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SUPREME COURT -
STATE OF WASHINGTON

No. 200,577-2

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BY RONALD A. CARPENTER

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE:

BRADLEY R. MARSHALL,

Lawyer

WSBA NO. 15830

REPLY BRIEF OF APPELLANT MARSHALL

Bradley R. Marshall, Pro Per WSBA #15830
121 Lakeside Avenue, Suite 100
Seattle, Washington 98122
206.324.4842

ORIGINAL

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A. Introduction

Bradley R. Marshall has practiced law in the State of Washington since 1986. During this time, he has served as a standard bearer for those who are underrepresented within our community; victims of discrimination in public accommodations and employment, victims and families of wrongful police shootings; those with little money who are forced to request his assistance on a pro bono basis. Marshall has made a difference on behalf of his clients.

Like most of us, experience and time has provided Marshall with an increase in wisdom and understanding on how to practice law. Time and challenge has provided a deeper insight on the capabilities and limitations of the law; he has learned that the law does not promise truth or guarantee civility.

Marshall agreed to represent his clients in the present case with four goals in mind: first, to persuade the Grand Chapter to reinstate the women as members of the Eastern Star, second, to obtain an accounting of organizational funds, third, to obtain compensation for his clients due to slanderous and defaming statements made about them and fourth, to provide a successful defense against claims for money damages by the Grand Chapter. Although Marshall's clients were disadvantaged by a lack of resources he nevertheless succeeded in securing all but one of his

clients' goals---reinstatement into the Eastern Star organization. He obtained settlements (through a private mediation service) in the amount of \$12,500 per client; a complete dismissal of all cross claims; and a full and complete audit of the Grand Chapter's books and records.

Most of the clients Marshall has served over his career have been poor, usually without the means to pay a large retainer for fees and costs; representation in these cases is provided on a pro bono basis, a contingency fee basis, or on a modest hourly fee or flat fee arrangement, plus costs, to be paid over the course of his service to the client.

The representation of multiple clients is often a necessity in order for representation to be made economically feasible. The costs of depositions, expert witnesses, filing fees and other associated litigation expenses make it nearly impossible for a single client with limited resources to afford legal representation. The solution, for the few lawyers willing to undertake these types of cases, is to be armed with truth and the desire for justice by more than one client at a time. Sometimes these cases become class actions, most often they do not.

Marshall's success has been largely due to his willingness to work long hours in conducting depositions, perpetuating requests for admission, production or subpoenas in order to discover evidence necessary to prove a client's case. The money needed to conduct a deposition is minimal but

the cost to transcribe a deposition is expensive. An attorney representing these types of clients is left to hope; hope that the client will raise the money necessary to order the depositions; or hope that the defendant will realize the inevitability of his fate and settle the case without the need for a full fledged trial. In the present case, Marshall deposed more than 12 witnesses, drafted nearly one hundred letters, submitted thousands of pages of documentary evidence; submitted and responded to more than twenty separate motions, plus two separate summary judgment motions, prepared jury instructions, a trial brief and supplemental trial brief, voir dire questions, motions in limine, and then prosecuted the plaintiff's claims and defended against counter claims in a trial that lasted more than 10 days.

Marshall worked long and hard to assist his clients. He did so for little money. While discovery was ongoing and settlement negotiations were occurring, the clients seemed appreciative of the work Marshall provided. However, when Marshall failed to win their reinstatement, through mediation, in the case of Ms. Wormack, she became despondent and angry; stating at one point during the court facilitated mediation that she wanted her case settled and that she would not pay "another dime" towards the case. EX 43. When the court granted the defendant's motion for a directed verdict on the question of reinstatement, Ms. Richard simply

waited to the end of the trial, collected a modest jury award (\$3,500.00) and then claimed that under the retainer agreement she was no longer required to pay for the legal services she received. Mr. and Mrs. Rheubottom were appreciative of Marshall's efforts, disappointed with the outcome but content to accept the jury's award. Ms. Harris was also frustrated with the mediation but made the decision to settle her case. Due to her emergent hospitalization she was unable to provide testimony on Mr. Marshall's behalf. She remains willing and ready to offer her testimony if given the opportunity.

A Bar grievance was filed by Ms. Richard in response to a legal claim for fees owed (later dismissed). Bar counsel took the matter from there and claimed Marshall was in a conflict of interest relationship, where there was no such conflict, misrepresented a fact, where no such misrepresentation occurred or was intended; then claimed that Marshall attempted to force a settlement of his client's claims and receive fees to which he was not entitled when substantial evidence conclusively shows that he followed the instructions of his clients and sought fees and costs he was entitled to under legally enforceable retainer agreements. Sadly, the Bar makes its claims in the context of having committed a host of irrefutable ethical violations.

Teena Killian, the first hearing officer, knowingly engaged in ethical violations. She wanted to be a member of the Bar's prosecution staff. She did not want to be a hearing officer; she wanted to be a disciplinary counsel. She applied for the job of disciplinary counsel while sitting as the hearing officer in *In re Eric C. Hoort*, Public File No. 04-00037; she then took the same action in *In re Bradley R. Marshall*. Killian denied to investigators that she presided as a hearing officer while applying for employment with the Bar prior to the Marshall case. The sworn declaration of Mr. Kurt Bulmer refutes this claim.

James M. Danielson violated the appearance of fairness doctrine and failed to properly disqualify himself upon receipt of Mr. Bulmer's written objection to the appointment of *any* hearing officer with knowledge of the Killian matter. Instead, Mr. Danielson appointed himself to hear the case and then failed to provide a written or verbal ruling of his reasons for denying Mr. Bulmer's objection; he did this while he was a paid employee of the Bar, earning an annual salary of \$33,000, owing a fiduciary duty to his employer, a clear conflict of interest. He was an advocate for the Bar, sending letters on Bar letterhead, the same letterhead disciplinary counsel used,¹ issuing orders on Bar pleading

¹ See January 2, 2007 Mr. Danielson's letter to Clerk of the Disciplinary Board.

paper, the same pleading paper disciplinary counsel use,² thanking witnesses on behalf of the Bar, not on behalf of all parties, Tr. 236 denying discovery of misconduct by the Bar. By appointing himself as hearing officer, after all preemptory dismissals were used, by denying the deposition of Bar personnel and Ms Killian and by precluding the discovery of other instances where Ms. Killian served as hearing officer, through the issuance of a protective order, he in effect insulated Ms Killian, disciplinary counsel and the Bar from the rigors of constitutional impartiality and fairness.

Scott Busby and Christine Gray wrote in their memorandum to the Disciplinary Board that Mr. Marshall “should at long last be disbarred”. To accomplish this goal they misstated evidence, distorted other evidence and argued matters not admitted into evidence, all in an effort to disbar Marshall. They urged the Court to retaliate against Marshall for filing suit against the Washington State Supreme Court and the Bar. They failed to have Killian removed from hearing officer list after the *Hoort* matter, when they knew or should have known of her desire for Bar employment; a year later they failed to immediately report her conduct for more than two weeks; while actively seeking a scheduling

² See Ex. 296, Hearing Officer Killian. Also, see Hearing Officer Danielson’s August 1, 2006 Order Appointing [James Danielson] Hearing Officer in the present matter and January 2, 2007 Hearing Officer Danielson’s Order Granting Association’s Motion to Quash Subpoenas *Duces Tecum*.

order and an amended complaint by which to charge Marshall with additional violations. And they remained silent when Danielson appointed himself as hearing officer when they knew he was employed by the Bar and was actively violating the appearance of fairness doctrine.

B. The Washington State Bar Association Violated Marshall's Right to Due Process by Failing to Adequately Inform Him of All Essential Elements of a Violation of the Rules of Professional Conduct Regarding Conflicts of Interest

A prosecution for an alleged violation of the rules of professional conduct is quasi-criminal. *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 518, 29 P.2d 689 (2001) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). "A professional license revocation proceeding has been determined to be 'quasi-criminal' in nature and, accordingly, entitled to the protections of due process." *Id.* (citing *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983)).

In *Matter of Denting*, the Washington State Supreme Court held that a judge accused of misconduct is entitled to no less procedural due process than one accused of a crime. *Id.* 108 Wn.2d 82, 103, 736 P.2d 639 (1987) (*See* U.S. Const. amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71)). The Court went on to state that a lawyer charged with misconduct in a disbarment proceeding is entitled to

procedural due process. *Id.* (Citing *In re Ruffalo*, 390 U.S. 544, 550, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968)).

A criminal defendant's a right to be informed of all charges he or she will face at trial is guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution.³ From these protections comes the well-established principle, "a criminal defendant may be held to answer for only those offenses contained in the indictment or information." *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). "A charging document is constitutionally sufficient . . . only if it includes all 'essential elements' of the crime. . . ." *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004) (quoting *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). "If the necessary elements are neither found nor fairly implied in the charging document, '[the court] presumes[s] prejudice and reverses[s]. . . .'" *Id.* at 788 (quoting *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000)).

Here, contrary to the Bar's argument, that the Bar's Amended Formal Complaint was "sufficient to inform [Marshall] of the nature of the

³ "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." U.S. Const. Amend. VI. the Washington Constitution states, "[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him. . ." and to have such information in writing. Const. art. I, § 22.

misconduct charged and to allow him to prepare a defense”, the Bar’s Amended Formal Complaint was constitutionally insufficient.

The Bar pleaded:

2. In or about October 2000, Respondent agreed to represent Callie Rheubottom and Essie Wormack in bringing a lawsuit against the Prince Hall Grand Chapter Order of the Eastern Star (Grand Chapter).

7. In or about February 2001, Respondent agreed to represent Lorraine Harris, another former member of the Grand Chapter, joining her as a plaintiff in the Rheubottom litigation.

9. Mrs. Wormack objected to having Mrs. Harris join the Rheubottom litigation.

10. In February and March 2001, Respondent knew that Mrs. Wormack objected to having Mrs. Harris join the Rheubottom litigation.

11. On April 20, 2001, Respondent filed an amended complaint to the Rheubottom litigation, adding Mrs. Harris as a plaintiff.

12. Both before and after agreeing to represent Mrs. Harris, Respondent failed to explain to Mrs. Rheubottom, Mrs. Wormack or Mrs. Harris the implications of the common representation or the risks involved in the common representation. Respondent did not obtain consent in writing to the potential conflict of interest from Mrs. Rheubottom, Mrs. Wormack or Mrs. Harris.

WSBA’s Amended Formal Complaint.

But, the Hearing Officer findings included:

21(c). The conflicts issues ranged from how costs of the litigation would be allocated among, now, five clients; how global settlement proposals would be dealt with if one client wanted to settle and others did not; and how the different agendas of Mrs. Harris and Mrs. Wormack would be reconciled.

Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendations.

First, we must assume real conflicts of interest must exist in order to find a violation of RPC 1.7(b). The only conflicts of interest enumerated at any time, either in the Bar's Amended Formal Complaint or in the Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendations were found in paragraph 21(c) of the later, as set out above. How can any person know what they are defending against? Are the allegations found in the Bar's Amended Formal Complaint "sufficient to inform Respondent of the nature of the misconduct charged and to allow him to prepare a defense" as to the conflicts of interest enumerated by the Hearing Officer? The answer to any reasonable person is "No". The allegations contained in the Bar's Amended Formal Complaint are constitutionally insufficient to make the finding of fact set out in paragraph 21(c) above.

C. A Complete Dismissal Is Required

An attorney defending disciplinary charges has the right to due process of law. An unbiased judge and the appearance of fairness are hallmarks of due process. *In re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 55 S. Ct. 623 (1955). *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.

Ct. 80, 34 L .Ed. 2d 267 (1972). The Code of Judicial Conduct states that “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” *CJC Canon* 3 (D)(1). The canon lists several specific instances where a judge’s duty to recuse is “clear and nondiscretionary”. In the present case an impermissible conflict of interest and appearance of impropriety existed because James Danielson, the Bar’s chief hearing officer was employed by the Bar at the time charges were being brought by the Bar against Marshall. Danielson was employed by the Bar at an annual salary of \$33,000.00. It was Danielson’s responsibility to train hearing officers and to oversee how they performed. He should have been aware that Killian, in 2005, had applied for employment with the Bar while simultaneously sitting as judge in *In re Hoort*. Danielson appointed Killian to serve as judge in the present case less than one year after she violated her judicial responsibilities in *Hoort*. Killian was subsequently forced to recuse herself. Two other hearing officers were appointed by Danielson but each were disqualified by the Bar and/or Marshall. Mr. Bulmer filed a five page letter on June 29, 2006 objecting to the appointment of a hearing officer with knowledge of the Killian matter and all issues related thereto. See App 1. With full knowledge of Bulmer's objection and the facts surrounding Killian, including his duty to train, evaluate, monitor and

discipline hearing officers and the negative reflection the Killian matter would have on his office, at a time when his law partner had recently been elevated from his position as a member of the Board of Governors to the office of Bar President-Elect, Danielson, without explanation, appointed himself to evaluate the evidence and determine whether the facts constituted unethical conduct, App. 2 and 3. Danielson functioned not only as a trier of fact but also as the ultimate decision maker.

In *Chicago, M., St. P. & Pac. R.R. v. State Human Rights Comm'n*, 87 Wn.2d 802 557 P.2d 307 (1976), the Court found that an impermissible conflict of interest existed because one of the tribunal members, Susan Ammeter, had a job application pending with the Commission during the time period the tribunal was processing and deciding this case. *Id.* at 806. This Court held that the application by one of the tribunal's members created an impermissible conflict of interest and that one acting in a judicial capacity must avoid even mere suspicion of irregularity or appearance of bias or prejudice. In applying an "appearance of fairness doctrine" to the facts, the Court stated:

There is no direct evidence that Ms. Ammeter was prejudiced or motivated in favor of the Commission, and we do not even suggest that she performed her duties as a tribunal member in less than an exemplary manner. It is the fact of her pending application for a job with the very Commission appearing before the tribunal as an advocate that strips the proceeding of the appearance of the fairness.

Id. at 810.

The Court went on to hold:

Under these facts and circumstances, we cannot say that a reasonably prudent and disinterested observer would conclude that the Railroad obtained a fair, impartial, and neutral hearing in the proceedings before the hearing tribunal. Therefore, the decision of the tribunal is not valid and cannot be sustained.

Id. at 811.

While the appearance of fairness doctrine applies to the Killian situation, it applies even more so to Danielson, who was not simply applying for employment with the Bar, but had already obtained it and the \$33,000 per year paycheck that went with it. But, the question is not even whether, because of his fiduciary relationship with the Bar, Danielson was biased, the question is, would his employment by the organization that is prosecuting a respondent attorney create an appearance of unfairness to a reasonable prudent and disinterested observer. The answer is “Yes”, and his decision, including all findings of fact, conclusions of law and recommendation of disbarment must be declared void.

D. Mrs. Harris and Mrs. Wormack Wanted to Settle Their Cases

Ms. Wormack and Mrs. Harris on June 3, 2002 settled their cases in a settlement conference with Judge Edward Heavey. Mr. Marshall did not learn that they had changed their minds until weeks later. In response to a question by the Bar as to whether or not Mrs. Wormack told Mr.

Marshall, immediately following the June 3, 2002 settlement conference with Judge Heavey, whether or not she wanted to continue to pursue her case against the Grand Chapter, Mrs. Wormack clearly stated she had not, “Not in walking to the car because the car was so close to the Regional Justice Center, not at that time.” Tr. 155:1-6. Despite the Bar’s continued protestations to the contrary, they are simply misstating the evidence and continue to do so.⁴ Mrs. Wormack and Mrs. Harris both changed their minds much later and wanted to proceed to trial. At that time, it was Marshall’s position that he would proceed to a jury trial so long as the case was still viable and he received the additionally requested funds for litigation and court related costs.

1. Marshall Did Not Misrepresent the Facts in Either the June 17, or July 31, 2002 Letters

a. The June 17, 2002 Letter Contained No Known Material Misstatements

The Bar claims that Marshall misrepresented the facts in his June 17, 2002 letter to Mrs. Wormack and Mrs. Harris when he stated that “the court has directed Mrs. Wormack and Mrs. Harris [to] sign the release and settlement agreement and the Chapter to do the same in order to consummate this matter.”

⁴ See the WSBA’s Response Brief, P. 39 where the WSBA again misstates the truth by writing “After the June 3, 2002 settlement conference with Judge Heavey, Mrs. Wormack told Respondent that she had not resolved her claims against the Grand Chapter” This statement is patently untrue.

- Mrs. Wormack's testified that she did not hear Judge Edward Heavey direct her to sign the release. Of course she did not hear this communication by Judge Heavey as she was not present at the second hearing when Judge Heavey directed Mr. Marshall to obtain the signatures and file the appropriate pleadings. Tr. 158.
- Mr. Thomson testified that he did not hear Judge Heavey direct Ms. Wormack and Ms. Harris to sign the releases. The court made this statement after ordering the parties to return to his courtroom a day or so following the initial settlement conference. Mr. Thompson was naturally not in the same room with Mr. Marshall and the Rheubottoms. Tr. 82-3.
- Mr. Thomson confirms that the case had settled, Tr. 61, and Ms. Wormack and Mrs. Harris were required to sign releases or be subject to contempt of court citations if they did not. Ex. 38.
- Ms. Wormack did not, at any time prior to the June 17 letter, communicate that she had changed her mind about settling her case. By the time representation began on behalf of Ms. Richard, the remaining cases had been settled and/or dismissed. Ex. 40.

b. The July 31, 2002 Letter Contained No Known Material Misstatements

The Bar claims that Marshall misrepresented the facts and the truth in his July 31, 2002 letter to Mrs. Wormack and Mrs. Harris when he wrote that “[d]espite your reluctance to sign the Settlement Agreement, your claims have been dismissed and will not be heard at trial. If you wish to discuss this matter, please feel free to contact me.” Ex. 30, 42, 43, 254. He should have used the term “settled” but invited Ms. Wormack and Mrs. Harris to contact him if they had questions. Marshall’s goal was to facilitate the settlement and bring the matter to an end, consistent with Ms Wormack’s and Ms. Harris’ previously stated desires.

2. Marshall Had A Contractual Right to Request Additional Monies from Mrs. Harris and Mrs. Wormack

Mr. Marshall requested additional money to cover costs. He had a contractual right to charge additional fees if he chose to do so. He did not choose to make this request. The retainer agreement stated that “Marshall Wheeler Zaug will make no further charge for its services other than as set forth in this agreement or unless otherwise agreed.” (*Emphasis added*). Ex. 3:3. “Marshall Wheeler Zaug may terminate its employment hereunder in its discretion if it determines there are no reasonable grounds to pursue the matter or that it is not practical to do so.” (*Emphasis*

added). Ex. 3:4. As a result, Mr. Marshall told Mrs. Wormack “that [she] needed to get another attorney to represent [her].” Tr. 229.

3. There Was No Conflict Of Interest Between Mrs. Harris and Mrs. Wormack

Marshall does not believe a legal conflict of interest existed in the case but he did represent multiple clients without a signed waiver. There is no dispute regarding this claim. At the time Mr. Marshall undertook to represent his clients, this Court had not issued its opinion in *In Re Marshall*, which provides a great deal more instruction on how these cases should be handled.

a. Multiple Representations Do Not Necessarily Require Written Waivers

The Hearing Officer found that that RPC 1.7(b) was not a *per se* rule that requires every representation of more than one client in a matter to obtain written waivers of conflict. This is in accord with the plain language of both the old and the new RPC 1.7. Neither requires a signed written waiver in every representation of more than one client.

b. The Hearing Officer Did Not Find that Mrs. Wormack and Mrs. Harris Had Differences That Amounted to Legal Conflicts Which Were Not Resolved

In paragraph 12, the Hearing Officer made the following finding of fact:

Respondent claims that the clients worked out the conflict of interest, but he never advised them in writing about the conflict nor did he obtain a written waiver of the conflict of interest.

Nowhere did the hearing officer find that Marshall's claim was not true. RPC 1.7(b) is not a *per se* rule that requires a signed written consent in every representation of more than one client. Since there was no finding that Mrs. Wormack and Mrs. Harris had not worked out their differences, then, there was no finding of a conflict of interest to make RPC 1.7 applicable to this factual scenario.

c. The Conflicts Found by the Hearing Officer Were Insufficient to Create a Legal Conflict, Which Violates RPC 1.7

The conflicts of interest found by the hearing officer were never alleged by the Bar; and none are sufficient to violate RPC 1.7. The hearing officer found the following conflicts concerning the following subjects: (1) how the costs of litigation would be allocated; (2) how the settlement proposals were to be handle; (3) how attorney time would be allocated; (4) and how the agendas of Mrs. Harris and Mrs. Wormack would be reconciled.

The costs were allocated on a pro rata basis. See e.g. Ex. 61, 64. There was no global settlement, each client's case was negotiated and settled on its own terms. By the time representation began on behalf of Ms. Richard, only Ms. Rheubottom's case remained; the others had either been settled and dismissed or abandoned. An hourly agreement was consummated with Ms. Lindia Richard. Attorney time was allocated on a pro rata basis between her case and Ms. Rheubottom's case. Both clients agreed to this formula in advance of representation. *Id.* Mrs. Harris' and Mrs. Wormack's "agendas" were discussed above.

d. Under the Present RPC 1.7, Marshall's Conduct Would Not Have Been a Violation

It should be emphasized that Comment 8 of the new RPC 1.7, states:

The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

RPC 1.7, Comment 8.

This is the precise situation here. The alleged conflicts asserted here could possibly exist in all litigation where an attorney is representing multiple clients and therefore, if Comment 8 means anything, it must fall into the category of mere "possibility of subsequent harm".

4. Marshall Never Agreed to a Flat Fee with Mrs. Richard

The essential elements of a contract are “the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.” *Family Med. Bldg., Inc. v. Department of Soc. & Health Servs.*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985); *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995).

“ [P]arol evidence is admissible . . . for the purpose of ascertaining the intention of the parties and properly construing the writing.” *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)); see also, e.g., *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 570, 919 P.2d 594 (1996). Parol evidence admitted to *interpret* the meaning of what is actually contained in a contract does not alter the terms contained in the contract. Thus, use of parol, or extrinsic, evidence as an aid to interpretation does not convert a written contract into a partly oral, partly written contract.

Moreover, the “parol evidence rule” precludes use of parol evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract, i.e., one which is intended as a final expression of the terms of the agreement. *Berg*, 115 Wn.2d at 670; *U.S. Life*, 129 Wn.2d at 570; *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997).

DePhilips v. Zolt Const. Co., Inc., 136 Wn.2d 26, 31-2, 959 P.2d 1104 (1998).

Despite the Bar’s protestations, Marshall had a written fee agreement with Ms. Richard, which contained the following language:

3. In consideration for the professional services, including litigation to be provided by the firm. You will pay an hourly fee of \$185.00. In order to begin work on the case, you will remit a retainer payment of \$2,000 [\$2000 was

lined out and \$1,000 was written by Mrs. Richard in along with the words "per our agreement"]. Legal fees at \$185 [\$185 was lined out and \$175 written in by Mrs. Richard] per hour will be deducted from the retainer amount until the retainer has been used, and, at that time you will be billed for legal services as they are rendered.

Ex. 34:2.⁵

If you have any corrections or objections to the fee agreements set out herein, or to any billing statements you receive from me, please let me know immediately. Otherwise, I will assume that the above is an accurate statement of our understanding regarding how I will be compensated for rendering legal services to you and I will proceed with your representation on that basis. Please indicate your approval of this Agreement by signing where indicated below.

Ex. 34:3.

Mrs. Richard signed the agreement accordingly on June 11, 2002.

Parol evidence may not be used to modify or change the parties written agreement from one charging an hourly fee for all legal services performed to one charging only a flat fee, especially a flat fee mentioned nowhere in the written agreement. *DePhilips v. Zolt Const. Co., Inc.*, 136 Wn.2d at 32 (citing *Berg*, 115 Wn.2d at 670).

There was no modified written agreement and Exhibit 65 certainly does not represent a modification of the original written fee agreement.

The Bar argues that because the fee agreement called for a \$1,000 advance, that Marshall agreed to accept \$5,000 as a flat fee for all legal

⁵ See also Ex. 65, where Mrs. Richard wrote in additional language attempting to modify the original written agreement without obtaining the signature of Mr. Marshall. It has consistently been Mr. Marshall's position this modification was not agreed to by him.

services he had and would perform for Mrs. Richard and there was no reason to require an additional \$5,000. On the other hand, Marshall did not put the \$5,000 in his general account, as he could have if the \$5,000 was the total he would charge Mrs. Richard. Instead, Marshall put the \$5,000 in his trust account and did not withdraw it until after the trial was concluded. Why would he accept \$5,000 for approximately \$20,000 worth of hard work? It is a patent absurdity to believe he would.

D. Conclusion

If Mr. Marshall violated the Rules of Professional Conduct in this matter, it was in his failure to obtain signed conflict waivers. Mr. Marshall was disciplined in *Jefferies*, for among other things, the failure to prove that he obtained signed conflict waivers from his clients. Marshall completed the present case in April of 2003. The Bar filed its initial Statement of Charges against Marshall on October 21, 2002 and filed an amended statement on November 17, 2003. The Court issued its ruling in May of 2006. The nature of the conflict of interest claims in *Jefferies* and in the present case were not obvious and remain an issue for interpretation now that the Court has issued its opinion in *Jefferies* and promulgated the new version of RPC 1.7.

The imposition of an 18 month suspension has provided a lifetime of lessons: the inability to earn a living for his family; the consequential

impact that the discipline had on his credit, his financial stability and his standing in the community, not to mention the humiliation and embarrassment he experienced locally and nationwide have together changed his life forever. Marshall deserves a chance to prove he gets it.

Dated this 23 day of September 2008.


Bradley R. Marshall, Pro Per

APPENDIX 1

KURT M. BULMER
ATTORNEY AT LAW
740 Belmont Place E., # 3
Seattle, WA 98102-4442

(206) 325-9949

(206) 325-9953- Fax

June 29, 2006

VIA E-MAIL AND US MAIL

James M. Danielson
Chief Hearing Officer
2600 Chester Kimm Rd.
Wenatchee, WA 98801-8116

RE: *Disciplinary Proceedings Against Bradley R. Marshall*
Public No. 05#00103

Dear Danielson:

I was out of my office yesterday and when I returned today I found in my e-mails a letter to you from Bar Counsel regarding appointment of a new hearing officer in the above case. I also found in my mail a letter from the hearing officer recusing herself. As far as I know, you have not entered an order removing the hearing officer. The letter from the Bar to you is premature as it was submitted to you in anticipation of an occurrence which had not yet happened and still has not happened – namely the removal of the current hearing officer. Despite this the Bar's letter, in essence, asks that when a new hearing officer is appointed in this case that you pre-screen for his/her availability on hearing dates established by the prior hearing officer. We object to this for several reasons.

First, there is no way to judge the impact on a hearing officer who is asked to take on a matter to be heard on short notice on specific dates. The process of screening will itself necessarily require either ex parte details of the case be provided by you or will leave some mystery as to what has happened to create the situation. If details are provided the parties will have no control over those details and they could have significant influence on the hearing officer because of the source of information – namely, the Chief Hearing Officer. The alternative would seem to be to leave it all sort of mysterious as to why the hearing is happening on an expedited basis based on a prior hearing officer's schedule. It is impossible to judge whether the ex parte details or mystery will be viewed by a new hearing officer as prejudicial to Mr. Marshall, in favor of Mr. Marshall or have no impact at all. But it is exactly because we do not know that you should not go through a pre-screening process for specific dates.

Second, I realize that you have advised me that there is pre-screening of hearing officers in that as part of your appointment process you look at a hearing officer's case

load, the apparent length of time of a hearing and check with possible appointees for conflicts based on the respondent and the lawyers involved. However, the screening process proposed by the Bar in this instance is a different situation. Here the Bar asks that you pre-screen the hearing officer for specific dates with the implicit implication that the hearing is to be held on that date since the Chief Hearing Officer is making a selection specifically based on those dates being available. We have objections to the hearing being held before the new hearing officer on dates selected by the prior hearing officer. We think that it is a possible denial of due process to force a hearing too soon on a hearing officer who will be essentially taking the case in a rush, rush situation. We also think that we are entitled to move for different hearing dates based on the fact that Mr. Marshall has learned that he misread his calendar regarding some of the dates at issue – we have alerted the Bar of this. If the Bar does not agree to a change in the schedule based on this mistake it would be our intention to seek a change in the hearing schedule.

Because this has all come on us so quickly, there may be other reasons why we might ask for new hearing dates. If you have pre-screened on the basis of specific dates, it seems likely that the hearing officer may feel duty bound to proceed on those dates no matter what motion we file.

Third, both the WSBA and Mr. Marshall are entitled to seek removal of the hearing officer as a matter of right up to ten-days after service of the new appointment. ELC 10.2(b). For a number of reasons which I will not go into here, Mr. Marshall has had and continues to have concerns about who the hearing officers are in his cases. The Bar is well aware of his concerns. The fact, as discussed below, that a sitting hearing officer would apply for a job as Bar Counsel, something which would be known to Bar Counsel, without notice to the respondent and without voluntarily recusing herself has done nothing to give Mr. Marshall confidence in those who sit in judgment upon him. Mr. Marshall will want to and will need to take full advantage of the right granted to him to investigate and review any new hearing officer.

Even if you appointed a new hearing officer today, his or her appointment would not be final until sometime in the middle of July, less than two weeks before the current hearing dates. If such hearing officer has been pre-screened for dates, Mr. Marshall will be put in the unfair position of having to make his decision regarding possible removal in the face of the likely perception that any removal by him was not based on legitimate concerns about the hearing officer but instead on the basis that Mr. Marshall is simply attempting to "game the system" to get a continuance by use of the rules. While you have told me in informal discussions about the removal process that such perceptions do not influence who the next hearing officer is that is appointed, I think you can see that from Mr. Marshall's perspective he will have doubts that if you think he is playing games that even unconsciously it would influence your next hearing officer selection. Such concerns by him will chill his right to make an unfettered decision about whether to exercise his preemptive removal of a hearing officer.

Fourth are significant concerns about the validity of the prior hearing officer's orders. The reason the prior hearing officer has recused is a joint letter was sent to her by Disciplinary Counsel and I asking her to do so. This was because she has applied for a job as Disciplinary Counsel. She did not recuse when she applied for the job and it appears that but for the joint letter she did not intend to do so. Her willingness to continue to serve as a hearing officer while simultaneously applying for a job with the Bar without notice to respondent (the Bar, of course would have notice since she was applying to work for the Office of Disciplinary Counsel) raises serious questions, at a minimum, of the appearance of impropriety and as to where her loyalties lay when she has made rulings in this case.

The case was previously set for hearing. Within twenty days of that hearing date, the Bar filed an Amended Formal Complaint. The new charges alleged that Mr. Marshall lied to his clients, attempted to coerce his clients into accepting a settlement and, essentially, conspired with opposing counsel to force a settlement on the clients through a settlement enforcement motion. These were new allegations which had not previously been addressed at any stage of the investigation of the proceeding, including prior to the recommendation to the Review Committee. We moved for a continuance on the basis that we were entitled under the rules to at least 20 days to answer and to prepare to defend the new allegations. We asked for more than 20 days since the Amended Formal Complaint was not just a modification or adjustment of prior allegations but rather contained entirely new assertions not ever investigated or asserted in the past. We asked that we be given at least as much time as we would have received if a new formal complaint were filed against Mr. Marshall since that was the reality of what had happened in the Amended Formal Complaint.

In addition, Mr. Marshall is the subject of a pending Supreme Court case in which the Disciplinary Board has recommended his disbarment. When we asked for the continuance based on the filing of the Amended Formal Complaint, we asked that the entire case be stayed until after the Supreme Court case is resolved given the enormous costs both financially (the Bar is already seeking \$24,000 in costs from him) and emotionally, and, in the event of his disbarment, the lack of necessity for the hearing.

On both these issues, we pointed out, as the Bar acknowledges in its letter to you, that any concerns about elderly witnesses could be dealt with by the use of preservation depositions.

The Bar Association objected to the continuance based on the pending Supreme Court case while conceding that some continuance was required by its filing of the Amended Formal Complaint within 20 days of the hearing. The Bar, however, asserted that the new allegations were "easy" to prepare for and asked that the continuance be for the least possible time after the 20 days had run.

The hearing officer denied our motion for the stay based on the pending Supreme Court case. Without elaboration she asserted that it was "just too vague as to when the hearing could be held." She ignored the costs issues and the fact that a less restrictive remedy, preservation of the witnesses' testimony, was available. She granted, as she had to based on the rules, a continuance because the Amended Formal Complaint had been filed within 20 days. However, she demanded that the reset hearing be held as soon as mutual dates could be established. She appeared to give little concern to Mr. Marshall's preparation issues. Bar Counsel and I looked for dates and when we came up with them, she accepted them while stating that she thought the dates we had agreed upon were not soon enough.

I was then advised by Bar Counsel on June 22, 2006, that they had learned the hearing officer had applied for a position in its office. In 30 years of practice this issue has never come up for me and then within two or three months it has come up twice. You may recall that you, the Chief Disciplinary Counsel and I had a discussion about the first instance at the hearing officer application meeting held at the Bar office. This second instance came to my attention after that discussion. I am not aware if that discussion had anything to do with the disclosure of the second instance. In both instances Bar Counsel has acted professionally and advised me of the employment application. In the first instance, Bar Counsel and I were discussing how to proceed when we learned through the personnel office at the WSBA that the hearing officer in that case had already notified you and had recused. That does not appear to be the situation in this pending matter since she did not recuse until after we sent the joint letter.

Because of confidentiality we have not been advised when the hearing officer initially applied for the job and what she stated in her job application or in any interviews as to why she was suited for job. I also do not know when it was first posted as being available. But even if the job was posted and she applied after she made the continuance rulings on the case I would hope you could see that Mr. Marshall and I have concerns about her prior rulings. At a minimum it appears that the hearing officer was inclined to approach the case from a Bar Counsel perspective. It is our intent to file a motion with you asking that all prior orders of the hearing officer be voided on the basis of the appearance of impropriety and perhaps other grounds. We intend to ask that Mr. Marshall be given a clean slate not tainted by prior rulings on substantive issues by this particular hearing officer.

I am sending this letter because of the pre-emptive nature of the Bar's letter to you which seems to ask for an accelerated appointment of a pre-screened hearing officer. Our motion is not something that can be done on the fly. We can file by next Thursday. (I have a significant motion on another case in which the WSBA has asked on short notice that a disability hearing be held for my client which I am required to respond to on July 5, 2006.) I am asking that you do not appoint a new hearing officer at this time, that you not pre-screen for any dates and that you set a schedule for us to file our motion

and the Bar to respond regarding invalidating the prior orders of the prior hearing officer with the date for us to file the initial motion of July 6, 2006.

I note that the Bar has filed its letter in the public file. When this issue came up the Bar asked me to preserve the hearing officer's privacy and to not indicate in the public file why the hearing officer was being asked to recuse herself. We drafted the joint letter in a manner which did that. I do not know how the Bar wishes this letter and our planned motion to be treated so for the moment I am not filing it in the public file but rather will wait for guidance and discussion with Bar Counsel.

Thank you.

Sincerely,

Kurt M. Bulmer
Attorney at Law
WSBA # 5559

cc: Bradley Marshall
By e-mail and mail to Scott Busby

APPENDIX 2

FILED

AUG 10 2006

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

BRADLEY ROWLAND MARSHALL,

Lawyer

WSBA No. 15830

) Public File No. 05#00103

) ORDER COMPELLING DOCUMENTS

) AND INFORMATION AND DENYING

) STAY OF PROCEEDINGS

The above entitled matter came on before the Chief Hearing Officer on August 9, 2006 on the Respondent's Motion to Compel Documents and Information and to Stay Proceedings. The Chief Hearing Officer considered the Motion of the Respondent, the Response of the Association, and the Reply of Respondent, as well as oral argument by Mr. Kurt M. Bulmer, on behalf of Respondent, and Ms. Christine Gray, on behalf of the Association.

Pursuant to ELC 3.2(e), the Chief Hearing Officer hereby orders disclosure by the Bar Association of the following information, subject to this protective order: **Public disclosure of the information identified is prohibited except to the extent to allow any hearing officer, the Disciplinary Board, or the Supreme Court to perform their duties in this or any future disciplinary proceeding against the Respondent.**

ORDER COMPELLING DOCUMENTS AND
INFORMATION AND DENYING STAY OF
PROCEEDINGS

Page 1 of 2

589048.doc

WASHINGTON STATE BAR ASSOCIATION
2101 Fourth Avenue - Fourth Floor
Seattle, WA 98121-2330
(206) 727-8207

OTK

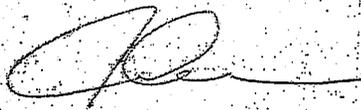
1 The documents to be disclosed are:

2 1. Any and all communication between Teena Killian and the Washington State
3 Bar Association concerning employment by Ms. Killian at the Washington State Bar
4 Association. The documents shall be redacted so they show only the letterhead, if any, the
5 date of the document, the sender, the recipient, and the Re line, if any.
6

7 2. Any correspondence between any employee of the Washington State Bar
8 Association and any other employee of the Washington State Bar Association relating to
9 employment at the Washington State Bar Association by Teena Killian. The documents, if
10 any, shall be redacted so they show only the letterhead, if any, the date of the document, the
11 sender, the recipient, and the Re line, if any.
12

13
14 IT IS FURTHER ORDERED that the orders of Hearing Officer Killian in this file are
15 vacated. Contemporaneous with the entry of this Order; the Chief Hearing Officer has
16 appointed himself as hearing officer in this matter; a scheduling conference will take place
17 telephonically on Tuesday, August 29, 2006 at 9:00 a.m.; and the motion to stay the
18 proceedings is DENIED.
19

20 DATED this 10Th day of August, 2006.

21
22 

23
24 _____
25 JAMES M. DANIELSON
26 Chief Hearing Officer

APPENDIX 3

1
2
3
4
5
6 BEFORE THE
7 DISCIPLINARY BOARD
8 OF THE
9 WASHINGTON STATE BAR ASSOCIATION

9 In re) Public File: 05#00103
10 BRADLEY R. MARSHALL,)
11 Lawyer (Bar No. 15830).) RESPONDENT'S REPLY TO MOTION TO
12) QUASH AND MOTION TO PERMIT
13) DEPOSITIONS

13 Respondent Marshall issued subpoenas to Teena Killian, a former hearing officer in this
14 matter, and to the records custodian for the Washington State Bar Association. Copies of the
15 subpoenas are attached to the WSBA's Motion to Quash. The WSBA has asserted that the
16 subpoenas were not properly issued and that if there is an attempt to get an order to allow the
17 discovery it should be denied for a variety of reasons. The discovery cutoff is January 9, 2007.

18 Authorization to Issue Subpoenas: The WSBA asserts there was no order authorizing
19 the issuance of the subpoenas and no stipulation by counsel permitting them. Respondent
20 agrees there is no order authorizing the depositions. Apparently, contrary to below counsel's
21 belief, there is no agreement between counsel that each side can take deposition subject to
22 review by the hearing officer. Since the WSBA asserts there is no agreement, there cannot be
23 one. Below signing counsel's agreed to have preservation depositions taken and he thought it
24 was understood that this was a quid pro quo matter in which both he and bar counsel agreed to
25

RESPONDENT'S REPLY TO MOTION TO
QUASH AND MOTION TO PERMIT
DEPOSITIONS - 1

KURT M. BULMER
Attorney at Law
740 Belmont Place E., # 3
Seattle, WA 98102-4442
(206) 325-9949

1 depositions but with the common understanding in such matters that any such request was
2 subject to review by the hearing officer. Apparently, bar counsel did not share this
3 understanding.

4 Based on his belief that the taking of the depositions were agreed to subject to review
5 by the hearing officer, below signing counsel sent an e-mail to the WSBA on December 4,
6 2006, advising of the intent to take the depositions, requesting dates and acknowledging that
7 the WSBA would probably want to resist one or more of the subpoenas. The WSBA wrote
8 back on December 5, 2006, indicating dates, asking for more information about the probable
9 scope of the depositions and advising that it would likely seek to quash one or more of the
10 subpoenas but making no indication that the WSBA disputed the authority to issue the
11 subpoenas in the first place. A copy of the e-mail exchange is attached as Exhibit A. This
12 seemed consistent with below signing counsel's understanding of the situation and,
13 accordingly, he issued the subpoenas. The WSBA has objected on the basis that there was no
14 stipulation for taking of depositions.
15

16 Below signing counsel advises of the above so the hearing officer will understand that
17 the subpoenas were not issued "willy-nilly" or out of some sort of wholesale disregard of the
18 rule. However, since the WSBA says they never agreed to the taking of depositions by
19 Respondent subject to review by the hearing officer, Respondent must accept such
20 representation and accordingly, as set forth below, seeks permission from the hearing officer to
21 allow such depositions.
22

23 Motion to Permit Taking of Depositions and Response to Other Issues Raised by
24 the Association:
25

RESPONDENT'S REPLY TO MOTION TO
QUASH AND MOTION TO PERMIT
DEPOSITIONS - 2

KURT M. BULMER
Attorney at Law
740 Belmont Place E., # 3
Seattle, WA 98102-4442
(206) 325-9949

1 As the WSBA will not agree to the taking of depositions, pursuant to ELC 10.11,
2 Respondent seeks authorization from the hearing officer for them. He seeks to take the
3 deposition of Ms. Killian and the WSBA's record custodian. Apparently anticipating this, the
4 bulk of the WSBA's Motion provides argument as to why such authorization should not be
5 given.

6 Respondent seeks the depositions because the WSBA has resisted every effort to learn
7 the scope and true history of the employment applications of the prior hearing officer. When
8 Respondent requested the documents reflecting the history, the WSBA refused to provide them
9 and only provided the redacted copies when ordered to do so by the hearing officer. The
10 redacted copies provide a glimpse into the history of this matter but not the substance.

11 While the WSBA would characterize this as a minor situation, it is not. What happened
12 here was outrageous. After being appointed as a hearing officer in this matter, the prior hearing
13 officer applied for employment as bar counsel. While the WSBA, of course, knew of such
14 application, neither she nor the WSBA advised Respondent. In fact, the redacted documents
15 show that Ms. Killian was interviewed by the WSBA while she was still a hearing officer,
16 before Respondent was advised of the job application, during the period she was being asked to
17 sign an order and prior to her recusing herself. Knowing that the hearing officer had applied for
18 a job, the WSBA allowed Respondent to proceed under the wrongful impression that the prior
19 hearing officer was going to remain as the hearing officer. Without disclosing the material
20 change that had occurred, namely that the hearing office was going to have to be recused, the
21 WSBA allowed Respondent's Counsel to sign off on an order even though it knew full well
22 that after the order was signed the hearing officer would have to be recused. The WSBA argues
23 that "no harm, no foul" since the order was an agreed order. This ignores the fact that
24
25

1 Respondent's counsel agreed to the order because he had just lost a scheduling motion to this
2 same hearing officer and, therefore, had reached the conclusion that any attempt to resist the
3 WSBA's proposal was fruitless before this particular hearing officer.

4 It will be Respondent's position at hearing that the employment application of the
5 hearing officer represented a material change in circumstances and that the silence by the
6 WSBA on this material change represents prosecutorial misconduct and is a denial of due
7 process and equal protection. Respondent will also argue that such actions, just as they are
8 when the WSBA has delayed matters, is a significant mitigator which Respondent is entitled to
9 assert. As there has been WSBA misconduct by both bar counsel and the hearing officer,
10 Respondent will assert this misconduct as a mitigator just as he can when there is delay not
11 caused by him and is the result of "slack prosecution." *Discipline of Tasker*, 141 Wn.2d 557,
12 568, 9 P.3d 822 (2000).

13 The prior discovery, as listed in the subpoena to the records custodian, shows that there
14 are documents relevant to this history and to the scope of "who knew what, when" in regards to
15 this matter. Respondent's discovery request is a proper exploration of these areas. All he is
16 asking is for the ability to depose the person who is at the center of this matter, Ms. Killian,
17 about her employment application history with the WSBA and about her ex parte contacts with
18 the Association, including an undisclosed job interview with the Office of Disciplinary Counsel
19 while still a hearing officer in this matter. Respondent further seeks to have full copies of the
20 redacted documents identified by the WSBA.
21

22 The WSBA asserts that the discovery is not likely to lead to useful information. That is
23 clearly not true. It is apparent already from the information admitted by the WSBA and from
24 the limited documents provided by them, that they failed to inform Respondent of a substantial
25 changed in circumstances while urging Respondent's counsel to sign off on the form and

1 substance of an agreed order, that prior to accepting appointment as a hearing officer Ms.
2 Killian had previously applied for appointment as a bar counsel, that after accepting
3 appointment she again applied, exchanged correspondence with the ODC, was interviewed by
4 it and ruled on relevant motions. Without the prior discovery none of this history would have
5 been made known to Respondent. On the basis of the prior discovery he now seeks to
6 determine, not whether there has been misconduct in this matter, but rather the scope of that
7 misconduct. As indicated above, this is relevant to these proceedings because "slack
8 prosecution" is a mitigator and Respondent is entitled to learn the scope of the due process
9 violations which have occurred in his case.

10
11 The WSBA asserts that as to the records custodian, it should not have to provide the
12 documents because the Board of Governors treats them as confidential documents. The Board
13 of Governors is no different than the board of any corporation. They have no right to exclude
14 documents from discovery, only the Supreme Court or the Legislature can do that. If the
15 discovery is otherwise granted, the wish by the Bar and its Governors to keep in its records
16 secret, while consistent with the wishes of most organizations, does not provide a barrier to
17 their production. Any confidentiality issues can be covered by a protective order similar to the
18 one already in place on this case.

19 Conclusion: Since the WSBA will not stipulate to the depositions, the hearing officer
20 should authorize them. This will address resolve the issue raised by the WSBA of the authority
21 to conduct the depositions. (Bar Counsel has extended the courtesy of advising that if the
22 hearing officer permits the depositions that new subpoenas will not have to be served.)

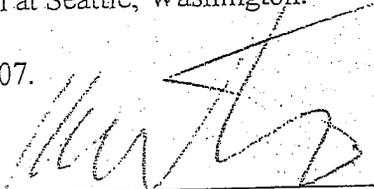
23
24 The requested documents are not entitled to any special exemption from discovery as
25 there is no statute or court rule giving them special protection. Confidentiality concerns can be

1 dealt with by a protective order. The discovery is likely to lead to relevant information as
2 Respondent is entitled to raise as a mitigator and as a possible defense misconduct in how his
3 case was handled. The precedent of this can be found in cases where the court has found "slack
4 prosecution" as a mitigator.

5 Accordingly, the discovery should be permitted, since absent an order to do so the
6 WSBA will continue to refuse to produce this relevant information. Ms. Killian has advised
7 that she will not agree to a deposition absent an order from the hearing officer. Respondent
8 requests that the hearing officer authorize the taking of the depositions.
9

10 As to factual statements made above, Kurt M Bulmer, makes them under penalty of
11 perjury under the laws of the State of Washington at Seattle, Washington.

12 Dated this 2nd day of January, 2007.

13 
14 _____
15 Kurt M. Bulmer, WSBA # 5559
16 Attorney for Respondent Marshall
17
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25