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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE MATTER OF THE  
DISCIPLINARY PROCEEDINGS AGAINST

TERRY J. PRESZLER  
An Attorney at Law

Bar Number 13836

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OPENING BRIEF OF RESPONDENT PRESZLER

---

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This is an attorney disciplinary proceeding in which the hearing officer determined that attorney Terry Preszler (Preszler) acted improperly in his handling of certain bankruptcy forms, disbursing of trust funds and charging a fee. Although the hearing officer found that disbarment was the presumptive sanction for three of the allegations, after observing Preszler at an extended hearing and after consideration of mitigators, the hearing officer recommended a 30-day suspension. Upon review of the suspension, the Disciplinary Board agreed that suspension was the appropriate sanction but increased the suspension to three years. Preszler seeks review of that recommendation.

#### **ASSIGNMENTS OF ERROR**

1. The Board erred when it misapplied the ABA Standards and recommended a three year suspension.
2. The Board and the hearing officer erred when they failed to take into account Preszler's good faith belief that under all the circumstances he could charge a contingent fee.
3. The Board and the hearing officer erred when they found a knowing violation for charging an unreasonable fee.

4. The Board and hearing officer erred when they failed to find that Preszler acted negligently when he entered into the fee agreement with Kennie Gerrard.
5. The Board and hearing officer erred when they found a knowing violation for withdrawing funds without a court order.
6. The Board and the hearing officer erred when they found a violation of conduct prejudicial to the administration of justice for a single instance of impropriety in failing to follow a court rule.
7. The Board erred when it failed to enter a finding that Counts 14 and 15 were merged.
8. The Board and hearing officer erred when they found Preszler knew he could not remove the funds without a court order and when they failed to take into account Preszler's belief that he could remove the funds without a court order because of the order of employment and because the fees were subject to final court review.
9. The Board and hearing officer erred when they failed to find that Preszler acted negligently when he removed the funds without a court order.

10. The Board and hearing officer erred when they found serious or potentially serious injury in connection with the withdrawing of funds without a court order.
11. The Board erred when it found multiple offenses.
12. The Board erred when it found delay was not a mitigating factor.
13. The Board erred when it determined to give little weight to the finding of good faith effort to make restitution.
14. The Board erred when it rejected the hearing officer's recommendation of a 30 day suspension and recommended a three year suspension.
15. The Board erred when it failed to impose reprimands or less for the Count 1, 14, and 15 violations.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the Board commit error when it rejected the 30 day suspension and recommended a three year suspension?  
(Assignments of Error 1, 14 and 15.)
2. Did the Board improperly apply the ABA Standards and sanction's analysis? (Assignments of Error 3, 4, 5, 8, 9, 10, 11, 12, 13, 14 and 15.)

3. Did the Board and the hearing officer commit error when they failed to take into account Preszler's good faith belief that under all the circumstances he could charge a contingent fee? (Assignment of Error 2.)
4. Did the Board and the hearing officer commit error when they found violation of conduct prejudicial to the administration of justice for a single instance of impropriety in failing to follow a court rule? (Assignment of Error 6.)
5. Did the Board commit error when it failed to enter a finding that Counts 14 and 15 were merged? (Assignment of Error 7.)

### STATEMENT OF CASE

#### Factual Background

Except as noted in this brief, Preszler accepts the Hearing Officer's Findings of Fact ("FFCLR") but contests that the appropriate result is a three year suspension. Unless there is a citation to other parts of the record, this summary of the factual background is from the paragraphs cited in the FFCLR, Bar File No. 85, Decision Papers, pages 1 -37.

Terry Preszler has been an attorney since 1983, has practiced in the Tri-Cities area and has never received attorney discipline. He has

substantial experience in representing persons in Chapter 13 bankruptcies.  
FFCLR 1, 2.

He was hired to represent Kinnie Gerrard and her husband Jeffrey in a Chapter 13 bankruptcy on December 19, 2000. FFCLR 2. At the time he was hired he was told by the Gerrards that Kinnie Gerrard had an unresolved pre-bankruptcy personal injury claim as a result of a September 6, 2000, automobile accident. FFCLR 3. At the time the bankruptcy was filed Preszler did not represent the Gerrards on the personal injury case. FFCLR 8. When Preszler filed the Chapter 13 bankruptcy on April 14, 2001, he showed the personal injury claim as having a current value of \$16,150.00 and showed the claim was exempt under 11 USC 522(d)(11)(D). FFCLR 4.

The initial plan as filed was for 57 months with a plan base of \$13,365.41 and payments of \$236.00. This was modified by agreement with the trustee on September 27, 2001, to a base of \$13,743.88 with a 58 month plan duration. The amended plan was approved on October 12, 2001, by the bankruptcy judge for the Eastern District of Washington. FFCLR 5, 6, 7.

By August 18, 2003, the personal injury suit had not been settled and the September 6, 2003, statute of limitations was coming up. On

August 18, 2003, Preszler meet with Kinnie Gerrard and her husband, at her request, to discuss the personal injury claim. Kinnie Gerrard asked Preszler if he would be willing to call the adjuster handling the claim. Preszler specifically told her that he was not interested in representing her on the claim since the statute of limitations was so near. He did tell her that he would, as a courtesy, call the agent and put pressure on the agent to settle the case. Neither Preszler nor the Gerrards expected there to be a fee for this courtesy call. FFCLR 9.

Prior to making the call, Preszler learned details of the claim including that she had medical expenses in the \$15,000 to \$20,000 range. FFCLR 10 and RP 823, lines 10 to 11. Based on what he had learned he advised the Gerrards that he believed the claim was worth about \$53,000. He did so based on his experience and education that a rough settlement range of 3 times the "specials" is reasonable. He used a middle range of medicals of about \$17,500 and rounded up to arrive at the \$53,000 number. RP 823, line 9, through 824, line 17. After giving Kinnie Gerrard his opinion as to the value of the case she advised she would accept that amount. FFCLR 11.

Preszler called the agent and offered to settle for the \$53,000. The agent did not think Preszler was acting as the Gerrard's attorney but did

advise him that she could not settle for that amount without additional medical records from Kinnie Gerrard. Preszler conveyed this information to the Gerrards. He also restated that he did not want to take the case because it was so close to the statute of limitations. FFCLR 12, 13.

The Gerrards returned to Preszler's office on August 19, 2003, and had an additional discussion with him regarding the personal injury case. Although sadly in the interim Kinnie Gerrard's brother-in-law had passed away (a traumatic event for her since she was close to him) she remained capable of conducting her business affairs. FFCLR 15, 16.

At that August 19, 2003, meeting Jeffrey Gerrard, wanted Preszler to be hired to represent them on the personal injury claim. Preszler advised that because Kinnie Gerrard was upset about her brother-in-law's death that it was not a good time for her to make decisions. At the end of that meeting it was understood that Preszler was not acting as the Gerrards' attorney in the personal injury matter. FFCLR 16, 17.

Kinnie Gerrard engaged in negotiations with the agent but the agent told her that without additional medical records the most the agent could offer was \$15,000 plus PIP. Kinnie Gerrard had arranged to have additional medical records sent to the agent. The agent advised that if she got the medical records she would evaluate them and submit a new offer.

Kinnie Gerrard asked the agent to send any new offer in writing to Preszler's office and threatened to hire Preszler for representation if the agent did not follow through. A letter was sent to Preszler and he reviewed it. FFCLR 19, 20.

The agent received the additional medical information and offered the policy limits of \$50,000 to Kinnie Gerrard on August 22, 2003. The agent's offer was to pay \$19,000 to the PIP carrier and pay the balance of \$31,000 (\$10,000 of future medical expenses and \$21,000 of general damages) to the Gerrards. Kinnie Gerrard asked that the paperwork be sent to Preszler's office and set up an appointment to see him. FFCLR 22. Later that day Preszler received the paperwork and obtained his form contingent fee agreement. FFCLR 23.

Preszler meet with Kinnie Gerrard and discussed with her the settlement paperwork and told her that he could file a request to increase her exemption amount from \$16,150 to \$17,425 but that the balance would have to go to pay creditors in the bankruptcy. He did so because at the time he incorrectly believed this to be the correct application of the law. It turned out that she could have exempted an additional \$10,000 under the "Wild Card" exemption of 11 USC section 522(d)(5). FFCLR 25.

At the time of the settlement, Preszler knew that he had done no independent investigation, very little other work on the claim and that all Kinnie Gerrard needed to do to receive the \$31,000 was to sign the settlement agreement. FFCLR 26. However, he also explained to Kinnie Gerrard that he had participated in the settlement by advising her whether the amount being offered was consistent with a reasonable offer, RP 823 – 824, and that since he was recommending to her that she accept the settlement he was accepting the malpractice risk. FFCLR 26. Preszler had repeatedly told her that he did not want to represent her on the matter but she wanted him to do so. He believed she was essentially asking him to indemnify her in case the settlement amount being offered was not reasonable or if there was funding other than from the insurance company or if the statute of limitations was being misinterpreted. RP 853-857.

Preszler told Kinnie Gerrard that he thought the risk he was accepting justified him receiving a contingent fee and that the money would not go to her in any case. FFCLR 26. She called her husband and discussed the issue with him and concluded that she was willing to agree to the contingent fee agreement. FFCLR 28. She then signed the agreement with the understanding that Preszler would receive 1/3 of the \$31,000. FFCLR 29. Preszler understood that his fee agreement was only the starting place

and that ultimately the final word would be up to the bankruptcy trustee and the court. RP 845 – 847.

They both signed the release, Preszler wrote the agent and the \$31,000 check was duly received and deposited to Preszler's trust account. FFCLR 30 – 32.

Preszler was unsure how to obtain court approval so he could disburse the fee so he asked his paralegal Julie Ahlers ("Ahlers") to contact the bankruptcy trustee to find out how this was done. Ahlers talked with an employee of the trustee who guided Ahlers to an online form which Ahlers then used as a guide for an application for an order approving Preszler's employment as the trustee's attorney. FFCLR 33. Preszler had never prepared such an application and when he asked Ahlers if the form was what the trustee wanted she said yes. He quickly scanned it and without appreciating fully what it said signed it. FFCLR 34. The form indicated that the applicant was a fiduciary to the bankruptcy estate, that the case needed to be settled with Allstate Insurance, that a contingent fee would be paid "in accordance with 11 USC 329 and 330 and FRBP 2016" and that the applicant has read the application and that it was true to best of his knowledge and belief. Preszler had not really read the application and the application did not disclose all material facts. FFCLR 35.

Preszler then had amended bankruptcy schedules prepared which left blank the "current market value" space in the portion of Schedule B designated for the September 6, 2000, car accident; claimed on Schedule C that \$17,425 of the car accident claim was exempt; and the term "unknown" was inserted in the blank in Schedule C for delineation of the "current market value" of the car accident claim. FFCLR 36. Preszler did not change the schedules that had been prepared by Ahlers. FFCLR 37.

When the trustee received the schedules they raised questions about the claims which caused him to inquire. He learned that the settlement had already occurred and that the contingent fee agreement had an August 18 date when it had actually been signed on August 22. He had questions in his mind about whether a contingent fee was appropriate but he did not pursue the issue. FFCLR 38. The trustee signed the application but would not file it unless the Gerrards agreed to commit nonexempt proceeds to funding the plan. Preszler signed a stipulation to that effect which was filed with the bankruptcy court. FFCLR 39.

Ahlers, based on a form she had previously used, prepared an order approving settlement which provided that Preszler was being employed in regards to an ongoing personal injury suit "in order to obtain resolution and settlement." Compensation was to be in accordance with 11 USC 327,

330, FRBP 2016<sup>1</sup> and the contingent fee agreement. Preszler signed the document, not having fully read it. It was forwarded to the bankruptcy judge who signed it. FFCLR 40.

Kinnie Gerrard twice asked to receive her proceeds. Preszler felt pressured to provide them to her and did so with the intent to help her with her financial needs. FFCLR 41.

On September 15 and 16, 2003, Preszler disbursed to himself \$10,323, just less than the 1/3 provided by the fee agreement. He did not obtain a court order allowing him to do so and did not provide notice to the Gerrards, the Trustee or the bankruptcy court that he was doing so. FFCLR 42.

Kinnie Gerrard learned from the bankruptcy trustees' office that she might have been able to use some of the contingent fee money to reduce the term of her Chapter 13 bankruptcy plan. FFCLR 43. Having lost faith in Preszler she hired attorney Bill Hames ("Hames") to represent her. Hames determined that the entire \$31,000 received from the personal injury settlement, less a reasonable fee, could have either gone to the Gerrards (\$9,650 to them personally pursuant to the "wild card" exemption and the rest to reduce the length of the Gerrards' Chapter 13 plan). FFCLR

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<sup>1</sup> The order mistakenly said FRBP 22016.

44. Hames contacted Preszler and explained this, demanded all funds not already disbursed to the Gerrards and an itemization. He also offered to have the Gerrards give Preszler a release of all claims. Preszler said during the conversation "I screwed up, didn't I." FFCLR 45, 46.

Preszler immediately reimbursed his trust account and complied with the specific demands made by Hames. He provided the itemization but not the portion of his ledger which showed the fee being removed and returned. FFCLR 46. Hames filed amended schedules with the result that the Gerrards were able to obtain \$9,965 in additional proceeds and were able to reduce the number of payments they made to the plan. FFCLR 49.

The Gerrards filed a grievance against Preszler and a hearing was held in May 2005. The hearing officer in that proceeding considered evidence outside the record and took into account his personal knowledge of Preszler. On March 29, 2006, the Disciplinary Board remanded the matter for a new hearing before a new hearing officer. As a result the hearing was delayed through no fault of either party by almost 2 years. FFCLR page 5 and paragraph 50. At the suggestion of the prior hearing officer Preszler has taken steps to ensure that occurrences of the type in this matter will not occur again. Preszler also wrote to Hames expressing remorse to Kinnie Gerrard. FFCLR 50.

### Procedural History

Preszler has had two hearings. The first, as discussed, above, was held in May 2005. On May 27, 2005, at the end of the hearing the first hearing officer disclosed that he personally knew Preszler and that he had considered evidence outside the record. The WSBA asked the chief hearing officer to disqualify the hearing officer which motion was denied. The hearing officer then filed his Findings of Fact, Conclusions of Law and Recommendation on August 19, 2005. The Association appealed the findings and recommendation. On March 29, 2006, the Disciplinary Board remanded for a new hearing. EX 128.

The second hearing was held on April 16 through 20, 2007. FFCLR page 5. The hearing officer entered his findings on May 16, 2007, recommending an admonition, a reprimand and a 30 day suspension. FFCLR 53, 56, 35 and page 35. The Disciplinary Board heard arguments and issued its decision on January 25, 2008. Board Decision, Bar File No. 103, Decision Papers, pages 38 – 42. This is referenced as the “Board Decision.” The Board made certain changes to the findings, discussed below, and by a 9-2 vote increased the recommended sanction to a three year suspension. The 2 dissenting members would have disbarred Preszler based on “the sanction analysis.” Board Decision page 2, footnote 1.

Preszler timely filed a notice of appeal and the matter is brought before this court for consideration. Notice of Appeal, Bar File No. 104, Decision Papers, pages 43 – 44.

The First Amended Formal Complaint charged 17 counts of misconduct. Clerks Papers, Bar File No. 009, pages 26 – 42. Prior to the hearing the Bar dismissed Counts 4, 5, 6, 7, 10, 11 and 13. FFCLR page 1. The hearing officer dismissed Counts 2, 8, 9, and 16. FFCLR 52, 54, 55, 59. Pursuant to a letter to the Board from Bar Counsel, the Board dismissed Count 12. Board Decision page 2. According at this time the remaining counts are Counts 1, 3, 14, 15 and 17.

Count 1 alleged violation of RPC 1.5(a)<sup>2</sup> (reasonable fees) and/or RPC 8.4(a) (violations through the acts of another) for charging or attempting to charge an unreasonable fee. The hearing officer found a knowing violation of RPC 1.5(a) but not a violation of RPC 8.4(a). He found there could have been harm if Hames had not intervened. He determined the presumptive sanction was disbarment under ABA Standard 7.1, that a single aggravator of substantial experience in the practice of law applied, Standard 9.22(i), and that the mitigators of absence of a prior disciplinary record, good faith effort to make restitution, full and free

disclosure to board, excellent character and reputation and delay in disciplinary proceedings applied. Standards 9.32 (a), (d), (e), (g) and (i). He determined that the mitigators justified a sanction of less than disbarment and recommended a suspension of 30 days. FFCLR 51.

The Disciplinary Board concluded as to Count 1 that the record showed knowing conduct and injury or potential injury to Kinnie Gerrard, the public or the legal system but not serious or potentially serious injury and, therefore, the presumptive sanction was suspension under Standard 7.2. Board Decision page 2. After consideration of the aggravators and mitigators, discussed below, and in conjunction with Counts 14 and 15, the Board recommended a three year suspension. Board Decision page 4.

Count 3 alleged violation of RPC 1.4(b) (explaining matters sufficient to make an informed decision) for failure to properly explain to Gerrard the impact of the personal injury claim on the bankruptcy. The hearing officer found that Preszler acted negligently in failing to properly explain the exemptions and reduction of the length of plan in the context of the personal injury recovery. He found the presumptive sanction under Standard 7.3 was reprimand. After consideration of the aggravating factor and mitigating factors found in connection with Count 1, he concluded an

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<sup>2</sup> Because the alleged violations occurred prior the effective date of the September 1,

admonition was the appropriate sanction. FFCLR 53. The Disciplinary Board did not recommend any change to this recommendation.

Count 14 alleged violation of RPC 3.4(c) (knowingly disobeying a court rule); RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation); RPC 8.4(d) (conduct prejudicial to administration of justice); and/or RPC 8.4(j) (willful disobedience of a court order). The hearing officer found a knowing violation of RPC 3.4(c) (knowingly disobeying a court rule) and RPC 8.4(d) (conduct prejudicial to administration of justice). He dismissed the remaining RPC allegations. He found the presumptive sanction was disbarment under Standard 6.21. After consideration of the aggravating factor and the mitigating factors found at Count 1, he determined that disbarment was not the appropriate sanction and recommended a 30 day suspension. FFCLR 57. The Disciplinary Board, after consideration of the aggravators and mitigators, discussed below, and in conjunction with Counts 1 and 15, recommended a three year suspension. Board Decision page 4.

Count 15 alleged violation of RPC 1.14(a) (deposit of client funds to trust account) and/or RPC 8.4(d) (conduct prejudicial to administration of justice) for Preszler disbursing the personal injury proceeds to himself

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2006, amendments to the RPCs, all counts were heard under the rules in effect prior to

without the consent, knowledge or authority of the bankruptcy Trustee. The hearing officer found a knowing violation of RPC 8.4(d) (conduct prejudicial to administration of justice) and dismissed the RPC 1.14(a) allegation. He found the presumptive sanction was disbarment under Standard 6.21. After consideration of the aggravating factor and the mitigating factors found at Count 1, he determined that disbarment was not the appropriate sanction and recommended a 30 day suspension. FFCLR 58. The Disciplinary Board, after consideration of the aggravators and mitigators, discussed below, and in conjunction with Counts 1 and 14, recommended a three year suspension. Board Decision page 4.

Count 17 alleged violation of RPC 5.3 (supervision of nonlawyer assistants) and/or RPC 5.5(b) (assisting another in the unauthorized practice of law) for failure to adequately supervise Ahlers. The hearing officer found a violation of RPC 5.3(b) (failure to properly supervise a nonlawyer assistant) and RPC 5.3(c)(1) (responsible for nonlawyer conduct when later ratified). He dismissed any other allegations under RPC 5.3 and the RPC 5.5(b) allegation. He found the presumptive sanction was reprimand under Standard 6.13. After consideration of the aggravating factor and the mitigating factors he determined that the sanction should

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September 1, 2006. FFCLR page 2, footnote 1.

remain a reprimand. FFCLR 60. The Disciplinary Board did not recommend any change to this recommendation.

In arriving at its recommendation of a three year suspension for the Count 1, 14 and 15 violations the Disciplinary Board found that the aggravating factor of multiple offenses under Standard 9.22(d) was shown since there were five counts proven involving five RPCs.<sup>3</sup> The Board found that delay was not an appropriate mitigator since the record did not show prejudice to the respondent and was not caused by the ODC. The Board accepted that there was timely good faith effort to make restitution but gave it little weight since "Respondent required his client to sign a release to get her own money back." Board Decision page 3.

Preszler does not challenge the admonition for Count 3 or the reprimand for Count 17. He does challenge the three year suspension recommendation.

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<sup>3</sup> At page 4, line 7 of its decision the Board appears to have mistakenly written that the hearing officer found "pattern of misconduct" but the FFCLR do not appear to confirm this and earlier in the Board's Decision, at page 3, the Board references the hearing officer having found "the following aggravating factor: Substantial experience in the practice of law." Later in its decision the Board provides that it found "2 aggravating factors." Therefore, it appears that while the Board confused its own addition of multiple offenses with pattern of misconduct it ultimately determined that the two aggregators of substantial experience and multiple offences applied. Furthermore, *In re Discipline of McMullen*, 127 Wn.2d 150, 171, 896 P.2d 1218 (1995) (multiple violations as to one client is not a pattern of misconduct) would make a finding of pattern of misconduct inappropriate in any case. Accordingly, this brief will assume that a pattern of misconduct was not found and will not argue it.

## ARGUMENT

### Standard for Review

The standard for review before this court in an attorney disciplinary matter is generally established law and was recently summarized in *In re Disciplinary Proceeding Against Marshal*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007):

This court bears the ultimate responsibility for lawyer discipline in Washington. *In re Disciplinary Proceeding Against Cohen (Cohen II)*, 150 Wn.2d 744, 753-54, 82 P.3d 224 (2004). However, we give considerable weight to the hearing officer's findings of fact. *E.g.*, *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 717, 72 P.3d 173 (2003). Unchallenged findings of fact are treated as verities on appeal. *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 735, 122 P.3d 710 (2005). Where challenged, we will uphold the hearing officer's findings if they are supported by substantial evidence. *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 208, 125 P.3d 954 (2006). Substantial evidence is evidence sufficient "to persuade a fair-minded, rational person of the truth of a declared premise." *Id.* at 209 n.2 (internal quotation marks omitted) (quoting *In re Disciplinary Proceeding Against Bonet*, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001)). "[W]e ordinarily will not disturb the findings of fact made upon conflicting evidence." *Longacre*, 155 Wn.2d at 736 (quoting *In re Disciplinary Proceeding Against Miller*, 95 Wn.2d 453, 457, 625 P.2d 701 (1981)). We also give great weight to the hearing officer's evaluation of the credibility and veracity of witnesses. *Longacre*, 155 Wn.2d at 735; *Whitt*, 149 Wn.2d at 717.

The Association must prove misconduct by a clear preponderance of the evidence. *Poole*, 156 Wn.2d at 209. The clear preponderance standard requires more proof than simple preponderance, but less than beyond a reasonable doubt. *Id.* The hearing officer's ultimate conclusion that misconduct occurred should be upheld on review if it is supported by substantial evidence in the record that the lower court could reasonably have found would meet the clear

preponderance standard. See *Bay v. Estate of Bay*, 125 Wn. App. 468, 475, 105 P.3d 434 (2005) (citing *In re Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986)). Our substantial evidence review should therefore take into account the clear preponderance burden of proof. We review conclusions of law de novo and will uphold them if they are supported by the findings of fact. E.g., *Cohen II*, 150 Wn.2d at 754.

An attorney challenging findings of fact must present argument as to why the specific findings are unsupported and cite to the record to support that argument. *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005). The attorney must do more than argue his or her version of the facts while ignoring the testimony of other witnesses. *Id.* We will not overturn findings based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer and Board. *Poole*, 156 Wn.2d at 212 (citing *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 133, 94 P.3d 939 (2004)).

Perhaps the most important point, however, on the standard of review is that “[W]hile we do “not lightly depart from the Board's recommendation,” we are “not bound by it.” *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 565, 9 P.3d 822 (2000) [Emphasis added.].

## Discussion

### Count 1

Count 1 deals with the issue of the fee Preszler sought from the Gerrards. Both the hearing officer and the Board found that this was knowing conduct but the Board reduced the level of injury from “serious or potentially serious” to “injury or potential injury” with result of changing

the presumptive sanction from disbarment to suspension. Preszler did not knowingly seek to charge an unreasonable fee.

In this matter, Kennie Gerrard, knew full well that Preszler did not want to be her attorney on the case, yet she pressured him to take on that role. If Preszler had wanted to take advantage of the Gerrards to earn a fee, he could have jumped in when she came to him when the statute was closing in but he told her he did not want to represent her. When she came back and her husband was recommending she hire him he declined and told her not to make any major decisions while she was upset about her brother-in-law's death. When it became clear that she was going to use his office and look to him for advice on whether or not to accept the settlement, he recognized that he was going to be acting as her attorney either expressly or de facto. Accordingly, he did what lawyers are supposed to do – he tried to help her as best he could under the circumstances.

Preszler explained to Kennie Gerrard that he had participated in the settlement by advising her whether the amount being offered was consistent with a reasonable offer, RP 823 – 824, and that since he was recommending to her that she accept the settlement he was accepting the malpractice risk. FFCLR 26. He believed she was essentially asking him to indemnify her in case the settlement amount being offered was not

reasonable or if there was funding other than from the insurance company or if the statute of limitations was being misinterpreted. RP 853-857. He also understood that his fee agreement was only the starting place and that ultimately the final word would be up to the bankruptcy trustee and the court. RP 845 – 847. For all intents and purposes, the fee agreement was either illusory or at the least only an informal memorandum which imposed a cap on what could be charged but did not impose a floor. Prior to agreeing Kinnie Gerrard called and discussed the matter with her husband.

The statute of limitations date was nearing. He is chided for not conducting an independent investigation and talking with the doctor – there was no time to do so. There was a policy limits offer on the table – further investigation would have not increased the offer since there was no additional money to be had from the insurance company. Under RPC 1.5(a) which provides factors to consider in determining a reasonable fee the situation was novel since the Gerrards were looking to him to provide advice quickly; there was skill involved in identifying what amount might be reasonable to seek in settlement – he provided this based on his experience and education. The terms of the fee agreement were in writing and the Gerrards had an understanding of what he was going to charge. There were time limitations imposed because of the looming statute date.

Based on his understanding of what a reasonable fee would be in view of the risk he was being asked to assume, Preszler felt that asking for a 1/3 fee which he knew would be reviewed by the court in any case, was not an unreasonable place to start. Preszler did not set out to charge an unreasonable fee, had a rationale as to why he thought under the circumstances the fee he sought was reasonable and knew that whatever happened his fee would ultimately be subject to review and adjustment by the court.

In order for there to be knowing conduct a lawyer has to have the “conscious awareness of the nature or attendant circumstances of the conduct” ABA Standards, Definitions [Emphasis added]. What occurred in this matter is that Preszler was charged with “knowing conduct” for reaching the wrong conclusion as to what would be a reasonable fee. But what he did actually was fail “to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation,” in short, he was negligent. ABA Standards, Definitions. There seems to be a sense that a contingent fee can only be charged when there is risk of collection. There is no such restriction in the rules. RPC 1.5(c) provides that a contingent fee can be charged based on the outcome of a matter but

there is no rule which provides that this is the only situation in which a contingent fee or percentage fee can be charged.

Preszler does agree that in hindsight he should have either not taken on the case at all or should have come up with a different fee arrangement but that is not the question. The question is what was his state of mind at the time he entered into the fee agreement? Both Standard 7.1 (disbarment) and 7.2 (suspension) require knowing conduct and are not applicable here. No one has shown that he did not in fact believe that the assumption of risk and the serving as an indemnifier justified a contingent fee that would ultimately be reviewed by the court. He has not been found to have acted dishonestly or with a selfish motive. He acted negligently and with at most injury or potential injury. The presumptive sanction for Count 1 is reprimand under Standard 7.3 or admonition under Standard 7.4. After consideration of the correct presumptive sanction and the mitigators identified by the hearing officer, the appropriate sanction for Count 1 is no greater than reprimand.

**Counts 14 and 15**

Counts 14 and 15 deal with the same subject matter – the disbursing of funds without court approval. It is important to keep in mind that this is not a trust fund case in which Preszler has been found to have misused or attempted to misuse client funds. Although the Bar charged him with trust account violations in Count 15, these were not proven. This is a case of a single failure to follow an obligation under the court rules which allegedly resulted in conduct prejudicial to the administration of justice.

The court should dismiss the findings of violations of RPC 8.4(d) – conduct prejudicial to the administration of justice: *In re Discipline of Carmick*; 146 Wn.2d 582, 597, 48 P.3d 311 (2002) - “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. 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).” Preszler engaged in a single instance of the failure to obtain the necessary approval to remove the funds. The finding of conduct prejudicial to the administration of justice should be dismissed.

The hearing officer found at Count 14, FFCLR 57, that when Preszler disbursed trust account funds to himself for fees he violated RPC 3.4(c) - knowingly disobeying an obligation under the bankruptcy rules and RPC 8.4(d) - conduct prejudicial to the administration of justice. He

dismissed the other allegations against Preszler. At FFCLR 58, Count 15, the hearing officer found a violation of RPC 8.4(d) – conduct prejudicial to the administration of justice - for the same conduct as cited in Count 14 – namely disbursing the personal-injury proceeds. The hearing officer dismissed the other allegations. As a result of the dismissal of the other portions of Counts 14 and 15 the two counts have been merged and are duplicative as they deal with the same conduct and the same rule – RPC 8.4(d). Preszler should not be subject to a violation finding twice for the same conduct and same rule so the Court should find that Count 15 is subsumed into Count 14.

The hearing officer found that the presumptive sanction for Counts 14 and 15 was disbarment under Standard 6.21 but after consideration of the mitigators, determined that the appropriate sanction was a 30-day suspension. Standard 6.21 requires knowing conduct and serious actual or potential injury to a party or serious or potentially serious interference with a legal proceeding. The hearing officer found that when Preszler removed the money from his trust, as an experienced Chapter 13 attorney, he knew he should have obtained a court order first. Preszler explained at the hearing, RP 900 – 905, that he removed the money because he believed that once the order of the court granting him employment was entered with

the language that he was to be compensated in accordance with 327, 330, and 22016, and the contingent fee agreement....,” RP 903 [Emphasis added], that he felt this was the appropriate time to remove the fees. He also testified that he now recognized that he should have left the funds in trust pending the filing of additional documents with the trustee.

The record does not support the hearing officer’s finding that Preszler knew that he could not remove the funds, instead it shows just the opposite – Preszler thought he could remove them. We recognize that we cannot simply reargue our version of the facts – but that is not the case here. The WSBA must point to substantial evidence in the record that Preszler knew he could not remove the funds under his theory of the case. There is no such evidence. The essence of the hearing officer’s finding is that Preszler *should* have known he could not remove the funds without a court order. This is not knowing behavior but rather negligent behavior.

Furthermore, there was no serious injury or potential injury to a party or any serious or potentially serious interference with a legal proceeding by the early removal of the funds. There is no finding or identification of any such injury and no evidence in the record to support such a determination. While it is true the WSBA argues that if the true nature of the time spent on the case and the lack of risk were known to the

trustee he would not have approved the fee, that is not the issue in these counts. The question is whether the withdrawal of the funds posed any serious risk of injury. There was none – Preszler made the amounts good immediately when questioned by Hames. FFCLR 46. There is no evidence to support any argument that there was any possible interference with the legal proceeding.

Because Preszler's actions were negligent rather than knowing and because there was no actual or potentially serious harm, Standard 6.21 is not the appropriate presumptive sanction but rather Standard 6.23 – Reprimand - is the correct presumptive sanction. When the mitigators are taken into account, the appropriate sanction for Counts 14 and 15 is reprimand or lower.

### **Multiple Offenses**

The Board found the aggravator of multiple offenses, Standard 9.22(d) because there were five counts proven involving five RPCs. However, in terms of suspension, there were only three RPC sections found to have been violated and since Counts 14 and 15 should be considered merged, only two counts were shown for to have been violated in connection with the suspension counts. The court should find that under the circumstances, either no finding of multiple offenses should be made or

give such determination little weight. *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006).

### Delay

The hearing officer found the mitigator of delay. The Board determined that because there was no showing of prejudice to Preszler and because the record did not show that the ODC caused the delay the mitigator of delay was not appropriate. Delay is found at Standard 9.32(i). Mitigators are any considerations that may justify a reduction in the degree of discipline to be imposed. Standards 9.31. The Board appears to believe that delay should be considered only as a sort of punishment to the Bar where the ODC causes the delay or is to be applied only when prejudice is shown. That is not the test. There have been many cases dealing with delay but the best summary is found at *Discipline of Tasker*; 141 Wn.2d 557, 568, 9 P.3d 822 (2000):

We have said recently that delay in the prosecution of a case is a mitigating factor to be balanced against any aggravating factors, but it does not automatically merit a reduction in sanction. *In re Discipline of Dann*, 136 Wn.2d at 82-83. See also *Yokozeki v. State Bar*, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974) (unexplained seven-year delay mitigated disbarment to suspension); *Florida Bar v. Thomson*, 429 So. 2d 2 (Fla. 1983) (unexplained delay mitigated suspension to reprimand); *In re Conduct of Morrow*, 303 Or. 102, 734 P.2d 867, 63 A.L.R.4th 647 (1987) (lengthy delay between conduct and charges mitigated sanction); *Vaughn v. State Bar*, 9 Cal. 3d 698,

511 P.2d 1158, 108 Cal. Rptr. 806 (1973) (four-year delay in prosecution mitigated suspension to reprimand); *Louisiana State Bar Ass'n v. Guidry*, 571 So. 2d 161 (La. 1990) (lawyer who committed misconduct by commingling and converting client funds suspended for six months due to three-year delay in bringing charges and intervening rehabilitation). Here Tasker made the most of the delay by demonstrating his willingness and ability to clean up his act, thus showing disbarment is not necessary to protect the public. Moreover Tasker demonstrates the delay in prosecution was caused through no fault of his own, subjected him to the opprobrium of Bellingham's small legal community, and was the result of administrative understaffing and slack prosecution on the part of the association.

It is important to note the *Yokozeki v. State Bar*, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974) and *Florida Bar v. Thomson*, 429 So. 2d 2 (Fla. 1983) cases cited by the *Tasker* court are the two cases cited by the Standards as the basis for the mitigator of delay. Standard 9.3 Mitigation, Commentary. Neither case requires that the prosecution acted improperly, for example in *Yokozeki*, the hearing office delayed the filing of his decision, nor do these cases require prejudice to the respondent. While some sort of delay by the prosecution or actual prejudice to the respondent may justify the finding of delay, such determinations are not mandatory.

Preszler's case is unique – a hearing officer acted in such a way that when the Bar Association asked it to the Board took the unusual action of remanding for a new hearing. The new hearing officer found and the Board confirmed that the hearing was delayed for more than two years through no

fault of anyone and that in the meanwhile Preszler took steps to assure that the occurrences would not occur again. FFCLR 50. Similar to Tasker, Preszler made good use of the delay “by demonstrating his willingness and ability to clean up his act.” During this period he also withdrew the release he had been given, additionally demonstrating his willingness to accept responsibility for his actions. RP 914, EX 124. Also similar to Tasker, Preszler did not cause the delay. The court should reinstate the mitigator of delay.

**Timely effort to pay restitution**

The Board determined that it would accept the hearing officer’s determination of timely good faith effort to make restitution but would give it little weight because Preszler “required his client to sign a release to get her money back.” Board Decision page 3. The record does not support the determination that Preszler required the Gerrards to sign the release. The hearing officer specifically found and the Board affirmed that it was Hames who came up with the idea of the release. Nothing in the record supports the contention that Preszler somehow made the release a condition precedent to returning the money. Hames asked him to return the money and Preszler immediately did so. Furthermore, while the first decision was

pending Preszler voluntarily sent a letter to Hames withdrawing the release.  
RP 914, EX 124.

The Board is simply incorrect about how the release came about. Preszler immediately returned the funds without conditions and, therefore, this mitigator should not be given diminished weight.

### **Sanction**

The hearing officer, after hearing all the evidence and seeing Preszler testify concluded that disbarment was the presumptive sanction for Counts 1, 14 and 15 but that after consideration of the aggravator and mitigators a 30 day suspension was appropriate. How is one to take this recommendation? Was he simply hoodwinked by Preszler and his counsel into being too lenient or did he recognize the charge of the Standards, Theoretical Framework, that:

While there may be particular cases of lawyer misconduct that are not easily categorized, the standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in the particular situation. The standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

The hearing officer recognized that "The challenge ... is to fashion a suitable remedy in each case to accomplish these goals and insure that individualized justice is dispensed." *In Re Livesey*, 85 Wn.2d 189, 193, 532 P.2d 274 (1975). The goals of an attorney disciplinary case is:

The underlying purpose of all attorney disciplinary action is for the protection of the public and to preserve confidence in the legal profession as well as the judicial system. In deciding the nature of proper disciplinary action, we consider the seriousness and circumstances of the offense, the need to avoid repetition, deter others from similar misdeeds, maintain respect for the honor and dignity of the legal profession, and assure that those who seek legal services will be insulated from unprofessional conduct. *In re Smith*, 83 Wn.2d 659, 663, 521 P.2d 212 (1974).

The hearing officer recognized that a 30 day suspension protect the public would be protected and maintain confidence in the legal profession and the judicial system. Such suspension would deter repetition by respondent while deterring others from similar misdeeds.

The Board disagreed with the hearing officer and found the presumptive sanction for the unreasonable fees violation found at Count 1 was suspension but agreed with the hearing officer that disbarment was the presumptive sanction for failing to get permission from the court before he removed the funds from his trust account. The recommendation of a three year suspension is not based on any case law cited by the Board or any other analysis other than the apparent pro forma plugging in that this was

knowing conduct and that there was potentially serious harm which means disbarment. The Board does this without really looking at the substance of the misconduct. Having determined that disbarment is the presumptive sanction, the Board applied the aggravators and mitigators and stepped the sanction down to a suspension. There is no explanation as to why the three years except to say that it is a close question so apparently the Board felt it could only come down to what it viewed as the next level – a three year suspension, which is the maximum suspension. ELC 13.1. This is the overly ridged application of the Standards, is contrary to their express purpose and essentially turns them into determinate sentencing rules.

We ask this court to look at what really happened and in doing so to apply the individualized justice required in attorney disciplinary cases. In a single instance Preszler though he was entitled to his fees pursuant to his fee agreement so he withdrew them. He was then fired before he could put together the packet of information which would have put all the information before the court for a ruling on the fees. RP 904 and 907. He did not steal money, he did cheat anyone. He violated a court rule that required him to seek court permission before he removed the funds. He was did not do so contemptuously and the trustee already knew about the fee agreement and that the case had been settled. FFCLR 38. While the

hearing officer and the Board found serious or potentially serious injury, there is simply nothing in the record to support such finding. Nothing indicates that Preszler was broke or in desperate need of clients in order to earn money – if he had been he would not have refused several times to represent the Gerrards on the personal injury matter. There is nothing to indicate that Preszler was not good for the money, as he was immediately when Hames asked him to send it.

So what should be the sanction for a lawyer who makes a mistake about how a court rule is applied but where that mistake is not likely to result in harm?

### Proportionality

In regards to proportionality of the sanction with other cases, there are no cases at the court that have relatively simple findings of improperly charging an unreasonable fee. All the cases show dramatically worse conduct than that committed by Preszler.

*In re Disciplinary Proceeding Against Brothers*, 149 Wn.2d 575, 70 P.3d 940 (2003). One year suspension for grossly unreasonable fee where the lawyer had taken a \$36,000 fee for preparation of a quitclaim deed. Brothers felt he was entitled to the fee because he could not get the client to agree to any other fee. The court did not find this credible in view of a prior history of sanctions for unreasonable fees and trust account violations as well as the fact that less than a year earlier, Brothers had returned \$25,000 to another

client at the suggestion of disciplinary counsel because of a disagreement as to the basis for the large fee.

*In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 98 P.3d 477 (2004). Six month suspension where Egger billed and collected \$21,000 additional from a client for preparing loan documents even though the loan document provide for a \$15,000 payment from other sources which resulted in Egger collecting a \$36,000 fee for drafting the loan documents. Egger did not discuss the situation with his client and the client did not consent. Egger ended up being paid twice for the same work. Egger did not challenge a finding that he acted knowingly.

*Discipline of Heard*, 136 Wn.2d 405, 963 P.2d 818 (1998). Two year suspension where attorney charged unreasonable fee when he took advantage of disabled client by taking the only cash in a settlement. He also exploited his relationship to take advantage of the client sexually.

*In re Disciplinary Proceeding Against Cohen*, 149 Wn.2d 323, 67 P.3d 1086 (2003). Six month suspension for unreasonable fee in conjunction with many other violations.

All of these cases had much worse conduct than Preszler and yet none of them provide for a three year suspension.

On the issue of a violation of RPC 3.4(c) – Violation of court rules – We were unable to find any Supreme Court cases on this rule so it would appear to be an issue of first impression.

On the issue of a violation of RPC 8.4(d) – Conduct prejudicial to the administration of justice – This tends to be a finding in complicated and convoluted sets of facts so it is generally impossible to isolate the actual sanction for the misconduct – for example, *In re Disciplinary Proceeding Against Vanderbeek*; 153 Wn.2d 64, 101 P.3d 88 (2004) and *In re*

*Disciplinary Proceeding Against Schwimmer*; 153 Wn.2d 752108 P.3d 761 (2005).

**Analysis**

As discussed above, upon proper application of the facts and law, the presumptive sanctions for Counts 1, 14 and 15 are reprimand or less and this is what the court should impose. The overly ridged application of the Standards in this case will result in an unnecessarily harsh sanction.

If the presumptive sanctions are to remain suspension and disbarment, the application of the aggravators and mitigators as well as a comparison of the suspensions imposed for much worse conduct for unreasonable fees all demonstrate that a three year suspension is extreme. The hearing officer saw Preszler and had the best handle on what was necessary and appropriate – his recommendation of a 30 day suspension should be reimposed.

**CONCLUSION**

Preszler has acknowledged that he did not act as he should have in all aspects of his handling of the Gerrards' matters but he did not knowingly seek to charge an unreasonable fee since he thought there were valid grounds for a contingent fee to be charged given his perception of the risks and since he knew that any fee agreement had to ultimately be reviewed by the trustee and court who could completely disregard it. Preszler acted negligently in removing the funds from trust under the belief that the court's employment order allowed this and with the knowledge that any removal was subject to review later. His actions did not cause

serious or potentially serious harm to a party or interfere with the court proceeding.

Preszler actions do not reflect that a presumptive sanction of disbarment or long suspension is appropriate on any of the counts found to have been violated. Given the mitigators found by the hearing officer the appropriate sanction is either reprimand or a 30 day suspension.

Dated this 28<sup>th</sup> day of April, 2008.

**FILED AS ATTACHMENT  
TO EMAIL**

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Kurt M. Bulmer, WSBA # 5559  
Attorney for Respondent Preszler

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**To:** Kurt Bulmer  
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**From:** Kurt Bulmer [mailto:[kbulmer@comcast.net](mailto:kbulmer@comcast.net)]  
**Sent:** Tuesday, April 29, 2008 12:13 AM  
**To:** OFFICE RECEPTIONIST, CLERK; Joanne Abelson  
**Subject:** Perszler - Respondent's Opening Brief - Sup. Ct. No 200,570-5

Attached for filing is Respondent's Opening Brief in the Preszler matter.

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