misconduct.

- Count 15: RPC 8.4(d), by disbursing to himself the personal injury proceeds without the knowledge of the bankruptcy court or bankruptcy trustee;
- Count 17: RPC 5.3(b) and 5.3(c)(1), by failing to review the work of his paralegal, who prepared bankruptcy forms with false and misleading information, and by ratifying such misstatements by signing the forms.³

FFCL ¶¶ 51, 53, 57, 58, 60. The hearing officer found that Preszler acted knowingly with respect to Counts 1, 14 and 15 and negligently with respect to Counts 3 and 17. Id.

For Counts 1, 14 and 15, the hearing officer determined that the presumptive sanction under the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) was disbarment, applying ABA Standard 7.1 to Count 1 and ABA Standard 6.21 to Counts 14 and 15.⁴ For Count 3 and 17, the hearing officer found that the presumptive sanction was reprimand, applying ABA Standard 7.3 to Count 3 and ABA Standard 6.13 to Count 17. Id. The hearing officer found two aggravating factors (substantial experience in the practice of law as to all counts and pattern of misconduct as to Count 17) and five mitigating factors (absence of prior discipline, character and reputation, cooperative attitude toward proceedings, timely

³ The hearing officer also found that the Association proved a violation of RPC 3.4(c) as alleged in Count 12, but the Association dismissed that count while the matter was pending before the Board. Decision Papers (DP) 39.

⁴ The ABA Standards applied by the hearing officer are attached as Appendix C.

good faith effort to make restitution or rectify consequences of misconduct, and delay in disciplinary proceedings). Id. Based on the aggravating and mitigating factors, the hearing officer recommended a 30-day suspension for Counts 1, 14 and 15, an admonition for Count 3 and a reprimand for Count 17. Id.

Both parties challenged the recommended sanction before the Disciplinary Board. The Board approved the findings of fact without amendment. DP 39.⁵ As to Count 1, the Board explicitly upheld the hearing officer's finding that Preszler's conduct was knowing, but it decreased the presumptive sanction from disbarment to suspension because the record proved "injury or potential injury" rather than "serious or potentially serious injury." Id. The Board modified the aggravating and mitigating factors by adding the aggravating factor of multiple offenses, deleting the mitigating factor of delay, and finding that the mitigating factor of timely good faith effort to make restitution was entitled to little weight. DP 40. Finally, the Board increased the recommended sanction to a three-year suspension. DP 41. The vote was 9-2, with the two dissenting members favoring disbarment. DP 39 n.1.

⁵ The Disciplinary Board order is attached as Appendix D.

On appeal, Preszler challenges the suspension recommendation for Counts 1, 14 and 15. He accepts and does not address the Board's recommendations on Counts 3 and 17. Respondent's Brief (RB) at 19.

B. SUBSTANTIVE FACTS

1. Preszler's Background

At all relevant times, Preszler had "substantial experience" representing clients in Chapter 13 bankruptcies. FFCL ¶ 2. He started handling bankruptcy cases by 1986. By 2003, about 40 percent of his practice focused on consumer bankruptcies; he filed between 150 and 180 bankruptcies in that year alone. TR 544-46, 791. Also, he routinely represented clients in personal injury cases, representing eight to ten clients in such cases in 2003. TR 547-48.

2. The Gerrard Bankruptcy

In December 2000, Kinnie Gerrard (Gerrard) and her husband hired Preszler to represent them in their bankruptcy. FFCL ¶ 2. Preszler filed a Chapter 13 bankruptcy on their behalf. EX 104. A Chapter 13 bankruptcy allows debtors to discharge their debts with some repayment to creditors over an extended period of time. TR 292, 298. The Gerrards' plan was confirmed in October 2001. It required them to make payments to the bankruptcy trustee of \$236 for 58 months. FFCL ¶¶ 5-7.

The Gerrards told Preszler that one of their assets was Gerrard's unresolved personal injury claim from an automobile accident on September 6, 2000. FFCL ¶ 3; EX 103 at 6. The bankruptcy schedules Preszler filed stated the "current value" of the personal injury claim as \$16,150 and exempted that amount from creditors under 11 U.S.C. §522(d)(11)(D), which covers personal injury exemptions. FFCL ¶ 4.

3. Gerrard Obtains a Policy Limits Settlement

By August 2003, Gerrard personally had been in negotiations with Allstate adjuster Jenny Macy on her personal injury claim but had not yet settled it. She knew that the statute of limitations would run on September 6, 2003. On August 18, 2003, she and her husband met with Preszler to discuss the claim. FFCL ¶¶ 8-9, TR 39-40; EX 1. Preszler told them that he was not interested in handling the case due to the proximity of the statute of limitations but, as a "courtesy," agreed to call Macy to apply pressure to conclude the settlement. FFCL ¶¶ 9, 12. Preszler and Gerrard understood that Preszler would not receive any fee as a result of this call. FFCL ¶ 9.

Before the call, Preszler advised the Gerrards that he thought the claim was worth \$53,000 based on Gerrard's actual and projected medical expenses. He conveyed an offer to settle in that amount to Macy. Macy explained that policy limits were \$50,000 and that she would consider

making a policy limits offer if she received more medical records. FFCL ¶¶ 10-12; TR 44, 556-57. Preszler relayed the message and learned that Gerrard would accept policy limits. FFCL ¶ 13; TX 560, 589. Preszler, Gerrard and Macy all understood that Preszler was not representing Gerrard at this time. FFCL ¶ 12; TR 45-46, 553, 628.

Preszler met with the Gerrards the next day. He again told them that he did not want to get involved and that they should settle the claim themselves. At the end of this meeting, the parties understood that Preszler had not been hired for the personal injury case. FFCL ¶ 17; TR 830.

Over the next few days, Gerrard gathered the required medical records and faxed them to Macy. FFCL ¶¶ 17-22. The morning of August 22, 2003, Macy told Gerrard that, based on the information Gerrard had provided, Allstate would pay the \$50,000 policy limits, with \$19,000 going to pay State Farm on its subrogation claim and \$31,000 to Gerrard for general damages and future medical expenses. FFCL ¶ 22. This offer was acceptable to Gerrard. TR 61. Macy advised her that she would need to sign a release of claims against Allstate's insured if she wanted to finalize the deal. Gerrard had Macy fax the settlement and release to Preszler's office. Preszler previously had agreed that she could use his fax machine for this purpose. TR 55; FFCL ¶ 22.

4. Preszler Charges Gerrard a Contingent Fee for the Settled Case

Preszler received the faxed settlement paperwork from Macy later that morning, which included the release and a letter from Macy to Gerrard confirming the settlement offer. FFCL ¶ 23; EX 5-6, 8. Gerrard met with Preszler that afternoon to discuss how the settlement would affect her bankruptcy. FFCL ¶ 22. She did not intend to hire him to handle the claim because she “had already settled it.” TR 66.

Preszler began the meeting by explaining that, of the \$31,000 earmarked for her, Gerrard would be entitled to keep only \$17,425 under the personal injury exemption and the rest would go to her creditors. FFCL ¶ 25; TR 64. Gerrard asked if any of the settlement funds could be used to shorten the length of the bankruptcy plan. Preszler said no. TR 65; FFCL ¶ 27. As it turned out, although Preszler thought that the remaining funds would go to the unsecured creditors, the funds actually were available to benefit Gerrard. FFCL ¶ 25. She could have exempted almost \$10,000 more of the personal injury proceeds under the unused portion of the so-called “Wild Card” exemption.⁶ And, because the length

⁶ Under 11 U.S.C. § 522(d)(5), the “Wild Card” exemption allows debtors to use any unused portion of their homestead exemption to exempt personal injury proceeds over and above the \$17,425 exemption otherwise available for that purpose. FFCL ¶ 25. Preszler had used only a small portion of the Wild Card exemption when he filed the Gerrards’ bankruptcy. See EX 16.

of the plan was more than 36 months, she could have applied the rest to shorten the length of the plan. FFCL ¶¶ 25, 44; TR 387, 534-35.

In any event, Preszler suggested to Gerrard that, “maybe you should give me the money instead of the bankruptcy court?” TR 65. He proposed a one-third contingent fee based on his participation in the settlement process and his perceived risk of malpractice. FFCL ¶ 26. Gerrard was uncertain about this arrangement; she did not object to giving the money to her creditors if the law so required. FFCL ¶ 27. She called her husband from Preszler’s office and the two discussed Preszler’s request. They agreed to pay Preszler the contingent fee because he had been their bankruptcy attorney, he had called Macy, he thought it was fair that he get the money rather than “their creditors who were owed the money” (FFCL ¶ 28), and he told them they could not benefit from the additional personal injury proceeds themselves. FFCL ¶¶ 26-27.

Preszler presented Gerrard his standard one-third contingent fee agreement, which they both signed. FFCL ¶ 29, TR 798.⁷ The parties understood that the agreement required Gerrard to pay Preszler one-third of the \$31,000 that Allstate would send to Gerrard for compensation of her claims, or \$10,333.33. FFCL ¶ 29. Although Preszler had prepared the agreement earlier on August 22, after he had received the settlement

⁷ A copy of the fee agreement is attached as Appendix E.

paperwork, he dated the agreement August 18, 2003. FFCL ¶¶ 23, 29; TR 590, 622. Among other things, the agreement provided that Gerrard retained Preszler “to act as my attorney in settling, negotiating or trying my case[.]” EX 3. It further provided that Gerrard “understand[s] that [Preszler] would be willing to represent me on a guaranteed hourly time charge of \$160.00 per hour regardless of the results but I would rather have the claim handled on a contingent fee.” Id. Preszler, however, acknowledged that he never considered charging hourly and did not give Gerrard that option. TR 592.

Gerrard wanted some assurance that she really would obtain the exemption that Preszler promised, so Preszler handwrote a guarantee on her copy of the fee agreement: “TJ Preszler hereby guarantees a minimum recovery of \$17,425 from settlement to client.” FFCL ¶ 30; EX 3. At the time he wrote the guarantee, Preszler assumed the deal with Allstate would go through. TR 594. He told Gerrard not to let anyone see the guarantee. TR 73.

At the time Preszler entered into the contingent fee agreement, he “knew that he had done very little work on the personal injury matter” and that he had agreed not to charge for the work he had done. FFCL ¶ 26. He never did any independent investigation or research relating to the claim. He never spoke to a doctor or obtained or reviewed any medical

records. He never spoke to State Farm about the personal injury protection (PIP) recovery. Id. He never asked Gerrard about uninsured motorist (UIM) coverage. TR 195-96; TR 380-82. He never sent a Hamilton⁸ letter to provide the UIM carrier with an opportunity to buy out or advance \$50,000 to protect its potential subrogation interest as to PIP payments if Gerrard's case was worth more than \$50,000. He never analyzed the Thiringer⁹ claim to determine whether Gerrard could recover the \$19,000 paid to State Farm on its subrogation claim. TR 375-81. "He knew that Ms. Gerrard only needed to sign the release and send it to Ms. Macy to receive a check for \$31,000 . . . He knew there was no existing contingency with respect to the settlement because the claim really was already settled." FFCL ¶ 26.

Preszler faxed the signed release back to Allstate later that day with directions to make the check payable to Gerrard and him. FFCL ¶ 31; EX 7-8. He received the \$31,000 check on August 27, 2003 and deposited it into his trust account. FFCL ¶ 32.

5. Preszler Files Misleading Bankruptcy Documents

Under the governing bankruptcy procedures, a lawyer hired to handle a civil claim belonging to the estate must file an application for an

⁸ Hamilton v. Farmers Ins. Co., 107 Wn.2d 721, 733 P.2d 213 (1987).

⁹ Thiringer v. American Motorist Ins. Co., 91 Wn.2d 215, 588 P.2d 191 (1978).

order of employment with the trustee. If the trustee approves the application, the lawyer files a proposed order approving employment with the bankruptcy court. TR 323-29, 481-83.

After Preszler received the settlement proceeds from Allstate, his paralegal, Julie Ahlers, prepared the application to approve Preszler's employment as attorney. Preszler signed it under penalty of perjury "after quickly scanning it and without appreciating exactly what it said[.]" FFCL ¶ 33-34. Among other things, the application stated that the "case needs an attorney to settle," "the legal services to be rendered are: settle with Allstate Insurance," that Preszler would take payment under his proposed compensation arrangement "in accordance with 11 U.S.C. 329 and 330 and FRBP 2016," and that the application disclosed all material facts. FFCL ¶ 35; EX 11. But the application did not disclose that the case had settled or that Preszler already had received the settlement check. FFCL ¶ 35. Preszler submitted the application to the trustee and later filed it with the bankruptcy court. FFCL ¶ 35, 38; EX 11.

Ahlers then prepared a proposed order approving employment, which Preszler also signed "without having fully read it." FFCL ¶ 40. The order recited that Preszler was employed "with regards to an ongoing personal injury case" and "to continue the personal injury case in order to obtain a resolution and settlement[.]" FFCL ¶ 40. EX 15. Preszler

submitted the proposed order to the bankruptcy court, which entered it on September 15, 2003. Id.

6. Preszler Removes His Fee from Trust Without Notice to or Consent of Anyone

Bankruptcy rules provide that, before taking any fee, lawyers representing debtors or the estate first must file an application for award of compensation so the court can assess whether the fee was reasonable and the work beneficial to the debtor and estate. TR 329-32, 408-09, 486-87, 493; see 11 U.S.C. § 330; Federal Rule of Bankruptcy Procedure (FRBP) 2016.¹⁰

The order approving employment in this case, discussed above, stated specifically that “compensation as attorney for the Chapter 13 Trustee shall be made in accordance with 11 USC 327, and 330, and FRBP 22016 [*sic*: 2016]” and the fee agreement. FFCL ¶ 40; EX 15. Preszler was familiar with these rules and “knew, in particular, that before an attorney in a Chapter 13 proceeding could obtain a fee, that he must

¹⁰ 11 U.S.C. § 330(a)(1) requires a lawyer seeking payment of compensation to file an application with the court with notice to the trustee and all interested parties. The application requires the court to determine the amount of reasonable compensation to be paid based on enumerated factors including the time spent on the services and their necessity to the estate. FRBP 2016(a) sets forth the procedure for payment of services. It requires the lawyer seeking an order authorizing payment of compensation to “file an application setting forth a detailed statement of the services rendered, time expended and expenses incurred.” FRBP 2016(a). Copies of 11 U.S.C. § 330 and FRBP 2016 in effect in 2003 are attached as Appendix F.

obtain an order from the bankruptcy court allowing that.” FFCL ¶¶ 2, 42; see TR 227-32, 408-11, 607; EX 24-31 (fee applications Preszler submitted in other cases). Nonetheless, on September 15 and 16, 2003, Preszler removed from his trust account and disbursed to himself \$10,323 of the settlement proceeds without notice to the Chapter 13 trustee or the court and without a court order allowing him to do so. FFCL ¶ 42; EX 21.

Preszler did not tell Gerrard about this disbursal, either. And he did not prepare a settlement statement, something he normally did before distributing proceeds in personal injury cases. FFCL ¶ 42; TR 79, 620.

7. Gerrard Hires Hames, Who Confronts Preszler

In late September 2003, Ahlers made an offhand statement to Gerrard suggesting that she might have been able to use the settlement proceeds to reduce the term of her bankruptcy, contrary to what Preszler had told her. FFCL ¶ 43; TR 77-78. Upset, Gerrard contacted the Chapter 13 Trustee’s office for clarification. She described to Terry Poteet, an administrator, the settlement of the personal injury claim, the contingent fee agreement, and Preszler’s advice about how much of the settlement she could keep. FFCL ¶ 43; TR 80, 246-49. Poteet suggested she talk to Preszler and gave her a list of questions. TR 81; EX 18.

Rather than talk to Preszler, Gerrard sought help from lawyer William Hames. FFCL ¶ 44; TR 372, 907. Gerrard brought Hames the

contingent fee agreement and related documents and explained the circumstances surrounding the settlement. When Hames told Gerrard she could have used the Wild Card exemption to get more money, she started crying. TR 83, 372; FFCL ¶ 44.

Preszler's handling of the case raised numerous concerns for Hames. Among other things, he believed Preszler improperly had charged Gerrard a contingent fee after he had received a policy limits offer, the fee agreement was backdated, the documents filed with the bankruptcy court sought approval to work on a case that already had been settled, and, with respect to the personal injury matter, Preszler had failed to protect Gerrard's interests under Hamilton and Thiringer. TR 375-81. He called Preszler and confronted him about these issues. FFCL ¶ 45. Hames told Preszler that he was fired and that the Gerrards wanted an itemization of the amounts Preszler received and what had been paid to them, and a check for the difference. He offered a release of all claims against him in exchange. FFCL ¶ 45; TR 380-83; EX 19. Preszler agreed and said, "I screwed up, didn't I?" FFCL ¶ 46; TR 383.

8. Preszler Conceals His Trust Account Disbursal

Preszler restored to his trust account the funds he had removed for his fee and disbursed to Hames those funds and the remaining proceeds in the account belonging to the Gerrards. FFCL ¶ 46; EX 20, EX 21. But

the itemization Preszler sent Hames consisted only of the first three ledger entries: the deposit of the \$31,000 check and two prior disbursements to Gerrard. Preszler covered up the remaining entries, “most likely by placing a piece of paper over them.” FFCL ¶ 46. The concealed entries showed that Preszler had removed \$10,323 from trust and disbursed that sum to himself. FFCL ¶ 46; compare EX 20 with EX 21. Preszler “covered up these portions of his client ledger because he wanted to hide from Mr. Hames the fact that he has disbursed to himself \$10,323 prior to a time he was authorized by the court or anyone else to take that money. He knew what he had done was wrong.” FFCL ¶ 46. If Hames had seen the complete ledger, he would have “called the trustee.” TR 384.

Preszler also concealed these facts from the Association. In his response to this grievance, Preszler represented that “[a]ll money was retained, except for partial advances to the client, until the remainder was delivered to William Hames Office on October 2, 2003, including attorney fee’s [sic].” EX 33 at 4.

9. The Gerrards Recoup Additional Funds

Hames subsequently amended the Gerrards’ bankruptcy schedules to claim the unused Wild Card exemption of \$9,650, which exempted a total of \$27,027 of the personal injury proceeds from creditors, rather than the \$17,425 “guaranteed” by Preszler. Hames also disbursed \$2,925 of the

nonexempt settlement proceeds to the Chapter 13 Trustee, which shortened the duration of the Gerrards' plan by 12 months, saving them \$2,832. FFCL ¶¶ 47-48; TR 258, EX 23.

In addition, the hearing officer at the first disciplinary hearing recommended to Gerrard that she confer with a lawyer regarding an additional potential outstanding UIM claim relating to her personal injury claim. TR 197. She chose to handle the matter herself because, after her experience with Preszler, she didn't trust lawyers. TR 197. In January 2007, she negotiated a settlement of her UIM claim for \$40,000, plus payment of an additional \$4,800 in medical bills that were not part of the settlement with Allstate. TR 191-195; EX 37-39.

10. Defense Case

Preszler testified that on both August 18 and 19, 2003, Gerrard asked him to represent her in the personal injury matter but he told her he did not want to do so because the statute of limitations was due to expire shortly. TR 810-11, 820, 830.

Preszler denied that he knew about the policy limits settlement offer before he met with Gerrard on August 22, 2003. TR 555, 836. He said that he did not know that Allstate was even prepared to pay policy limits before the meeting. These assertions were impeached with prior testimony in which Preszler said that Macy had made a verbal policy

limits offer on August 18 and that he knew Gerrard would accept it. TR 555-56, 589, 953-54. Preszler acknowledged that the settlement offer and release Macy faxed to his office on August 22 bore a time stamp of "10 something a.m.," TR 559, but said he did not become aware of those documents until sometime "during the meeting [with Gerrard that afternoon] or after or just as we were concluding it." TR 843.

Preszler testified that when Gerrard came to his office on August 22, she insisted he represent her. TR 836-37. According to Preszler, when he expressed his reservations based on the looming statute of limitations, it was Gerrard who came up with the idea that he be paid from the money owed the creditors. TR 840-42. As he described it,

She's saying, 'Well, I don't want to sign this thing [the release] unless you sign it, too.' And I – finally it came down to this, 'If the bankruptcy trustee or my creditors are going to get this extra money, why can't you just take your fees out of that money?'

TR 842. Preszler said he agreed to represent Gerrard after her husband told him to do whatever his wife wanted. TR 843.

Preszler testified he prepared the contingent fee agreement during the meeting with Gerrard, not before. TR 590, 844. He gave differing explanations as to why he had dated the agreement four days before it was signed. See, e.g., TR 847, 849 958-59.

As to the fee itself, Preszler testified that, notwithstanding the agreement, he did not necessarily expect to receive a one-third contingent fee because the fee would be set by the bankruptcy court. According to him, one-third was “a cap on the maximum amount” he would be paid. TR 845. “The final word is the bankruptcy court judge.” TR 846.

Preszler admitted that he had not done very much work on Gerrard’s personal injury case. TR 853. But he did not consider charging her hourly due to “the risk [he] was taking of being involved.” TR 854. By that he meant that he was accepting the risk of committing malpractice because he had not performed any review of Gerrard’s claim. TR 855-57.

Preszler acknowledged that he told Gerrard that \$17,425 of the settlement proceeds would be exempt and that the rest would go to the unsecured creditors and would not help her get out of bankruptcy sooner. This was based on his understanding of the law. TR 560-61, 578, 861-64, 870-71, 874. He did not realize that he could use the Wild Card exemption for the personal injury claim until Hames pointed it out to him. TR 877, 907. He acknowledged he was wrong about that. TR 878.

With respect to the bankruptcy documents, Preszler testified that he was not familiar with the application for employment process. TR 886. The Gerrard matter was the only consumer bankruptcy case he ever handled in which he applied for employment as an attorney to handle a

personal injury matter for a debtor. TR 795-96. He did not read the application that Ahlers prepared because he trusted her. TR 603, 890-91, 960. Although he testified that he should have phrased the document differently to eliminate the representation that Gerrard “needs an attorney to settle” the personal injury claim, TR 919, he was impeached with previous testimony in which he said that statement was accurate. TR 963-64. He also claimed that he did settle the claim for Gerrard because his name was on the agreement. TR 967. He was not certain how he came to sign the order approving employment; he suspected that Ahlers gave it to him to sign, and he signed it. TR 898-99.

Preszler said he did not prepare a settlement statement for Gerrard because he was waiting until the amended exemption was approved, but he was terminated before that happened. TR 904-05. As to why he disbursed the \$10,323 fee to himself, Preszler testified that he thought the order approving employment authorized him to pay himself his contingent fee, even though he had not yet submitted a fee application and narrative to the court. TR 901-03. But he admitted he routinely submits fee applications to the court in Chapter 13 cases and was aware of the rule requiring him to submit an application describing the work performed before being paid. TR 607, 798, 800-01. He said he provided the incomplete ledger to Hames because all Hames asked for was an

accounting of the funds paid out to Gerrard, not of any funds he paid out to himself. He wasn't trying to hide from Hames that he had paid out the funds to himself. TR 909-11. With respect to his letter to the Association, Preszler testified that when he said that "all money was retained," he meant that the fee he had taken out of trust was retained in his general account. TR 986-87.

The hearing officer, noting Preszler's changing recitation of events over time, found him to be "an unreliable historian with regard to the facts of this case." FFCL ¶ 49.

III. SUMMARY OF ARGUMENT

This case is about a lawyer who took some easy money as an illegitimate contingent fee, then hid his actions from the bankruptcy court, the trustee, his client and successor counsel. Because of his misunderstanding of bankruptcy law, he thought the pocketed funds should have gone to his client's unsecured creditors. As it turned out, the funds were available to help his client. Only through the competent actions of successor counsel did his client reap the full benefits of her personal injury settlement.

The hearing officer and Disciplinary Board found that Preszler knew that he had done next to nothing on the case and that his client had settled it on her own when he charged the contingent fee. The hearing

officer and Board also found that Preszler knew he was required to obtain a court order before removing his fee from trust. The Board found that the presumptive sanction was disbarment, but mitigated that sanction to a three-year suspension. The Board was unanimous in recommending at least a three-year suspension; the dissenting members favored disbarment.

Preszler seeks a sanction of a reprimand or less. The gist of his argument is that the Court should reverse the hearing officer's factual findings and credit his testimony that he acted in good faith or, at worst, negligently. But the law is clear that the Court defers to the hearing officer's determinations of witness credibility. Only by retrying the facts and accepting testimony that the hearing officer rejected could the Court grant Preszler the relief he seeks. The Court has never done that, and should not do so here.

Preszler also claims that the Board erred in not finding additional mitigating factors and reducing the presumptive sanction of disbarment still further. The Board properly applied the ABA Standards. The Court should affirm and adopt the Board's recommendation.

IV. ARGUMENT

A. STANDARD OF REVIEW

Unchallenged findings of fact are verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d

550 (2005). The Court upholds challenged factual findings if they are supported by substantial evidence. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58-59, 93 P.3d 166 (2004). “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. And circumstantial evidence is as good as direct evidence.” Rogers Potato Service, 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 Kronenberg, 155 Wn.2d 184, 191-92, 117 P.3d 1134 (2005). The substantial evidence standard requires the reviewing body to view the evidence and the reasonable inferences “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).

In reviewing the factual findings, the Court does not retry the facts. See In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003). The Court gives particular weight to the credibility determinations of the hearing officer, who has had direct contact with the witnesses and is best able to make such judgments. Id. Thus, “even if this court were of the opinion that the hearing officer should have resolved the

factual finding otherwise, it would be inappropriate for it to substitute its judgment for that of the hearing officer or the Board.” In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 512, 29 P.3d 1242 (2001). Parties challenging factual findings must not simply reargue their version of the facts but, instead, must present argument as to why the findings are unsupported by the record. In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 331, 157 P.3d 859 (2007). The Court “will not overturn findings based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer or Board.” Id.

The Court reviews conclusions of law de novo, upholding them if supported by the findings of fact. Guarnero, 152 Wn.2d at 59. It also reviews sanction recommendations de novo, but generally affirms the Board’s sanction recommendation unless it “can articulate a specific reason to reject” it. Id. (quotations omitted). The Court hesitates to reject the Board’s recommendation if it is unanimous. Id. And, where the sanction recommendations of the hearing officer and Disciplinary Board differ, the court gives greater weight to the Board because “the Board is the only body to hear the full range of disciplinary matters and has a unique experience and perspective in the administration of sanctions.” In re Disciplinary Proceeding Against Cohen (Cohen II), 150 Wn.2d 744, 754, 82 P.3d 224 (2004) (quotations and citations omitted).

B. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS THAT PRESZLER ACTED KNOWINGLY

Under the ABA Standards, “knowledge” means “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” ABA Standards at 17. Like any state of mind, knowledge is a factual finding to which the Court defers. In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 744, 122 P.3d 710 (2005) (granting deference to hearing officer’s finding of negligence despite Association’s “suggestive” argument that lawyer acted knowingly).

The hearing officer found that Preszler acted knowingly when he charged an unreasonable contingent fee and withdrew funds from trust without a court order. FFCL ¶¶ 2, 42, 51, 57-58. The Board upheld these findings unanimously. DP 39. Without assigning error to any specific findings, Preszler claims that the hearing officer and Board should have credited his testimony that he acted in good faith and thus erred in finding that he acted knowingly. RB at 1-2 (Assignments of Error 2-5, 8-9), 24-25, 27-28. But “a hearing officer is not bound by various explanations if he or she is not persuaded by them.” In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 722, 72 P.3d 173 (2003); In re

Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 78, 960 P.2d 416 (1998).

1. The Hearing Officer and Board Properly Found That Preszler Knowingly Charged an Unreasonable Fee

These facts provide substantial evidence to support the conclusion that Preszler acted knowingly with respect to charging an unreasonable contingent fee:

- Preszler did not represent Gerrard before Allstate made its policy limits offer and faxed the release to his office on August 22. FFCL ¶ 12, 17;¹¹ TR 45-46, 553, 628, 830. He knew before that date that Gerrard would accept a policy limits offer. TR 560, 589.
- When Gerrard came to Preszler's office on August 22, she did not intend to hire him because she already had settled the case herself. TR 66.
- It was Preszler's idea to enter into the contingent fee agreement. He thought the money would be unavailable to Gerrard and would go to the unsecured creditors. TR 65; FFCL 26.
- Preszler prepared the fee agreement after he received the settlement documents from Allstate. FFCL ¶¶ 23, 29; EX 5, 6, 8 (showing documents faxed at approximately 10:00 a.m.); TR 559.
- Preszler backdated the fee agreement to a date before the settlement offer, TR 590, 622, something he could not explain. TR 847, 849, 958-59.

¹¹ The cited factual findings are verities as Preszler has not challenged them.

- Preszler wrote a “guarantee” on the fee agreement that Gerrard would get \$17,425, the value of the personal injury exemption, indicating he knew the settlement would go through. EX 3.
- The fee agreement stated that Preszler was retained “to act as my attorney in settling, negotiating or trying my case,” EX 3, which was not true.
- The fee agreement stated that Preszler had offered Gerrard an hourly fee agreement but she preferred a contingent fee, which was not true. EX 3; TR 592.
- When Preszler entered into the contingent fee agreement, he knew he had done almost no work on the case yet would be paid a fee of over \$10,000. FFCL ¶ 26, 29; TR 853.
- When Preszler entered into the contingent fee agreement, he knew all Gerrard had to do to get the check for \$31,000 was sign the release. FFCL ¶ 26, TR 586-87.

Preszler does not challenge these facts. Instead, he argues that Gerrard forced him into representing her and that it was she who suggested that he take his fee out of funds that would go to the creditors. TR 840-42; RB at 22. The hearing officer did not credit this testimony, finding instead that the contingent fee agreement was his idea, made with the intent of benefiting himself at the expense of the creditors. FFCL ¶ 26, 51. In any event, Preszler still would have committed misconduct even if Gerrard had suggested the unreasonable fee. In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 407, 99 P.3d 477 (2004) (“a client's acquiescence to an unreasonable fee does not absolve misconduct”).

Preszler next argues that the contingent fee agreement was “either illusory or at the least only an informal memorandum,” RB at 23, not a true agreement, because the bankruptcy court had the final word. TR 845-47. But the hearing officer did not accept this explanation, and it is belied by the uncontroverted evidence that Preszler acted on the agreement by removing funds from trust without court approval. FFCL ¶¶ 57-58.

Preszler also claims he did not knowingly charge an unreasonable fee because he thought a one-third contingent fee was reasonable based on his potential malpractice liability, which apparently was predicated on his having done nothing to evaluate the claim. He argues that the Association never proved that he did not believe that. RB at 23-25. But a lawyer need not know that his conduct violated the RPC to have acted “knowingly.” Egger, 152 Wn.2d at 416. The issue is whether he had a “conscious awareness of the nature or attendant circumstances of the conduct.” Id. As set forth above, there is ample evidence that at the time Preszler entered into the \$10,000+ contingent fee contract he was well aware that Gerrard had settled her case herself. The hearing officer and Board properly found he acted knowingly. See In re Disciplinary Proceeding Against Brothers, 149 Wn.2d 575, 585, 70 P.3d 940 (2003) (lawyer who obtained large fee for little work knowingly charged an unreasonable fee

despite his argument that he failed to recognize that the fee might be unreasonable).

Finally, contrary to Preszler's view, the risk at issue in contingent fee agreements is not the risk of liability for the lawyer but the risk of nonrecovery by the client. Where, as here, that risk is nonexistent, a contingent fee is unreasonable. See, e.g., Sulzer Hip Prosthesis & Knee Prosthesis Liability Litigation, 290 F. Supp. 2d 840, 856 (N.D. Ohio 2003) (declining to enforce contingent fee agreements made after parties announced settlement); Committee on Legal Ethics v. Tatterson, 177 W. Va. 356, 364-65, 352 S.E.2d 107 (1986) (disbarring lawyer who, among other things, charged contingent fee for collecting undisputed portions of insurance proceeds); Restatement (Third) of Law Governing Lawyers § 35 cmt. c (2000) (contingent fee unreasonable where "there was a high likelihood of substantial recovery by trial or settlement, so that the lawyer bore little risk of nonpayment"). Thus, even if Preszler did believe that his assumption of malpractice risk justified a large fee for no work on a case that already had settled, that view cannot be reasonable as a matter of law. To find otherwise would allow lawyers who perform the shoddiest work to command the highest fees, creating truly perverse incentives.

2. The Hearing Officer and Board Properly Found That Preszler Knowingly Removed His Fee from Trust in Violation of Bankruptcy Law

These facts provide substantial evidence to support the conclusion that Preszler acted knowingly with respect to removing his fee from trust without court approval:

- By August 2003, Preszler had represented bankruptcy clients for at least 17 years. In that year, 40 percent of his practice was consumer bankruptcy. TR 544, 79; FFCL ¶ 2.
- The order approving employment specifically cited to the bankruptcy rules that Preszler ignored. EX 15.
- Hames testified that it was never proper for a bankruptcy lawyer to take fees absent court order approving compensation – not just an order approving employment, TR 408-11, and “[i]f you practice in the bankruptcy arena, typically you know how you get paid.” TR 433.
- Preszler admitted that, as of August 2003, he knew he needed an order authorizing payment of compensation before he could get paid. TR 607.
- Preszler had prepared such orders in other cases. EX 24-31.
- Preszler’s lawyer conceded at hearing that Preszler knew of the forms for processing fee requests and how to process them. TR 227-29.
- Preszler concealed from Gerrard that he had removed the funds from trust by failing to prepare a settlement statement, contrary to his general practice. TR 79, 620.
- Preszler concealed from Hames that he had removed funds from trust without a court order by covering up the parts of his ledger that would have disclosed that information, FFCL ¶ 46; EX 20-21, reflecting consciousness of guilt.

- Preszler also concealed this information from the Association in responding to this grievance. EX 33.

Notwithstanding these facts and admissions, and citing only his own testimony, Preszler claims that the hearing officer should have believed that he thought he properly could remove his fee based solely on the fee agreement and the order approving employment. RB at 27-28.¹² But Preszler is simply rehashing his version of events. This is insufficient to overturn a factual finding. Marshall, 160 Wn.2d at 331. And the hearing officer was entitled to reject Preszler's self-serving testimony in any event. Whitt, 149 Wn.2d at 722; Dann, 136 Wn.2d at 78. The Court should not disturb the hearing officer's credibility determination. Kagele, 149 Wn.2d at 814.

C. THE FINDINGS SUPPORT THE CONCLUSION THAT PRESZLER VIOLATED RPC 8.4(d) BY REMOVING FUNDS FROM TRUST WITHOUT COURT ORDER

The hearing officer found that Preszler violated RPC 8.4(d) by disbursing his fee from trust in violation of the bankruptcy rules (Count 14) and without the consent, knowledge or authority of the bankruptcy

¹² Without citation, Preszler also claims that the Association must disprove his theory of the case. RB at 28. This is not the law. Guarnero, 152 Wn.2d at 61.

court or trustee (Count 15). FFCL ¶¶ 57-58.¹³ RPC 8.4(d) provides that “It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”

Preszler argues that the RPC 8.4(d) violations must be dismissed because that rule requires a pattern of misconduct, which was not present in this case. RB at 26, Assignment of Error 6. He cites In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 597, 48 P.3d 311 (2002), as stating that a single instance of impropriety will not support a violation of RPC 8.4(d). RB at 26. But the language he quotes was omitted from the Carmick decision when the Court amended its opinion on July 30, 2002. As amended, Carmick simply cites In Re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 801 P.2d 962 (1990), for the proposition that “the conduct prohibited by RPC 8.4(d) is more often associated with physical interference in the administration of justice or the violation of practice

¹³ Preszler argues that these counts should be “merged” because they involve the same subject matter and same rule, RPC 8.4(d). RB at 27. He fails to note that the hearing officer also concluded that, as to Count 14, his conduct violated RPC 3.4(c) (knowing violation of a court order), a conclusion he does not challenge except as to mental state, discussed above at pages 30-31.

norms.” Id.¹⁴ Thus, Preszler’s assertion that RPC 8.4(d) requires a pattern of misconduct misstates the law.¹⁵

The bankruptcy code and rules provide a comprehensive process for court scrutiny of professional compensation. 11 U.S.C. § 330; FRBP 2016; see generally In re Engel, 124 F.3d 567, 572-73 (3d Cir. 1997). These provisions “are designed to protect both creditors and the debtor against overreaching attorneys.” In re Kisseberth, 273 F.3d 714, 721 (6th Cir. 2001). The record demonstrates that Preszler violated both the law and well-established practice norms by removing his fee from trust absent court order. FFCL ¶¶ 2, 42; TR 329-32, 408-11, 486-87, 493. The Court should affirm the conclusion that he violated RPC 8.4(d). See People v. Singer, 955 P.2d 1005, 1006 (Colo. 1998) (lawyer violated RPC 3.4(c) and 8.4(d) by failing to comply with bankruptcy rules regarding compensation).

¹⁴ A copy of the Court’s July 30, 2002 Order Changing Opinion and the pertinent page of its Slip Opinion are attached as Appendix G.

¹⁵ Indeed, both before and after Carmick this Court has found violations of RPC 8.4(d) absent a pattern of misconduct. See, e.g., In re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 256, 66 P.3d 1057 (2003) (violation based on lawyer’s causing forged deed to be recorded); Bonet, 144 Wn.2d at 514 (violation based on prosecutor’s offering inducement to witness not to appear at trial).

D. THE COURT SHOULD ADOPT THE BOARD'S RECOMMENDED THREE-YEAR SUSPENSION

Under the ABA Standards, the Court first determines the presumptive sanction by examining the ethical duty violated, the lawyer's mental state and the injury caused. In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 331, 144 P.3d 286 (2006). It then determines whether the presumptive sanction should be increased or reduced due to aggravating or mitigating factors. Id.

Here, the hearing officer determined that the presumptive sanction was disbarment for Counts 1, 14 and 15, but mitigated the sanction to a 30-day suspension. The Board reduced the presumptive sanction to suspension for Count 1, agreed that the presumptive sanction was disbarment for counts 14 and 15, and mitigated the sanction to a three-year suspension.

Preszler argues that the sanction should be a reprimand or admonition. RB at 25, 29, 38. He claims that the Board engaged in an "overly rigid" application of the ABA Standards and failed to account for the substance of the misconduct, which he claims was just a mistake as to his entitlement to a fee. RB at 34-36. But Preszler's characterization of the misconduct, based on his version of events, bears little resemblance to what the hearing officer actually found – that, with the intent of

defrauding the unsecured creditors, he charged a contingent fee of more than \$10,000 for a case that he knew was already settled and for which he knew he had done no work, then surreptitiously withdrew his fee from trust in knowing violation of bankruptcy laws intended to protect debtors and creditors from this very misconduct. FFCL ¶¶ 51, 57-58. The Court should adopt the Board's recommendation without further mitigation.

1. For Count 1, the Board's Reduction of the Presumptive Sanction from Disbarment to Suspension Was Lenient

The hearing officer and Board determined that Preszler violated RPC 1.5(a) (unreasonable fee) by charging a contingent fee of \$10,323 for a claim that already was settled. FFCL ¶ 51. ABA Standard 7.0 applies to this misconduct:

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 a client, the public, or the legal system.

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.

7.3 Reprimand is generally appropriate when a lawyer negligently 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.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a

violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

The hearing officer determined that the presumptive sanction was disbarment under ABA Standard 7.1. FFCL ¶ 51. The Board reduced the presumptive sanction to suspension on grounds that the record proved “injury or potential injury” but not “serious or potentially serious injury.” DP 39.

Preszler argues that the hearing officer and Board erred because he acted negligently, not knowingly. RB at 24-25. As discussed above at pages 26-27, that argument fails because the hearing officer rejected it; mental state is a factual determination afforded great deference, Longacre, 155 Wn.2d at 744, and ample evidence in the record supports the hearing officer’s finding.

But the Board’s determination that the record supports only “injury or potential injury” rather than “serious or potentially serious injury” is questionable. While it is true that the injury was potential rather than actual due to Hames’s intervention, it is difficult to understand how the potential injury was not serious. Preszler kept for himself over \$10,000 in fees from a woman who not only was in bankruptcy but was unemployed due to mental health problems and had two chronically ill children, including one with Down’s Syndrome. TR 31-35. To someone in that

situation, \$10,000 surely would be a hefty sum. The facts support a determination that the potential injury was “serious” and that the presumptive sanction for this violation is disbarment.¹⁶

2. For Counts 14 and 15, the Board Properly Found That the Presumptive Sanction Was Disbarment

In Counts 14 and 15, the hearing officer and Board found that Preszler violated RPC 3.4(c) (knowingly disobeying the rules of a tribunal) and RPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice) by disbursing his fee from trust in violation of bankruptcy law and without the consent, knowledge, or authority of the bankruptcy court or trustee. FFCL ¶¶ 57-58. The Board adopted the hearing officer’s determination that the presumptive sanction was disbarment. DP 41.

ABA Standard 7.0, above at pages 35-36, applies to the RPC 8.4(d) violation. ABA Standard 6.2 applies to the RPC 3.4(c) violation:

6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

¹⁶ We have found no cases in which this Court delineates the degree of financial harm necessary to find “serious” injury. But it appears that in In re Disciplinary Proceeding Against Rentel, 107 Wn.2d 276, 286, 729 P.2d 615 (1986), where a lawyer misappropriated a total of \$26,000 from nine separate clients, the Court found “serious financial injury” based on individual losses less than that at issue here.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

Again, Preszler argues that the hearing officer and Board erred because he acted negligently, not knowingly. RB at 27-28. That argument fails for the reasons discussed above, at page 36, with respect to Count 1. See Longacre, 155 Wn.2d at 744.

Preszler also argues that his “early removal” of the funds from trust did not cause injury because he “made the amounts good” when questioned by Hames. RB at 29. Although Hames’s prompt and effective intervention ensured that any injury was potential rather than actual, the injury was serious nonetheless. Preszler subverted bankruptcy law by withdrawing his fee from trust without applying for, much less obtaining, a court order, thereby depriving the court of the opportunity to assess the

value of his negligible services. Without the court order, the funds belonged to the bankruptcy estate. TR 408; see Singer, 955 P.2d at 1006. But once Preszler removed the funds from trust, they became available to his creditors, could have been spent, or, if he became incapacitated or died, would have been unidentifiable as belonging to Gerrard or her bankruptcy estate. In other words, the injury was serious because the funds potentially would have been unavailable in the likely event that the court declined to approve the contingent fee. That he made good on the funds when caught does not change this result. See In re Disciplinary Proceeding Against Schwimmer, 153 Wn.2d 752, 765-66, 108 P.3d 761 (2005) (lawyer's repayment of misappropriated funds on client demand did not change nature of the violation). The Board and hearing officer properly found that the presumptive sanction was disbarment.

3. The Board Mitigated the Sanction from Disbarment to Suspension. No Further Mitigation Is Warranted.

The Board found two aggravating factors (multiple offenses and substantial experience) and four mitigating factors (absence of prior discipline, timely good faith effort to make restitution, full and free disclosure, and good character and reputation). DP 40. On the basis of these factors, the Board mitigated the sanction from disbarment to a three-year suspension. DP 41.

Preszler challenges the Board's decision regarding one aggravating factor and two mitigating factor. The claims fail for the reasons set forth below. Even if they had merit, they would not justify further mitigation.

a. The Board Properly Applied the Aggravating Factor of Multiple Offenses

Preszler argues that the Board improperly applied the aggravating factor of multiple offenses (ABA Standard 9.22(d)) because there were only three counts found "in terms of suspension," and two of them should be merged. RB at 29. Just because Preszler chose not to appeal some of the violations or they resulted in sanctions less than suspension does not mean they are disregarded for purposes of this aggravating factor. Dann, 136 Wn.2d at 81 (including unchallenged reprimand in determining multiple offenses). Here, the hearing officer and Board found Preszler engaged in four distinct acts of misconduct: charging an unreasonable fee (RPC 1.5(a); Count 1), failing to explain the bankruptcy exemptions to Gerrard (RPC 1.4(b); Count 3), withdrawing fees from trust without notice or court order (RPC 3.4(c) and 8.4(d); Counts 14 and 15) and failing to supervise Ahlers (RPC 5.3(b) and 5.3(c)(1); Count 17). The Board properly applied the aggravating factor of multiple offenses.

b. The Board Properly Found That the Mitigating Factor of Timely Effort to Pay Restitution was Entitled to Little Weight

The hearing officer applied the mitigating factor of timely good faith effort to effort to make restitution (ABA Standard 9.32(d)). FFCL ¶ 51. The purpose of this mitigating factor is to “ensure that the lawyer has recognized the wrongfulness of his conduct.” In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 95, 101 P.3d 88 (2004) (declining to apply mitigator when lawyer settled client lawsuit to avoid the expenses of a trial).

The Board affirmed but found that this factor carried little weight because “Preszler required his client to sign a release to get her own money back.” DP 40. Preszler argues that the Board erred because the record showed that the release was Hames’s idea. RB at 32. But while Hames initially proposed the release, TR 391, the record shows that the release was part of the agreement by which Preszler agreed to return the fees. EX 19, 20. The purpose of the release was to insulate Preszler from any malpractice liability, which he believed was substantial. TR 991. It does not acknowledge any wrongdoing. EX 22. The Board properly found that this mitigating factor was entitled to little weight.

c. The Board Properly Rejected the Mitigating Factor of Delay

i) Proceedings Below

The grievance was filed on January 28, 2004. The investigation was completed within five months, on June 14, 2004. EX 128. The Review Committee ordered it to hearing on September 10, 2004. CP 1. The Association filed the formal complaint 24 days later, on October 4, 2004. CP 3. Preszler filed his answer five months later, on March 4, 2005. CP 18.

On May 27, 2005, the first hearing officer disclosed in his oral ruling that he personally knew Preszler and that he had considered evidence outside the record. EX 128; FFCL at 5. On May 31, 2005, the next business day, the Association filed a motion with the Chief Hearing Officer to remove the first hearing officer because he had personal knowledge and had considered evidence outside the record. Preszler opposed the motion. On June 22, 2005, the Chief Hearing Officer denied the Association's motion. EX 128.

The first hearing officer filed findings of fact and conclusions of law on August 19, 2005. On September 1, 2005, the Association filed a notice of appeal. In its appeal, the Association asserted, among other

things, that the case should be remanded to be re-tried before a different hearing officer. EX 128.

On March 29, 2006, the Disciplinary Board remanded the matter for a new hearing before a different hearing officer. On April 26, 2006, Preszler filed a Petition for Discretionary Review of the Board's remand order. The Court denied the petition on July 10, 2006. EX 128.

On August 1, 2006, Lewis Card was appointed as hearing officer. EX 128. The second hearing commenced on April 16, 2007. TR 1.

The hearing officer applied the mitigating factor of delay based on the "delay of many months" between the two hearings. FFCL ¶ 51. He noted that the delay was based on the conduct of the first hearing officer and was not the fault of either party, but opined that the mitigating factor was appropriate since Preszler was not to blame. Id. at n.2. The Board reversed. It found that the main source of delay was the necessity for a second hearing, not delayed prosecution by the Association, and that the record contained no evidence of prejudice to Preszler. Under these circumstances, the Board ruled that the "passage of time" between the conduct and the sanction was not a mitigating factor. DP 40.

ii) The Mitigating Factor of Delay Should Not Be Based on the Length of Time Required to Litigate

Preszler claims that the Board erred in striking the mitigating factor of delay because that factor does not require a showing of prejudice or bad faith by the Association. He relies on In re Disciplinary Proceeding Against Tasker, 141 Wn.2d 557, 568, 9 P.3d 822 (2000). But the Tasker court confronted a case involving “slack prosecution” by the Association, id., a factor not remotely present here. That case does not speak to a situation involving diligent prosecution but prolonged litigation based on factors outside the parties’ control. To apply the mitigating factor of delay in such a situation would be a windfall to a respondent lawyer at the expense of public protection.

Also unlike Tasker, the record here contains no evidence of prejudice to Preszler. See Tasker, 141 Wn.2d at 568 (delay “subjected [Tasker] to the opprobrium of Bellingham’s small legal community”). Here, to the contrary, Preszler has been able to practice law unimpeded and “push back the day of judgment.” Discipline of Babilis, 951 P.2d 207, 217 (Utah 1997). This Court repeatedly has found the mitigating factor of delay to be inapplicable absent some prejudice to the lawyer. Kronenberg, 155 Wn.2d at 196-97; In re Disciplinary Proceeding Against Cohen (Cohen I), 149 Wn.2d 323, 341, 67 P.3d 1086 (2003); In re Disciplinary

Proceeding Against Huddleston, 137 Wn.2d 560, 576, 974 P.2d 325 (1999).¹⁷

Finally, even if the Court applies this mitigating factor, it is but one factor to be evaluated in the context of the case as a whole. Dann, 136 Wn.2d at 82-83. The presumptive sanction already has been decreased from disbarment to suspension on the basis of the mitigating factors. It should not be mitigated further. Id.

4. The Remaining “Noble” Factors Support the Board’s Recommendation

Finally, the Court reviews the two remaining “Noble” factors of unanimity and proportionality. “The court will generally adopt the Board’s recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision.” Haley, 156 Wn.2d at 339.

a. All Board Members Agreed on a Sanction of at Least a Three-Year Suspension

The Board voted 9-2 in favor of a three-year suspension. The two dissenting Board members favored disbarment. DP 38-39 n.1. The Court gives “great deference to the decisions of a unanimous Board[.]”

¹⁷ In In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 126 P.3d 1262 (2006), the Court applied the mitigating factor of delay without a finding of prejudice, but in that case the delay was far more substantial than the passage of time in this case: there was a five-year delay in reporting the misconduct, a four-year delay between the grievance and the formal complaint, and a 15-year delay between the misconduct and the final resolution of grievance.

Whitney, 155 Wn.2d at 469. Such deference is based on the Board's "unique experience and perspective in the administration of sanctions." Egger, 152 Wn.2d at 404 (quotations omitted). Also, for this reason the Board's sanction recommendation is entitled to greater weight than that of the hearing officer. Cohen II, 150 Wn.2d at 754.

b. Preszler Fails to Meet His Burden of Proving That a Three-Year Suspension 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 (quotation omitted). "[T]he attorney facing discipline bears the burden of bringing cases to the court's attention that demonstrate the disproportionality of the sanction imposed." Cohen II, 150 Wn.2d at 763.

Preszler cites to several cases in an effort to demonstrate disproportionality, but none is "similarly situated." He admits as much with respect to the cases involving conduct prejudicial to the administration of justice. RB at 37. As to the cases he cites regarding unreasonable fees (RB at 36-37), none involved knowing avoidance of laws and court rules designed specifically to monitor the reasonableness of a lawyer's fee. And none involved a Board finding that the presumptive sanction was disbarment, either. Preszler has not met his burden of

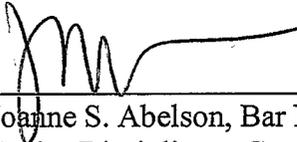
showing that the Board's recommended three-year suspension in this case is disproportionate.

V. CONCLUSION

Preszler intended to defraud his client's bankruptcy creditors by accepting an undeserved \$10,000 fee, then disbursed the funds to himself in knowing disregard of the oversight of the bankruptcy court. His conduct is inimical to his role as a lawyer and officer of the court. The Court should affirm the Board's recommendation of a three-year suspension to protect the public and the integrity of the legal profession.

RESPECTFULLY SUBMITTED this 11th day of June, 2008.

WASHINGTON STATE BAR ASSOCIATION



Joanne S. Abelson, Bar No. 24877
Senior Disciplinary Counsel

APPENDIX A

FILED

MAY 16 2007

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In Re

TERRY J. PRESZLER

Lawyer (Bar No. 13836)

Public No. 04#00064

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FORMAL COMPLAINT

The respondent was charged by formal complaint dated October 4, 2004, and filed with the disciplinary board on that date. The complaint was amended on April 26, 2005 and filed with the disciplinary board on that date. The amended complaint alleged 17 counts of violation of the Rules of Professional Conduct. At the hearing the Bar Association voluntarily dismissed seven of those counts. The counts dismissed were Count 4, Count 5, Count 6, Count 7, Count 10, Count 11, and Count 13. Thus, at

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DAVIS, ARNEIL LAW FIRM, LLP
617 WASHINGTON STREET
P.O. BOX 2136
WENATCHEE, WASHINGTON 98807
(509) 662-3551

1 the time of the hearing the respondent was charged with the following ten counts of
2 violation of the Rules of Professional Conduct:

3
4 Count 1

5 By charging and/or attempting to charge or obtain an unreasonable fee
6 from Kinnie Gerrard and/or the Gerrards' bankruptcy estate, respondent violated RPC
7 1.5(a) and/or RPC 8.4(a).¹
8

9 Count 2

10 By obtaining and/or attempting to obtain a portion of the proceeds of Ms
11 Gerrard's personal injury claim through deceit, dishonesty, and/or misrepresentation
12 directed toward Ms Gerrard, respondent violated RPC 8.4(c).
13

14 Count 3

15 By failing to explain to Ms Gerrard about exempting the proceeds of the
16 personal injury claim and/or by failing to accurately explain the effect or benefit of
17 using the personal injury claim proceeds to pay creditors in the Chapter 13 bankruptcy,
18 respondent violated RPC 1.4(b).
19

20 Count 8
21

22
23 ¹ Because the alleged violations in this proceeding occurred prior to the effective date of the
24 September 1, 2006 amendments to the Rules of Professional Conduct, all counts were heard under the rules in
effect prior to September 1, 2006.

25 **FINDINGS**
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1 By failing to disclose to the Trustee information regarding the resolution
2 of Ms. Gerrard's personal injury claim and/or the fee agreement, respondent violated
3
4 RPC 1.4(b).

5 Count 9

6 By signing and/or filing with the bankruptcy court documents (including
7 the application, the altered fee agreement, the supplement to application, the proposed
8 order approving employment), and/or the amended bankruptcy schedules containing
9 false, fraudulent, misleading, and/or deceitful statements and/or misrepresentations,
10 respondent violated the following crimes (sic): (1) 18 USC Section 152(3) (knowingly
11 and fraudulently making a false declaration verification or statement under penalty of
12 perjury), (2) 18 USC Section 152(6) (knowingly and fraudulently receiving or
13 attempting to obtain money or compensation for acting in a case under Title 11), (3) 18
14 USC Section 152(8) (knowingly and fraudulently concealing or falsifying information
15 relating to the property or financial affairs of the debtor), (4) 18 USC Section 157 (as
16 part of a scheme to defraud or attempt to defraud filing a document in a proceeding
17 under Title 11 or making a false or fraudulent representation), and/or (5) 18 USC
18 Section 1001 (knowingly and wilfully making any materially false, fictitious or
19 fraudulent statement or representation in any matter within the jurisdiction of the
20 judicial branch of the government), and thereby violated RPC 8.4(b).

21 **FINDINGS**

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Count 12

By signing, filing, submitting, and/or presenting to the bankruptcy court documents and/or pleadings (including the application, the altered fee agreement, the supplement to application, the proposed order approving employment, and/or the amended bankruptcy schedules) containing false, fraudulent, misleading, and/or deceitful statements or signatures and/or misrepresentations, and/or by failing to disclose to the bankruptcy court material facts relating to Ms. Gerrard's personal injury claim, the fee agreement, and/or the resolution of the personal injury claim, respondent violated RPC 3.4(d) (by violating Bankruptcy Rule 9011).

Count 14

By disbursing the personal injury proceeds to himself without the consent, knowledge, or authority of the bankruptcy court and/or in violation of the order approving employment, respondent violated RPC 3.4(c), RPC 8.4(c), RPC 8.4(d), and/or RPC 8.4(j).

Count 15

By disbursing the personal injury proceeds to himself without the consent, knowledge, or authority of the bankruptcy Trustee, respondent violated RPC 1.14(a), RPC 8.4(c), and/or RPC 8.4(d).

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Count 16

By failing to provide competent and/or diligently (sic) representation to the Gerrards regarding the proceeds from Ms. Gerrard's personal injury claim and/or by failing to diligently and competently disburse the proceeds of the personal injury claim, respondent violated RPC 1.1 and/or RPC 1.3.

Count 17

To the extent that respondent's misconduct described above is the result of his failure to supervise adequately his non-lawyer assistant in the preparation and submission of pleadings, schedules, and/or other documents filed with the court and/or submitted to the Trustee, respondent violated RPC 5.3 and/or RPC 5.5(b).

HEARING

There was a previous hearing on this matter which occurred between May 24, 2005 and May 27, 2005. The hearing officer there considered evidence outside the record and also took into account his personal knowledge of Mr. Preszler. On March 29, 2006, the Disciplinary Board remanded this matter for a new hearing before a new hearing officer. Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), a hearing was held before the undersigned hearing officer on April 16, 17, 18, 19 and 20, 2007. Disciplinary counsel John Burke appeared for the Association and respondent appeared and was represented at the hearing by his attorney, Kurt Bulmer.

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1 On the hearing dates indicated, witnesses were sworn and testimony was presented, and
2 documents were admitted into evidence. Having considered the evidence and argument
3 of counsel, the hearing officer makes the following findings of fact, conclusions of law,
4 and recommendation. The findings of fact set out below were proven by a clear
5 preponderance of the evidence.
6

7
8 **FINDINGS OF FACT**

9 1. Respondent Terry J. Preszler was admitted to the practice of law in
10 the State of Washington on November 11, 1983. He has practiced in the Tri-Cities area
11 since that time. He has not been previously disciplined by the Bar Association.
12

13 2. On December 19, 2000, Kinnie Gerrard and her husband, Jeffery
14 Gerrard, hired Mr. Preszler to represent them in a Chapter 13 bankruptcy. At that time
15 Mr. Preszler had substantial experience representing people in Chapter 13 bankruptcies.
16 He had filled out many bankruptcy documents, including applications for fees. He was
17 familiar with the bankruptcy rules and knew, in particular, that before an attorney in a
18 Chapter 13 proceeding could obtain a fee, that he must obtain an order from the
19 bankruptcy court allowing that.
20

21 3. The Gerrards informed Mr. Preszler that Mrs. Gerrard had an
22 unresolved pre-bankruptcy personal injury claim as a consequence of an automobile
23 accident occurring on September 6, 2000.
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25 **FINDINGS**
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1 4. At the time the Gerrards' Chapter 13 bankruptcy was filed, Mr.
2 Preszler was aware that 11 USC Section 522 (d)(11)(D) permitted an individual debtor
3 to claim an exemption of up to \$16,150.00 for certain personal injuries. On April 4,
4 2001, Mr. Preszler filed a Chapter 13 bankruptcy for the Gerrards. The bankruptcy
5 schedules filed by Mr. Preszler on behalf of the Gerrards showed the personal injury
6 claim as an asset of the bankruptcy estate with a "current value" of \$16,150.00, even
7 though at that time Mr. Preszler knew almost nothing about the claim or its value. He
8 did not leave blank the area designated for the value of the claim nor did he designate
9 the value as "unkown". The schedules claimed that the \$16,150.00 personal injury
10 claim was exempt under 11 USC Section 522(d)(11)(D). The bankruptcy schedules
11 claimed other exemptions, including exemptions under 11 USC Section 522(d)(5).
12

13 5. The initial Chapter 13 plan filed by the Gerrards established the
14 plan base (the Base) at the amount of \$13,365.41. The duration of the plan at that time
15 was 57 months. Under that plan for each month for the duration of the plan the Gerrards
16 were required to pay \$236.00.
17

18 6. On or about September 27, 2001, Mr. Preszler and the Chapter 13
19 Trustee, Daniel H. Brunner, stipulated to modify the Chapter 13 plan to provide a new
20 Base of \$13,743.88 and a new plan duration of 58 months. The balance of the plan,
21 including the monthly payment due, was to remain the same.
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26 FINDINGS
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1 7. On October 12, 2001, Judge John Klobucher, bankruptcy judge for
2 the Eastern District of Washington, entered an order confirming the Gerrards' Chapter
3 13 plan.
4

5 8. At the time the Chapter 13 bankruptcy plan was confirmed, Mr.
6 Preszler did not represent Mrs. Gerrard in her personal injury claim.
7

8 9. By August 18, 2003, Mrs. Gerrard had not settled her personal
9 injury claim. She scheduled an appointment with Mr. Preszler and she and her husband
10 met with Mr. Preszler on August 18, 2003. She expressed concern about her personal
11 injury claim because she understood that the statute of limitations was due to expire on
12 September 6, 2003. She asked Mr. Preszler if he would call Jenny Macy, the Allstate
13 insurance adjuster handling the claim. Mr. Preszler said he was not interested in
14 handling the case because of the proximity of the statute of limitations. He did say,
15 though, that as a courtesy he would call Ms. Macy in an attempt to put some pressure on
16 her in order to bring the settlement to conclusion. Both Mr. Preszler and Mrs. Gerrard
17 understood that Mr. Preszler would not receive any fee as a result of his help in the
18 personal injury matter.
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22 10. Mr. Preszler and the Gerrards then discussed some of the details of
23 the claim. Mr. Preszler learned that Mrs. Gerrard's medical expenses at that time were
24 about \$18,000.00, that State Farm Insurance had been providing PIP benefits for Mrs.
25

26 **FINDINGS**
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1 Gerrard, that State Farm was claiming a lien for those benefits, and that Mrs. Gerrard
2 would incur future medical expenses, estimated then to be \$5,000.00.
3

4 11. After discussions with the Gerrards, Mr. Preszler told the Gerrards
5 that he thought the claim was worth about \$53,000.00. Mrs. Gerrard said she would
6 accept that amount in settlement. Mr. Preszler then called Jenny Macy. Her name is now
7 Jenny Stevens.
8

9 12. Mr. Preszler and Ms. Macy briefly discussed Mrs. Gerrard's case.
10 Mr. Preszler conveyed an offer to settle for \$53,000.00. Ms. Macy said she could not
11 settle for that amount because she needed additional medical information from Mrs.
12 Gerrard. She said she had explained that to Mrs. Gerrard. She did not make a policy
13 limits offer. She did say that if Mrs. Gerrard could get those records to her that she
14 would be in a position to re-evaluate the claim and make a new offer to Mrs. Gerrard.
15 Neither after this conversation or after any other communication with Mr. Preszler did
16 Ms Macy think Mr. Preszler was representing Mrs. Gerrard. Mr. Preszler believed he
17 was providing this service only as a courtesy.
18
19

20 13. The telephone conversation ended and Mr. Preszler relayed to the
21 Gerrards what Ms Macy had said. He confirmed that he did not want to take the case
22 because the statute of limitations was so near. He said he did not think any attorney
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1 would take the case because of the proximity of the statute of limitations. He told Mrs.
2 Gerrard to get the records and send them to Ms. Macy.

3
4 14. Mrs. Gerrard then decided to gather the medical records on her
5 own. Meanwhile, she scheduled another appointment with Mr. Preszler for August 19,
6 2003.

7
8 15. After the August 18th meeting with Mr. Preszler, Mrs. Gerrard's
9 brother-in-law died. This was traumatic to her because her brother-in-law had been a
10 father figure to her. Even so, she remained capable of conducting her business affairs.

11
12 16. On August 19, 2003, the Gerrards again went to the office of Mr.
13 Preszler. Mr. Gerrard wanted to hire Mr. Preszler as the Gerrards' attorney for the
14 personal injury claim. Although Mrs. Gerrard was emotional due to the death of her
15 brother-in-law, she was not a vulnerable adult at this time, or any other time material to
16 this case. Her mental health issues were under control as a consequence of her faithful
17 adherence to the treatment regimens established by her health-care providers. This
18 included the taking of appropriate medications.

19
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21 17. At the meeting on August 19, Mr. Preszler indicated that he did not
22 believe Mrs. Gerrard should make any decision regarding whether to hire him given her
23 understandable emotional upset brought on by the death of her brother-in-law. Mrs.
24 Gerrard agreed that she would not hire him. At the conclusion of that meeting, the

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1 Gerrards and Mr. Preszler understood that Mr. Preszler had not been retained for
2 purposes of the personal injury claim.
3

4 18. On August 20, 2003, Mrs. Gerrard had a meeting with her shoulder
5 doctor. She told him he needed to fax to Jenny Macy the medical records that Ms. Macy
6 said she needed in order to complete the evaluation of Mrs. Gerrard's claim.
7

8 19. On August 21, 2003, Mrs. Gerrard spoke to Jenny Macy by
9 telephone. Ms. Macy said she had not received all of the medical information that she
10 needed. Mrs. Gerrard said it had been sent. Ms. Macy said she could not re-evaluate the
11 claim without this information. Mrs. Gerrard told her that the materials would be
12 arriving and that she expected to receive a new offer from Ms. Macy. Ms. Macy did say
13 that without the additional medical records she thought the case was worth about
14 \$15,000 plus the amount of State Farm's PIP. She said that if she received the needed
15 medical information that she would re-evaluate the personal injury claim, would contact
16 State Farm to verify the subrogation amount due State Farm, and then would call Mrs.
17 Gerrard the next day to discuss a settlement.
18

19 20. Mrs. Gerrard asked Ms. Macy to send a letter confirming that to
20 Mr. Preszler. Mrs. Gerrard also told Ms. Macy that if she did not follow through, then
21 Mrs. Gerrard would hire Mr. Preszler the next day to represent her in a legal action.
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1 Jenny Macy did send a confirming letter to Mr. Preszler on August 21, 2003. Mr.
2 Preszler received and reviewed that letter.

3
4 21. Later on August 21, 2003, Ms. Macy received the needed medical
5 information. She contacted State Farm and agreed to pay them \$19,000 for their
6 subrogation claim.

7
8 22. On August 22, 2003, Ms. Macy called Mrs. Gerrard and told her
9 that she had received the needed medical information. She also explained that she had
10 reached an agreement with State Farm regarding its subrogation claim. She then
11 extended a policy limits offer of \$50,000. She told Mrs. Gerrard that \$19,000 would go
12 to State Farm to reimburse it for its PIP payments. The balance, \$31,000, would be sent
13 to Mrs. Gerrard to compensate for approximately \$10,000 in future medical expenses
14 and \$21,000 in general damages. She said that if Mrs. Gerrard wanted to accept the offer
15 she would have to sign a release of claims against Allstate's insured. At Mrs. Gerrard's
16 request, she sent the settlement paperwork to Mr. Preszler. Mrs. Gerrard set up an
17 appointment with Mr. Preszler.

18
19 23. On August 22, 2003, Mr. Preszler received the settlement
20 paperwork, including a release and a letter from Jenny Macy confirming the settlement
21 offer. Knowing that Mrs. Gerrard would be coming to his office that day, Mr. Preszler
22 made accessible one of his form contingent fee agreements.

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25 **FINDINGS**

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1 24. That afternoon Mrs. Gerrard and her sister went to Mr. Preszler's
2 office. Her sister was still understandably distraught at the death of her husband on
3 August 18, 2003. The two sisters entered Mr. Preszler's office together. Concerned over
4 the presence of the sister, Mr. Preszler escorted the sister out of the office and met alone
5 with Mrs. Gerrard.
6

7 25. Mr. Preszler next discussed with Mrs. Gerrard the settlement
8 paperwork he had received from Ms. Macy. He explained that he could file a request to
9 increase the Gerrard's personal injury exemption from \$16,150 to \$17,425. He told her
10 that this was the most she could receive from the personal injury settlement proceeds.
11 He said the balance of the settlement proceeds would have to pay creditors in the
12 Gerrard bankruptcy. Although at that time he believed that was true under the
13 bankruptcy laws, this turned out to be untrue. He could have exempted almost \$10,000
14 more of the personal injury recovery proceeds under the "Wild Card" exemption in 11
15 USC section 522 (d) (5). This exemption allowed a debtor in a bankruptcy to use any
16 unused portion of his homestead exemption to exempt personal injury recovery proceeds
17 over and above the \$17,425 exemption that was otherwise available for that purpose.
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22 26. Except for the few things mentioned above, Mr. Preszler
23 contributed nothing towards the settlement of Mrs. Gerrard's personal injury claim. He
24 never did any independent investigation or research relating to the claim, he never spoke
25

1 to State Farm about the PIP or underinsured motorist coverage, he never spoke to a
2 doctor, and he never obtained any medical records or other records related to the
3 personal injury matter. Mr. Preszler knew he had done very little work on the personal
4 injury matter. He knew that the work he had done on the personal injury matter had been
5 pro bono up to that time. He knew that Mrs. Gerrard only needed to sign the release and
6 send it to Ms Macy in order to receive a check for \$31,000. He knew he had no
7 contingent fee agreement with Mrs. Gerrard. He knew there was no existing contingency
8 with respect to the settlement because the claim really was already settled. Despite these
9 things, Mr. Preszler next suggested to Mrs. Gerrard that his participation in the personal
10 injury settlement process, and his perceived risk of malpractice, justified payment to him
11 of a one-third contingency fee. He convinced Mrs. Gerrard that in any event this would
12 be fair since otherwise, he said, the money would just go towards payment of the
13 amounts owed to the Gerrard's creditors and could not benefit the Gerrard's in any way.

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18 27. Mrs. Gerrard then asked if Mr. Preszler was sure that the money
19 could not be used at least to reduce the time over which the Gerrard's were required to
20 make payments under the bankruptcy plan. Mr. Preszler assured her that the proceeds
21 could not be used for that purpose. Mrs. Gerrard was still uncertain about giving Mr.
22 Preszler a contingent fee. She did not object to giving the money to her creditors if the
23 law required that. So, from Mr. Preszler's office she called her husband.
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1 28. By telephone the Gerrards discussed Mr. Preszler's request that
2 they pay him a contingency fee instead of paying that money to their creditors in the
3 bankruptcy. They concluded that they should allow Mr. Preszler to have the money since
4 he had been their bankruptcy attorney, since he had in fact called the adjuster, since he
5 said he thought it was fair that he get a contingent fee instead of them paying that money
6 to their creditors who were owed the money, and since he had told them that they could
7 not benefit from the personal injury proceeds themselves.
8
9

10 29. Mr. Preszler then gave the contingent fee agreement to Mrs.
11 Gerrard for signature. In reliance on what he had told her, she signed it. For reasons still
12 not clear to this Hearings Officer, the release was dated August 18, 2003, even though
13 both parties agreed that was not signed on that date, but was signed on August 22, 2003.
14 The contingency agreement required Mrs. Gerrard to pay to Mr. Preszler one-third of the
15 amount obtained in settlement. The parties understood that this meant that Mr. Preszler
16 would receive one third of the \$31,000 that Allstate would send to Mrs. Gerrard.
17
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19 30. Mrs. Gerrard then expressed concern about the exemption. She
20 wanted to make sure that she got at least that \$17,425 from the settlement proceeds. Mr.
21 Preszler said she would get that amount. She asked him to guarantee that. On her copy
22 of the contingent fee agreement he wrote a written guarantee that said she would receive
23
24
25

1 \$17,425 from the personal injury settlement proceeds, and signed it on August 22, 2003.

2 Both Mrs. Gerrard and Mr. Preszler signed the Allstate release.
3

4 31. After the meeting, Mr. Preszler drafted and sent a letter to Ms.
5 Macy accepting the settlement offer which Ms. Macy had made to Mrs. Gerrard,
6 transmitting the release, and requesting that the settlement proceeds be made payable to
7 "Kinne Gerrard and her attorney Terry J. Preszler".
8

9 32. On August 26, 2003, Ms. Macy advised Mr. Preszler that she had
10 received the signed release and would forward \$31,000 to Mr. Preszler for division
11 between his client and him. The check was received by Mr. Preszler's office on August
12 27, 2003, and deposited to the Gerrard's credit in Mr. Preszler's trust account.
13

14 33. Mr. Preszler was uncertain about how to obtain court approval so
15 he could disburse his fee to himself. He asked his paralegal, Ms. Ahlers, to contact the
16 bankruptcy Trustee to find out what needed to be done. Ms. Ahlers talked to Terri
17 Poteet, an employee of the Chapter 13 Bankruptcy Trustee, Mr. Brunner. Ms. Poteet
18 directed Ms. Ahlers to an online form of an application Ms. Ahlers could use as a guide
19 in drafting an application for an order approving Mr. Preszler's employment as attorney
20 for the Trustee in connection with the personal injury claim. Using that form as a guide,
21 Ms. Ahlers drafted Mr. Preszler's application for an order approving his employment as
22 the Trustee's attorney (the Application).
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1 34. Mr. Preszler had never before prepared such an application. He
2 asked Ms. Ahlers if the Application was in the form wanted by the Trustee. She said yes.
3 After quickly scanning it and without appreciating exactly what it said, he signed it.
4 These applications were required by bankruptcy Trustees in the Eastern District of
5 Washington at that time. They are no longer required because the debtor can hire his or
6 her own attorney to pursue a personal injury recovery.
7

8 35. The Application indicates, as pertinent here, that the applicant:
9

10 (a) is a fiduciary to the estate;

11 (b) represents under penalty of perjury under 18 USC 152 that "the case needs an
12 attorney to settle";

13 (c) will render services to "settle with Allstate Insurance the personal injury
14 claim";

15 (d) will be paid pursuant to the contingent fee agreement executed by Mrs.
16 Gerrard;

17 (e) will take payment under his proposed compensation arrangement (here, the
18 contingent fee agreement) "in accordance with 11 USC 329 and 330 and FRBP
19 2016" which require approval by the bankruptcy judge prior to the time payment
20 is disbursed;
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1 (f) has read the representations contained in the application and verifies "that they
2 are true and inaccurate and that they disclose all material facts required to the
3 best of my knowledge and belief".
4

5 At the time the application was signed the case had been settled, there was no need for
6 an attorney to pursue it, Allstate Insurance had already told Mr. Preszler that it had
7 issued the settlement check, Mr. Preszler had not really "read" all of the representations
8 in the application, and the representations did not disclose all material facts.
9

10 36. Mr. Preszler then caused amended bankruptcy schedules to be
11 prepared. He testified that he did review these schedules. They were signed by the
12 Gerrards on August 29, 2003. In schedule B, a box was left blank reserved for
13 designating the "current market value" of the 9/6/00 car accident claim. Schedule C
14 claimed that \$17,425 of the car accident claim was exempt from creditors. The term
15 "unknown" was inserted in the blank in schedule C designated for delineation of the
16 "current market value" of the car accident claim.
17
18

19 37. Mr. Preszler testified that he did not value the claim because he did
20 not know its full extent. His testimony on that issue was not credible. He had placed a
21 \$16,150 value on the claim when he filed the initial schedule B and schedule C in April
22 of 2001, before he had spent any meaningful time even considering the claim. If he was
23 going to leave a value blank because he did not know the full extent of the claim, that
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1 would have been the time to do it because then he really did not know its value.
2 Furthermore, by August 18, 2003, Mr. Preszler testified he had placed a value on the
3 personal injury claim: \$53,000; and by the time the schedules were signed and filed, the
4 personal injury claim had been settled with Allstate for \$50,000 and Allstate had advised
5 Mr. Preszler that it had sent \$19,000 in payment to State Farm for its PIP subrogation
6 and that it had sent the \$31,000 earmarked for Mrs. Gerrard's general damages and
7 future medical expenses. Mr. Preszler did not change these schedules (prepared by Ms.
8 Ahlers).
9

10
11 38. When the Chapter 13 Trustee received the fee application he
12 reviewed it and was not aware that Mrs. Gerrard's personal injury claim had already
13 been settled. He learned about the settlement later. Because the amended schedules did
14 not set a value for the personal injury claim, something Mr. Brunner said is supposed to
15 be done, the hearing officer concludes from the circumstantial evidence that when Mr.
16 Brunner saw the schedules they raised questions about the claim and caused him to
17 inquire about it. That is when the Trustee learned that a settlement had already occurred.
18 The Trustee also learned then that while the contingent fee agreement bore the date of
19 August 18, it had actually been signed on August 22 and that the case had been settled
20 on August 22. This raised concerns in his mind about whether a contingent fee was
21 appropriate. In any event, the Trustee did not pursue that issue.
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1 39. On September 3, 2003, Ms. Poteet advised Ms. Ahlers that Chapter
2 13 Trustee Brunner had signed the Application but could not file it until the debtors
3 agreed to commit nonexempt proceeds from the car accident claim to funding of the
4 plan. On September 3, 2003, Mr. Preszler signed a stipulation whereby the Gerrard's
5 committed nonexempt proceeds from their personal injury claim to the funding of the
6 Chapter 13 Plan. This was filed with the bankruptcy court.

9 40. From a form she had prepared once before for a different attorney,
10 Ms. Ahlers prepared an "ORDER APPROVING EMPLOYMENT" which Mr. Preszler
11 signed. In part, the order recited that Mr. Preszler was employed "with regards to an
12 ongoing personal injury case" and "to continue the personal injury case in order to
13 obtain a resolution and settlement". That order provided that compensation for any
14 recovery must be in accordance with 11 USC 327, 330, FRBP 2016 (the order
15 mistakenly said 22016) and the contingent fee agreement. Mr. Preszler signed this
16 document, not having fully read it. The order was forwarded to the bankruptcy court
17 judge who signed it.

20 41. On or about September 9, 2006, Mrs. Gerrard told Mr. Preszler that
21 she wanted some of her personal-injury recovery money. On or about September 15,
22 2003, Mrs. Gerrard requested most of the balance of the settlement proceeds which were
23 exempt from creditors. On each of these occasions Mr. Preszler felt pressured to
24

1 provide the money to Mrs. Gerrard. On each of these occasions, he provided the money.
2 His intent in disbursing these funds to Mrs. Gerrard was to help her with her financial
3 needs. These disbursements are reflected in the client ledger for the Gerrard's which
4 Mr. Preszler maintained.
5

6 42. On September 15 and 16, 2003, without first obtaining a court
7 order allowing him to do so, something which as an experienced Chapter 13 bankruptcy
8 attorney he knew he was required to do prior to taking any fee, Mr. Preszler disbursed to
9 himself from the Gerrard trust account \$10,323, just less than the one third the
10 contingent fee agreement said he could have. He did not prepare a settlement statement
11 as he normally did before distributing personal injury proceeds. He did not disclose this
12 at the time to the Gerrards, to the Trustee, or to the bankruptcy court. The disbursements
13 are reflected in the client ledger for the Gerrard's which Mr. Preszler maintained.
14
15

16 43. After talking to Ms. Ahlers on or before 9/25/2003, Mrs. Gerrard
17 learned that she might have been able to use the contingent fee money to reduce the term
18 of her chapter 13 bankruptcy plan. Mrs. Gerrard contacted Ms. Poteet on or about
19 9/25/2003 to discuss that. Ms. Poteet took contemporaneous notes of the conversation.
20 Ms. Gerrard was upset; she believed that Mr. Preszler had not properly advised her
21 regarding whether the amount of money represented by his contingent fee could be used
22
23
24

1 to reduce the term of the Gerrard's plan. Ms. Poteet told Mrs. Gerrard to contact Mr.
2 Preszler about that.

3
4 44. Having lost faith in Mr. Preszler, Mrs. Gerrard contacted attorney
5 Bill Hames. Mr. Hames was an expert in chapter 13 bankruptcy proceedings. Mr. Hames
6 determined that Mr. Preszler had failed to utilize the Wild Card exemption in order to
7 exempt the unused portion of the homestead exemption available to Gerrards. Mr.
8 Hames determined that if he could convince Mr. Preszler to waive his contingent fee
9 that he could amend the exemption under 11 USC 522 (d) (5) and exempt for the
10 Gerrard's an additional \$9650 of the personal injury recovery. That would put into the
11 pockets of the Gerrards \$27,075 of the personal injury recovery instead of \$17,425. Mr.
12 Hames also determined that the rest of the \$31,000 settlement amount that had been paid
13 for Mrs. Gerrard could be used to reduce the term of the Gerrard's Chapter 13 Plan. In
14 other words, the entire \$31,000 settlement amount, less a reasonable fee, would have
15 been available to reduce the term of the Gerrard's chapter 13 bankruptcy plan.

16
17
18 45. Mr. Hames then contacted Mr. Preszler and explained: (i) that Mr.
19 Preszler had not taken the Wild Card exemption; (ii) that the non-exempt funds could be
20 used to reduce the duration of the Chapter 13 Plan; (iii) that Mr. Preszler was not
21 entitled to a contingent fee because there was no contingency as the case had already
22 settled prior to the execution of the contingent fee agreement; (iv) and that the Gerrard's
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1 wanted all of the money from the \$31,000 which had not already been disbursed to
2 them. Mr. Hames then demanded that Mr. Preszler pay the Gerrards "all money received
3 from Allstate Insurance Company" less sums Mr. Preszler had already paid directly to
4 the Gerrards. Mr. Hames also demanded an itemization "as to the amount of money that
5 was actually received, how much has been paid to them [that is, the Gerrards], and a
6 check for the difference." Mr. Hames offered to have the Gerrards give Mr. Preszler a
7 release of all claims against him in exchange for the check. Mr. Preszler was also
8 discharged as the Gerrard's chapter 13 bankruptcy attorney.

11 46. Mr. Preszler queried in response: "I screwed up, didn't I". After the
12 phone conversation Mr. Preszler immediately reimbursed his trust account with the
13 contingent fee he had taken from it. Then he complied with the specific demands which
14 had been made by Mr. Hames. The itemization he provided to Mr. Hames was a portion
15 of his client ledger relating to the Gerrard account. The itemization consisted of the first
16 three ledger entries: (i) the August 27, 2003 deposit of the \$31,000 settlement check; (ii)
17 the September 9, 2003 partial distribution to Mrs. Gerrard in the amount of \$2000; (iii)
18 the partial distribution to Mrs. Gerrard of \$14,150. The itemization was correct to the
19 extent it answered the specific request of Mr. Hames. But Mr. Preszler covered the
20 remaining entries on the client ledger, most likely by placing a piece of paper over them.
21 The covered portion of the ledger showed that on September 15, 2003, Mr. Preszler had

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1 withdrawn \$10,323 from the Gerrard trust account and that on September 16, 2003, he
2 had paid himself that sum for his fees. Mr. covered up these portions of his client ledger
3 because he wanted to hide from Mr. Hames the fact that he had disbursed to himself
4 \$10,323 prior to the time he was authorized by the court or anyone else to take that
5 money. He knew what he had done was wrong.
6

7
8 47. After he took over the Gerrard's Chapter 13 case, Mr. Hames
9 prepared amended schedules reflecting the exemption changes referenced above. In
10 amended schedule B he listed the "current market value" of the car accident claim at
11 \$31,000, the amount paid for Mrs. Gerrard's general damages. On schedule C Mr.
12 Hames claimed that \$27,075 of the personal injury recovery was exempt and that the
13 current market value of the recovery without deducting for exemptions was \$27,075.
14

15 48. As a consequence of these amendments the bankruptcy court
16 confirmed an amended Plan under which the Gerrard's were able to exempt from
17 creditors an additional \$9,650 of the personal injury recovery proceeds and were able to
18 apply \$2925 of the \$3925 of the personal injury recovery which was not exempt to
19 reduce the number of payments the Gerrard's were required to make under the Plan.
20

21 49. The Gerrards filed a grievance against Mr. Preszler with the Bar
22 Association. Mr. Preszler responded to the Bar Association by letter dated February 11,
23 2004. Mr. Preszler's recitation in that letter of his version of what occurred was
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1 different in material aspects from representations he made in his deposition which,
2 itself, was at odds with some of his testimony at the hearing. Mr. Preszler was an
3 unreliable historian with regard to the facts of this case.
4

5 50. A hearing was held in 2005, as noted above in the Hearings section
6 of this document. For the reasons already discussed, the hearing was delayed, through no
7 fault of either party, for almost 2 years. Meanwhile, Mr. Preszler has undertaken
8 measures in his practice to make ensure that occurrences of the type referenced above
9 will not occur again. This was done at the suggestion of the former hearing officer. On
10 August 29, 2005, Mr. Preszler also wrote to Mr. Hames, as Mrs. Gerrard's attorney, and
11 expressed remorse to Mrs. Gerrard.
12
13

14 **CONCLUSIONS OF LAW, PRESUMPTIVE SANCTIONS,**
15 **AND RECOMMENDATIONS**

16 **Count 1**

17 51. With the intent of benefitting himself at the expense of creditors in
18 the Gerrard bankruptcy, Mr. Preszler knowingly charged an unreasonable fee for the
19 negligible amount of work he did in Mrs. Gerrard's personal injury claim. His action
20 could have resulted in loss to the Gerrards if Mr. Hames had not intervened. Mr.
21 Preszler violated RPC 1.5 (a) and is subject to discipline.
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1 ABA Standards for imposing lawyer sanctions (hereafter simply the
2 presumptive sanction), 7.1 states:
3

4 7.1 Disbarment is generally appropriate when a lawyer
5 knowingly engages in conduct that is a violation of a duty
6 owed as a professional with the intent to obtain a benefit for
7 the lawyer or another, and causes serious or potentially
8 serious injury to a client, the public, or the legal system.

9 The hearing officer concludes that disbarment is the presumptive sanction
10 in this case for violation of RPC 1.5, charging a fee that is not reasonable. An
11 aggravating factor exists under Standard 9.22(i) in that Mr. Preszler had substantial
12 experience in the practice of law at the time of the events identified above. Numerous
13 mitigating factors under Standard 9.32 exist, also. They are:

14 9.32(a) Absence of a prior disciplinary record (Mr. Preszler has no
15 disciplinary record;

16 9.32(d) timely good faith effort to make restitution or to rectify
17 consequences of misconduct (upon being notified by Mr. Hames, Mr. Preszler
18 immediately rectified his conduct by paying all of the remaining proceeds to the
19 Gerrards-even those he had taken for himself);

20 9.32(e) full and free disclosure to disciplinary board and cooperative
21 attitude toward proceedings (Mr. Gerrard cooperated fully in the investigation and
22 proceedings);

23 9.32(g) character and reputation (Mr. Preszler has an excellent reputation
24 and his character is rated excellent in the Tri-Cities area);

25 9.32(j) delay in disciplinary proceedings (there was a delay of many
26 months here between the first and second hearing).²

² Both counsel agreed that this case presented unique circumstances on the issue of delay. This is not a case where the Bar Association caused delay nor is it a case where Mr. Preszler caused delay. However,

1 The hearing officer concludes that the mitigating factors justify a
2 sanction other than disbarment. The recommended sanction is suspension for 30 days.
3

4 **Count 2**

5 52. The Bar Association did not prove by a clear preponderance of the
6 evidence that in violation of RPC 8.4 (c) that Mr. Preszler obtained or attempted to
7 obtain a portion of the proceeds of Mrs. Gerrard's personal injury claim through deceit,
8 dishonesty, and/or misrepresentation directed towards Mrs. Gerrard. Therefore, Count 2
9 is dismissed.
10

11 **Count 3**

12 53. Mr. Preszler negligently explained to Mrs. Gerrard the exemptions
13 she could utilize for her personal injury recovery and he also negligently advised her that
14 no portion of her personal injury recovery could be used to reduce the duration of the
15 Gerrard Chapter 13 Plan. As a consequence of this negligence, Mr. Preszler violated
16 RPC 1.4 (b) and is subject to discipline. His conduct violated his duty to competently
17 advise the Gerrards to the extent reasonably necessary for them to make an informed
18 decision regarding their personal injury case.
19
20
21

22
23 because of circumstances not under the control of either party (conduct of a prior hearings officer necessitating
24 re-hearing of this case), delay did occur. This hearing officer concludes that since the delay here was not
25 caused by Mr. Preszler, but by circumstances unique to this case, that it is the type of delay which should
26 constitute a mitigating factor under the Standards.

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Presumptive sanction 7.3 provides:

Reprimand is generally appropriate when a lawyer negligently 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.

The hearing officer concludes that a reprimand is the presumptive sanction for a violation of RPC 1.4. Applying the aggravating factor and mitigating factors first set forth above, the hearing officer concludes that an admonition is the appropriate sanction for this offense.

Count 8

54. Mr. Preszler did not violate RPC 1.4 (b) by failing to disclose to the Trustee that the personal injury claim had been settled prior to the time the contingent fee agreement was signed and so Count 8 is dismissed. The reasons are as follows:

(ii) though his office required an attorney in a Chapter 13 bankruptcy to complete and file an application for employment, the Trustee did not believe that he was really the client and he questioned the need for applications for employment because the attorney's client for purposes of personal injury cases was, in his view, the debtor; he was concerned only with "when" the application was made; he approved every application for employment that came to him; under current practice, the Trustee is not the client for purposes of pursuing a debtor's personal injury claim and it

1 is now recognized in the Eastern District that attorneys who pursue personal injury
2 claims on behalf of Chapter 13 debtors are actually attorneys for the debtor, as the
3
4 Trustee thought at the times material to this case;

5 (iii) The Trustee was not deceived because he did not rely on Mr.
6 Preszler's application as was manifested by the fact that after he learned of the
7 settlement and the contingent fee he took no action to recover the fee and, instead,
8 approved Mr. Preszler's application and requested that he send an order approving
9 appointment to the court for entry.
10

11 **Count 9**

12
13 55. Count 9 is dismissed because the Bar Association did not prove by
14 a clear preponderance of the evidence that Mr. Preszler acted fraudulently or willfully or
15 as part of a scheme to defraud or attempt to defraud Mrs. Gerrard, the Trustee, or the
16 bankruptcy Court and so the hearing officer cannot conclude that Mr. Preszler violated
17 RPC 8.4 (d).
18

19 **Count 12**

20
21 56. Bankruptcy rule 9011 provides that an attorney who signs a
22 document which is filed with the court represents that he has read the document and that
23 to the best of his knowledge information, and belief the documents are complete and
24 accurate.
25

26 **FINDINGS**
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1 (i) Negligence. By signing the application for an order approving
2 employment, the supplement to the application, and the proposed order approving
3 employment (all of which contained false information) without having read those
4 documents and without having first determined that to the best of his knowledge,
5 information, and belief that those documents were complete and accurate, Mr. Preszler
6 negligently violated bankruptcy rule 9011. Mr. Preszler's negligence had the potential
7 to injure his client and creditors in the Gerrard's bankruptcy. As a consequence, Mr.
8 Preszler violated RPC 8.4 (d) and is subject to discipline.

11 Presumptive sanction 6.23 states:

12 Reprimand is generally appropriate when a lawyer
13 negligently fails to comply with a court . . . rule, and causes
14 injury or potential injury to a client or other party, or causes
15 interference or potential interference with a legal
16 proceeding.

17 The hearing officer finds that a reprimand is the presumptive sanction. In addition to the
18 aggravating factor first noted above, the hearing officer concludes that Mr. Preszler
19 engaged in a pattern of misconduct (signing court documents without really reading
20 them), as manifested by the number of times he signed but did not read documents
21 which were going to be delivered to the court and by the number of mistakes Ms. Poteet
22 said occurred in bankruptcy paperwork he filed. The mitigating factors are the same as
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1 those first discussed above. After consideration of the mitigating and aggravating
2 factors, the hearing officer concludes that reprimand is the proper sanction.

3
4 (ii) Knowingly. Amended Schedules B and C also contained false
5 information. Mr. Preszler read the amended schedules which the hearing officer
6 believes were prepared by Ms. Ahlers. The hearing officer concludes that he knowingly
7 allowed the submission of the schedules and that they omitted and misrepresented
8 information relating to the then current value of the personal injury recovery. That
9 information was material because it was filed with the court and could have alerted
10 creditors of the fact that there might be more money available to satisfy their claims or
11 to pay them earlier. It was also material because it was filed with the court and could
12 have alerted the Court to the same thing. Mr. Preszler violated the following RPC's as a
13 result of his conduct:

14
15
16
17 RPC 3.3(a)(1) by knowingly making a false statement to a tribunal (use of
18 the word "unkown" in Schedule C) and is subject to discipline;

19
20 RPC 8.4(c) for omitting from Schedules B the value of the personal injury
21 claim and by affirmatively misrepresenting the value of the personal injury claim in
22 Schedule C by stating that the value was "unknown", and is subject to discipline;

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1 RPC 8.4(d) by engaging in conduct prejudicial to the administration of
2 justice (the norm is to fill in the forms with information believed to be correct), and is
3 subject to discipline.
4

5 Presumptive Sanction 6.12 provides:

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

11 The hearing officer concludes that the Presumption Sanction is suspension. After
12 considering the aggravating and mitigating factors described in this paragraph under
13 section (i), the hearing officer concludes that suspension is the proper sanction and
14 recommends that Mr. Preszler be suspended from the practice of law for 30 days.
15

16 **Count 14**

17 57. By disbursing to himself from his trust account a portion of the
18 personal-injury proceeds, Mr. Preszler knowingly disobeyed obligations under the
19 bankruptcy rules in violation of RPC 3.4 (c) and engaged in conduct that is prejudicial to
20 the administration of justice in violation of RPC 8.4 (d). He is subject to discipline for
21 these things. The balance of the charges in Count 14 are dismissed. The Bar
22 Association did not prove those charges by a clear preponderance of the evidence.
23
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25 **FINDINGS**

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1 Presumptive sanction 6.21 provides:

2 Disbarment is generally appropriate when a lawyer
3 knowingly violates a court order or rule with the intent to
4 obtain a benefit for the lawyer or another, and causes serious
5 injury or potentially serious injury to a party or causes
6 serious or potentially serious interference with a legal
proceeding.

7 Disbarment is the presumptive sanction here. After consideration of the aggravating
8 factor and mitigating factors first referenced above, the hearing officer concludes that
9 disbarment is not appropriate here. The hearing officer concludes that suspension is the
10 appropriate remedy. The recommended sanction is suspension for 30 days.

11 **Count 15**

12
13 58. By disbursing the personal-injury proceeds to himself without the
14 consent, knowledge, or authority of the bankruptcy Trustee and bankruptcy Court, Mr.
15 Preszler knowingly violated bankruptcy rules with the intent to gain a benefit for
16 himself. He created a potential where his client might have lost exemptions and where
17 creditors could have lost some recovery potential. Therefore, Mr. Preszler violated RPC
18 8.4 (d) by engaging in conduct prejudicial to the administration of justice and is subject
19 to discipline. The balance of the charges in Count 15 are dismissed. The Bar
20 Association did not prove those charges by a clear preponderance of the evidence.
21
22

23 Presumptive sanction 6.21 provides:
24

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1 Disbarment is generally appropriate when a lawyer
2 knowingly violates a court order or rule with the intent to
3 obtain a benefit for the lawyer or another, and causes serious
4 injury or potentially serious injury to a party or causes
5 serious or potentially serious interference with a legal
6 proceeding.

7 Disbarment is the presumptive sanction. After consideration of the aggravating factor
8 and mitigating factors first referenced above, the hearing officer concludes that
9 disbarment is not appropriate here. The hearing officer concludes that suspension is the
10 appropriate remedy. The recommended sanction is suspension for 30 days.

11 **Count 16**

12 59. The Bar Association failed to prove the charges in Count 16 by a
13 clear preponderance of the evidence and so Count 16 is dismissed.

14 **Count 17**

15 60. Ms. Ahlers prepared forms for use in the Gerrard's bankruptcy
16 proceedings. The forms contained inaccurate and misleading information. Mr. Preszler
17 knew that Ms. Ahlers was preparing the forms. By not reviewing the forms prior to
18 signing them, and by not confirming that to the best of his knowledge and belief they
19 were correct, Mr. Preszler violated RPC 5.3 (b) by allowing false information to be
20 submitted in the bankruptcy proceedings and is subject to discipline. He violated RPC
21 5.3 (c) (1) because his signature on the forms was a ratification of the contents of the
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1 forms. He is subject to discipline as a result of these violations. The Bar Association did
2 not prove the remaining charge in Count 17 by clear preponderance of the evidence and
3 it is dismissed.
4

5 Presumptive sanction 6.13 provides:

6 Reprimand is generally appropriate when a lawyer is
7 negligent either in determining whether statements or
8 documents are false or in taking remedial action when
9 material information is being withheld, and causes injury or
10 potential injury to a party to the legal proceeding, or causes
11 an adverse or potentially adverse effect on the legal
12 proceeding.

11 The hearing officer finds that reprimand is the presumptive sanction. After consideration
12 of the same aggravating and mitigating factors referenced in the analysis of Count 12,
13 the hearing officer concludes that reprimand is the appropriate sanction.
14

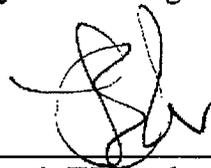
15 RECOMMENDATION

16 Where a hearing officer finds multiple ethical violations, the "ultimate
17 sanction imposed should at least be consistent with the sanction for the most serious
18 instance of misconduct among a number of violations." Bar Association's Hearing
19 Brief, page 24, citing In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833,
20 854 (1993). The hearing officer recommends that Mr. Preszler be suspended from the
21 practice of law for 30 days.
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24

25 FINDINGS
26 F:\LWCIT-2\WSBA\prsztl\p03.wpd
May 10, 2007

-35-

1 Dated this 10 day of May, 2007 by the undersigned hearing officer,
2 Lewis W. Card.



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4 Lewis W. Card

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11 CERTIFICATE OF SERVICE

12 I certify that I caused a copy of the FE, LL & HD's Recommendation
13 to be delivered to the Office of Disciplinary Counsel and to be mailed
14 to Kurt Bulmer, Respondent/ Respondent's Counsel
15 at 740 Belmont Pike #3 Seattle, WA, by Certified first class mail,
16 postage prepaid on the 16 day of May, 2007

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25 Bobby Covert
26 Clerk/Counsel to the Disciplinary Board

APPENDIX B

RULES OF PROFESSIONAL CONDUCT

RPC 1.4 -- Communication

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RPC 1.5 -- Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

RPC 3.4 -- Fairness to Opposing Party and Counsel

A lawyer shall not:

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

RPC 5.3 -- Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RPC 8.4 -- MISCONDUCT

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice.

APPENDIX C

ABA STANDARDS

Standard 6.1 -- False Statements, Fraud, and Misrepresentation

- 6.11 Disbarment is generally appropriate when a lawyer, with the 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.
- 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, 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.
- 6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

Standard 6.2 -- Abuse of the Legal Process

- 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
- 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
- 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

- 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

Standard 7.0 -- Violations of Duties Owed as a Professional

- 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 a client, the public, or the legal system.
- 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.
- 7.3 Reprimand is generally appropriate when a lawyer negligently 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.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

APPENDIX D

FILED

JAN 25 2008

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

TERRY PRESZLER,
Lawyer (WSBA No. 13836).

Proceeding No. 04#00064

DISCIPLINARY BOARD ORDER
MODIFYING HEARING OFFICER'S
DECISION

This matter came before the Disciplinary Board at its November 30, 2007 meeting on automatic review of Hearing Officer Lewis W. Card's decision recommending a 30 day suspension following a hearing.

Having reviewed the documents designated by the parties, the briefs and the applicable case law and rules, and having heard oral argument:

IT IS HEREBY ORDERED THAT the Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation are approved. The sanction is increased to a three year

ORIGINAL

103

1 suspension.¹

2
3 FINDINGS OF FACT

4 The Hearing Officer's Findings of Fact are approved without amendment.

5
6 CONCLUSIONS OF LAW

7 COUNT 1

8 The Board believes that the Hearing Officer's Findings of Fact and the
9 Conclusion of Law on this count support application of ABA Standard 7.2:

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

13 The record proves that Mr. Preszler's conduct was knowing. He knew he was
14 charging Ms. Gerrard a fee for a matter that was almost concluded. The record
15 also proves injury or potential injury to Ms. Gerrard, the public or the legal
16 system. The record does not prove serious or potentially serious injury.

17 COUNT 12

18 Count 12 is dismissed based on Disciplinary Counsel's November 21, 2007 letter
19 stating that the Association does not believe Respondent violated the rule cited in
20 that count of the Formal Complaint.

21 AGGRAVATING AND MITIGATING FACTORS

22 ¹ The vote on this matter was 9-2. Those voting in the majority were Carlson, Cena, Darst, Fine,
23 Kuznetz, Madden, Meyers, Montez, and Urena. Mr. Andrews and Ms. Coppinger Carter voted in the
24 minority. Ms. Andrews and Ms. Coppinger Carter believe the sanction analysis compels a sanction of
disbarment. Mr. Meehan recused from this matter and did not participate. He was not present during the
argument, deliberations or voting.

1 The Hearing Officer found the following aggravating factor:

2 Substantial experience in the practice of law;

3
4 Disciplinary Counsel asks that the Board add the aggravating factor multiple
5 offenses (9.22(d)). Five counts were proven, involving five RPCs. Multiple
6 offenses appears appropriate.

7 The Hearing Officer found the following mitigating factors:

- 8
- 9 • Absence of prior disciplinary record;
 - 10 • Timely good faith effort to make restitution or rectify consequences;
 - 11 • Full and free disclosure to Disciplinary Board;
 - 12 • Character and Reputation;
 - 13 • Delay

14 Delay does not apply in this circumstance. The main source of the delay in the
15 prosecution of this case was the fact that a second hearing before a second hearing officer
16 was necessary. The record does not contain evidence that this delay prejudiced the
17 respondent. The record does not contain that ODC delayed the prosecution of this matter.
18 In this circumstance, the passage of time between the conduct and the sanction is not a
19 mitigating factor.

20 The Board is concerned about including the mitigator of timely good faith effort
21 to make restitution, because Respondent required his client to sign a release to get her
22 own money back. However, the Hearing Officer correctly found that Respondent did
23 return the Monday when asked by Mr. Hames. This mitigator applies, but carries little
24 weight.

1 SANCTION ANALYSIS

2
3 The main focus of both parties' arguments in this case was the recommended
4 sanction. The Hearing Officer found that disbarment was the presumptive
5 sanction for Counts 1, 14 and 15 and that reprimand was the presumptive sanction
6 for Counts 3 and 17. The Hearing Officer pointed out that in cases of multiple
7 ethical violations, the ultimate sanction imposed should at least be consistent with
8 the sanction for the most serious violation. *In re Discipline of Petersen*, 120
9 Wn.2d 833, 854 (1993). The Hearing Officer then found two aggravating factors
10 (pattern of misconduct and substantial experience in the practice of law) and five
11 mitigating factors (absence of prior disciplinary record, timely good faith effort to
12 make restitution or to rectify consequences of misconduct, full and free disclosure
13 to the disciplinary board or cooperative attitude toward the proceedings, character
14 or reputation and delay). Without engaging in any analysis, the Hearing Officer
15 then recommended a 30 day suspension. Respondent requests that this Board
16 reduce the sanction to a reprimand. Disciplinary Counsel requests that this Board
17 increase the sanction to disbarment.

18
19 The Board agrees with the Hearing Officer that the appropriate sanction is a
20 suspension rather than disbarment. The Board finds the appropriate length of the
21 suspension is three years. The Board concludes that the presumptive sanction for
22 Count 1 is a suspension. The Board agrees with the Hearing Officer that the
23 presumptive sanction for Counts 14 and 15 is disbarment. The Board is mindful
24 that the Hearing Officer, having heard the evidence, and considered the
aggravating and mitigating factors, reduced the sanction from disbarment to a 30
day suspension. The Board found 2 aggravating factors and 4 mitigating factors.
Although this is a close case, the Board recommends a three year suspension. The
mitigating factors do outweigh the aggravating factors and do justify reducing the
presumptive sanction from disbarment to a 3 year suspension.

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Dated this 25th day of January, 2008



William Carlson, Vice Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Order Modifying Hearing Officer Decision
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Kurt Basler, Respondent/Respondent's Counsel
at 790 Belmont Street, Seattle, WA 98102, by Certified/first class mail,
postage prepaid on the 25 day of January, 2008

Becky Casey
Clerk/Counsel to the Disciplinary Board

APPENDIX E

CONTINGENT FEE
RETAINER AGREEMENT

I hereby retain TERRY J. PRESZLER to act as my attorney in settling, negotiating or trying my case, and authorize such representation to be on a contingent fee basis of one third (1/3) of the amount obtained or recovered if the matter does not go to trial, mediation or arbitration

I understand that the contingent fee will be calculated from the actual amount obtained or recovered prior to deducting any costs and/or expenses.

I understand that TERRY J. PRESZLER would be willing to represent me on a guaranteed hourly time charge of \$160.00 per hour regardless of the results but that I would rather have the claim handled on a contingent fee.

I understand and agree that I am responsible for all costs that TERRY J. PRESZLER may expend on my behalf i.e. investigative expenses, medical examinations, witness fees, phone charges, postage, copying costs, filing fees, travel expenses, etc.

I understand and agree that costs are to be paid from a retainer deposited with TERRY J. PRESZLER in the amount of \$ 0 . Any costs advanced beyond the deposited retainer, or if no deposit was required, will be billed monthly for such costs with a finance charge of twelve (12%) percent per annum.

I understand and agree that any outstanding costs or expenses advanced on my behalf will be deducted after calculating the one third (1/3) contingency fee and reimbursed to TERRY J. PRESZLER in addition to his one third (1/3) contingency fee.

I agree that if my claim is unable to be settled and the matter is scheduled for arbitration or mediation or a lawsuit is filed a contingent fee will be increased to 2/5 of the recovered amount.

I understand that if no recovery is obtained, that it is my responsibility to reimburse TERRY J. PRESZLER for any costs or expenses that he has advanced on my behalf.

I understand that in connection herewith, TERRY J. PRESZLER is free to associate with any other attorney of his choice, it being understood that there will be no additional compensation chargeable against me unless my written consent is given.

The parties hereby stipulate to the jurisdiction of the Benton County Courts in resolving any disputes relative to this fee agreement.

DATED this 18 day of AUGUST, 2003.

I have read and understand the above and I have received a copy of this agreement.

KINNIE GERRARD
CLIENT


TERRY J. PRESZLER

11 W. ENTIAT AVE
Address

() 582-5249

KENNEWICK, WA, 99336
City, Zip Code

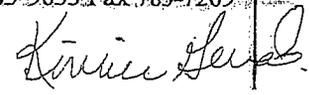
() 430-1488 Work

+ Kinnie V. Gerard.



TJ Preszler hereby guarantees
a minimum recovery of \$17,425
from settlement to client. TJ Preszler
8-22-03

TERRY J. PRESZLER
Attorney at Law
8797 W. Gage Blvd. Ste.B
Kennewick, WA 99336-1034
(509).783-9635 Fax 783-7269



APPENDIX F

552(a), formerly 553(a), of Pub.L. 98-353, set out as a note under section 101 of this title.

CROSS REFERENCES

Disclosure of compensation, debtor's attorney, see Fed. Rules Bankr.Proc. Form B 203, 11 USCA.

Fee agreements, see 18 USCA § 155.

Lists, schedules, statements and fees, see Fed. Rules Bankr.Proc. Form B 200, 11 USCA.

Property of estate, see 11 USCA § 541.

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A)¹ the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(b)(1) There shall be paid from the filing fee in a case under chapter 7 of this title \$45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States—

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title;

to pay \$15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such \$15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than \$5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2564; Pub.L. 98-353 Title III, §§ 433, 434, July 10, 1984, 98 Stat. 370; Pub.L. 99-554, Title II, §§ 211, 257(f), Oct. 27, 1986, 100 Stat. 3099 3114; Pub.L. 103-394, Title I, § 117, Title II, § 224(b), Oct. 22, 1994, 108 Stat. 4119, 4130.)

¹ So in original.

CROSS REFERENCES

Duties of trustee—

Individual debt adjustment case, see 11 USCA § 1302.

Reorganization case, see 11 USCA § 1106.

Operation of business by debtor, see 11 USCA § 1304.

Public access to papers filed in case under this title, see 11 USCA § 107.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

(a) Application for compensation or reimbursement

An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) Disclosure of compensation paid or promised to attorney for debtor

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted

to the United States trustee within 15 days after any payment or agreement not previously disclosed. (As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991.)

ADVISORY COMMITTEE NOTES

This rule is derived from former Rule 219. Many of the former rule's requirements are, however, set forth in the Code. Section 329 requires disclosure by an attorney of transactions with the debtor; § 330 sets forth the bases for allowing compensation, and § 504 prohibits sharing of compensation. This rule implements those various provisions.

Subdivision (a) includes within its provisions a committee, member thereof, agent, attorney or accountant for the committee when compensation or reimbursement of expenses is sought from the estate.

Regular associate of a law firm is defined in Rule 9001(9) to include any attorney regularly employed by, associated with, or counsel to that law firm. Firm is defined in Rule 9001(6) to include a partnership or professional corporation.

Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330

Introduction

The Bankruptcy Reform Act of 1994 amended the responsibilities of the United States Trustees under 28 U.S.C. § 586(a)(3)(A) to provide that, whenever the United States Trustees consider it appropriate, they will review applications for compensation and reimbursement of expenses under section 330 of the Bankruptcy Code, 11 U.S.C. § 101, et seq. ("Code"), in accordance with procedural guidelines ("Guidelines") adopted by the Executive Office for United States Trustees ("Executive Office"). The following Guidelines have been adopted by the Executive Office and are to be uniformly applied by all United States Trustee personnel unless the United States Trustee determines that circumstances warrant different treatment. The Guidelines generally reflect and formalize many of the procedural standards used by the United States Trustees in the past to fulfill their statutory responsibility to monitor applications under section 330 of the Code.

Recognizing that the final authority to award compensation and reimbursement under section 330 of the Code is vested in the courts, the Guidelines focus on the disclosure of factors relevant to a proper award under the law, including: the time spent on the services; the rates charged for the services; whether the services were necessary to the administration of a case at the time the services were rendered; whether the services were directed toward the completion of a case under title 11; whether services were performed within a reasonable time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and whether compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under title 11. The Guidelines, thus, reflect standards and procedures articulated in section 330 of the Code and Rule 2016 of the Federal Rule of Bankruptcy Procedure. Adherence to the Guidelines better enables United States Trustees to evaluate the nature, extent, and value of services for which compensation or reimbursement of expenses is sought. These Guidelines will also assist the United States Trustees, the courts, and all

APPENDIX G

THE SUPREME COURT OF WASHINGTON

FILED
SUPREME COURT
STATE OF WASHINGTON

2002 JUL 30 P 1:01

BY C.J. MERRITT

CLERK

No. 11365

ORDER

CHANGING OPINION

In the Matter of the Disciplinary
Proceeding Against

STEPHEN T. CARMICK,
Attorney at Law.

It is hereby ordered that the manuscript opinion of the Court filed in the above cause on
June 20, 2002 be changed as follows:

The text of the opinion beginning with the word "Similarly" in the fifth line from the top
of page 16 and ending with the word "misconduct." in the ninth line from the top of page 16 is
deleted, and the following text is inserted in its place:

Similarly, the conduct prohibited by RPC 8.4(d) is more often associated with physical
interference in the administration of justice or the violation of practice norms. *In Re
Disciplinary Proceeding Against Curran*, 115 Wn.2d 747, 801 P.2d 962 (1990). RPC
3.5(b) protects against impropriety in obtaining an ex parte order. Application of RPC
8.4(d) in this case would be redundant.

Dated this 30th day of July, 2002.

Gerry L. Allford
Chief Justice

127/19

8.4(d) (conduct prejudicial to the administration of justice). We do not affirm these conclusions. RPC 4.1(a) applies to out-of-court statements made to third parties. *See Hazard & Hodes, supra*, at 37-35. Carmick's statements were in-court statements made to the trial judge. RPC 4.1(a) does not apply to an ex parte proceeding. Similarly, the conduct prohibited by RPC 8.4(d) is more often associated with moral turpitude, obvious bias, or a persistent pattern of misconduct indicating disregard for the practice of law. Model Rules R. 8.4(d) cmt. 1. A single instance of impropriety in obtaining an ex parte order does not demonstrate a pattern of misconduct. We reverse the Disciplinary Board's conclusions of law 2 and 3 regarding Carmick's violation of RPC 4.1(a) and RPC 8.4(d).

B. Contacting a Represented Party

The Rules of Professional Conduct provide that in representing a client, an attorney shall not communicate about the subject of the representation with a party the attorney knows to be represented by another attorney in the matter, unless the attorney has the consent of the party's attorney. RPC 4.2. The rule's purpose is to prevent situations in which a represented party is taken advantage of by adverse counsel. *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 197, 691 P.2d 564 (1984). An attorney cannot evade the requirement of obtaining consent by