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NO. 200,586-1

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE MARY H. MCINTOSH,

Attorney at Law,

Appellant.

OPENING BRIEF OF APPELLANT ATTORNEY

Kenneth S. Kagan
Attorney for Mary H. McIntosh

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

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I. INTRODUCTORY STATEMENT

Mary H. McIntosh (WSBA No. 12744, admitted on November 2, 1982), was found by Hearing Officer Donald W. Carter, after a disciplinary hearing, to have committed a violation of RPC 3.3(f) and 3.5(b) (arising out of a single incident).

Notwithstanding the recommendation on the part of the Washington State Bar Association (hereinafter "Association") that Ms. McIntosh be suspended for "at least six months," Mr. Carter recommended that the sanction be a suspension for one year.

Pursuant to the appellate review undertaken by the Disciplinary Board of the Washington State Bar Association (hereinafter "Board"), the Board, by a vote of 10-1, reduced the term of suspension from one year to six months.

In her appeal to this Court, Ms. McIntosh urges this Court to conclude that even the six month suspension, as reduced by the Board, is disproportionate to the offense, as well as disproportionate to the sanctions imposed on other lawyers in analogous situations.

II. PROCEDURAL HISTORY OF THIS CASE

On June 7, 2005, the Association received a grievance against Ms. McIntosh, submitted by Tom DiNardo. Mr. DiNardo was a party to litigation in which Ms. McIntosh represented the parties adverse to Mr.

DiNardo. The gravamen of Mr. DiNardo's grievance was that Ms. McIntosh was dishonest to the tribunal, in that she misrepresented facts to a judge when presenting an *ex parte* order, and that she omitted facts that would have been considered material to a judge when she presented that *ex parte* order.

On or about February 3, 2006, a Review Committee of the Board determined that the matter ought to proceed to a hearing. CP 1. The Association filed a Formal Complaint, CP 2, and Donald W. Carter was appointed to serve as Hearing Officer.

The matter went to hearing before Mr. Carter on June 18, 2007, and was concluded in a single day. The parties submitted written closing arguments, which were then followed by Mr. Carter's entry of "Hearing, Findings of Fact; Conclusions re: Rule Violations; and Disciplinary Recommendations," dated August 1, 2007, and filed with the Board on August 2, 2007. CP 46.

The Association wrote a memorandum in support of Mr. Carter's decision, and counsel for Ms. McIntosh wrote a memorandum in opposition, and another in reply to the Association's memorandum.

On January 25, 2008, the Board heard the oral argument of counsel for the parties. On February 20, 2008, the Board issued its "Order Amending Hearing Officer's Sanction Recommendation." As noted

above, the most significant change made by the Board was to reduce the sanction from one year to six months. CP 61 at p. 1.

Additionally, however, the Board amended Mr. Carter's Findings and Conclusions by substituting its paragraph 4.13 for Mr. Carter's. The effect of that amendment was to adopt the mitigating factor of "good reputation," pursuant to ABA Standard 9.32(g), which Mr. Carter had not found to exist. CP 61 at p. 2.

Ms. McIntosh filed a timely Notice of Appeal to this Court, paid the filing fee, and this appeal follows.

III. STATEMENT OF THE FACTS

The following factual exposition is largely taken, for convenience, from the Association's "Brief in Support of the Hearing Officer's Decision," dated November 16, 2007. In its factual narrative, the Association incorporated Findings entered by Mr. Carter. Ms. McIntosh's prior counsel, John W. Murphy, did not, in any of the pleadings he filed on Ms. McIntosh's behalf with the Board, contest any of those factual findings.

Though Ms. McIntosh disagrees in the *strongest* possible terms with some of the facts found by the Hearing Officer, she is also aware of this Court's jurisprudence to the effect that uncontested findings of fact are considered "verities" on appeal.

In 2004, Tom DiNardo, an auctioneer in Skagit County, was ousted from membership in the Washington Auctioneers Association by a vote of the Board of Directors. BF¹ 46, ¶ 2.1. DiNardo hired lawyer Doug Owens, who brought an action against the Auctioneer's Association and its directors seeking reinstatement for DiNardo as well as damages for defamation, unfair competition and prima facie tort. BF 46, ¶ 2.2. The suit, *DiNardo v. Washington Auctioneers Ass'n, et al.*, was filed in November, 2004 in Skagit County. BF 46, ¶ 2.4.

Ms. McIntosh represented the Washington Auctioneers Association and Steve McMillan, one of its directors.

Unrelated to the DiNardo suit, McMillan had been audited by the Washington State Department of Licensing. DiNardo filed a Freedom of Information Act [or, possibly, a Public Disclosure Act] request with the Department for records from this audit. BF 46, ¶ 2.5. This request was not part of the Auctioneer's lawsuit and DiNardo did not seek any advice or assistance from Owens in preparation of that document. BF 46, ¶ 2.5; 2.15.

On April 18, 2005, Mr. McMillan received a telephone call from a Department of Licensing auditor who told him that unless he obtained an

¹ Though not indicated in the Association's November 16, 2007 Brief, "BF" refers to the document number in the "Bar File," which is reflected in the "Record [Index] Before the Disciplinary Board," prepared by the Association and transmitted to this Court.

injunction against the Department, the Department would release his audit records to DiNardo. BF 46, ¶ 2.8. McMillan called Ms. McIntosh and told her that he and his wife were about to leave the country. He asked her to try to stop the release of the records. BF 46, ¶ 2.8; 2.10.

Ms. McIntosh contacted the Department of Licensing the next day and was told that unless an injunction was entered pursuant to RCW 42.17.330, the records would be delivered to DiNardo on April 22, 2005. BF 46, ¶ 2.9.

Ms. McIntosh was about to leave on a vacation to see her grandchildren in California. BF 46, ¶ 2.10. Her last day in the office was to be April 21, 2005, and she was not planning to return until May 2, 2005. BF 46, ¶ 2.10. She reviewed RCW 42.17.330 to see what could be done. BF 46, 2.11.

This statute allowed for an action against the Department of Licensing to enjoin the inspection and production of public records. But Ms. McIntosh felt that following the process laid out in that statute would be "burdensome." BF 46, ¶ 2.27. The McMillans were, or soon would be, out of the country and unavailable to sign a complaint or provide the \$110 filing fee. BF 46, ¶ 2.12. Ms. McIntosh also knew from searching public records on the internet that DiNardo had sold his home near Anacortes, Washington. BF 46, ¶ 2.13. The only available address of record for

DiNardo was a post office box in Lynden, Washington, making personal service of an injunction difficult, if not impossible. BF 46, ¶ 2.13.

Ms. McIntosh believed that in order to bring an action against the Department of Licensing, she would have to delay her vacation by several days or hire an attorney to handle the case in her absence. TR² 91; BF 46, ¶ 2.22. Instead, she decided to seek an injunction [or restraining order] in the already-filed Auctioneers lawsuit, even though she was aware that the audit records were not the subject of any discovery in that action. BF 46, ¶ 2.14-2.15. [Note: Mr. Owens's testimony was that he had advised Ms. McIntosh that the request had not come from him and that he doubted that the records Mr. DiNardo sought from the Department of Licensing would ever be a part of the evidence in his case. TR at 33-34].

On April 19, 2005, Ms. McIntosh called Owens. BF 46, ¶ 2.14. Owens knew nothing about DiNardo's FOIA request. BF 46, ¶ 2.16. He told Ms. McIntosh that he did not know how to get in contact with his client, that DiNardo's request had nothing to do with the Auctioneers lawsuit and that the Skagit County Superior Court would not have jurisdiction to enter a restraining order against the Department of Licensing [in the Auctioneers' lawsuit] because the Department was not a party to the Auctioneers lawsuit. BF 46, ¶¶ 2.16 - 2.17.

² "TR," as used in the Association's brief below and herein, refers to the verbatim

Ms. McIntosh explained that she was leaving on a trip to visit her grandchildren. BF 46, ¶ 2.19. Owens was sympathetic and told her that she needed to file a separate lawsuit against the Department of Licensing to enjoin the release of the records. BF 46, ¶ 2.19. Ms. McIntosh told Owens she did not know how she would obtain signatures or the filing fee from her clients because they were out of the country. BF 46, ¶ 2.20.

Owens was unequivocal that he told Ms. McIntosh that he could not and would not agree to an order enjoining the production of the audit records in the Auctioneers lawsuit. BF 46, ¶2.11. When Ms. McIntosh hung up the phone, she knew that Owens would not agree to the injunction. BF 46, ¶ 2.23. Nevertheless, she began preparing a motion and declaration for an *ex parte* restraining order in the Auctioneers lawsuit. BF 46, ¶2.24. In her Declaration supporting her motion for a temporary restraining order, Ms. McIntosh implied that Owens had agreed to the order by stating, "I contacted Mr. Owens who was sympathetic to my vacation and thought that a hearing upon my return would be sufficient for his client's needs. He further indicated that he would not be able to contact his client between now and when I was leaving on my vacation, less than 24 hours notice."

The only true part of the statement was that Owens was sympathetic to Ms. McIntosh's vacation plans. He did not consent to any *ex parte* contact with the court by Ms. McIntosh, nor did he agree that an order could be entered. BF 46, ¶ 2.24.

Ms. McIntosh also stated in the Declaration that "There is no reason that the plaintiff needs these records to prove his case." This statement was misleading and calculated to tie DiNardo's FOIA records request into the unrelated Auctioneers lawsuit. BF 46, ¶ 2.25. Ms. McIntosh left out the important fact that Owens had told her she was legally incorrect in seeking the temporary restraining order against an unrelated, unnamed party. BF 46, ¶ 2.25.

In the preamble to the Temporary Restraining Order, Ms. McIntosh wrote that Owens "was notified of the defendant's intention to obtain this order and expressed no objection so long as the hearing could take place after defendant's vacation." This was a misrepresentation of Owens's position and the notification given to him. BF 46, ¶ 2.26.

On April 21, 2005, Ms. McIntosh went to the courthouse looking for a judge to sign the Temporary Restraining Order. She flagged down Judge Michael Rickert in the court administrator's office and handed him the Motion and Order, telling him that Owens had agreed to the entry of the order. BF 46, ¶ 2.29. Judge Rickert signed the order. Ex. 2.

Ms. McIntosh did not tell Judge Rickert that the records had nothing to do with the Auctioneers lawsuit or that Owens opposed an order being entered in that lawsuit. Nor did she tell him that Owens believed that the Superior Court of Skagit County had no jurisdiction to enter the injunctive relief in the Auctioneers matter as she requested. BF 46, 2.29. Judge Rickert testified that this information would have influenced his decision to sign the order. TR 126-27; BF 46 ¶ 2.30.

Upon learning of the entry of the *ex parte* order, Owens moved to set it aside. Court Commissioner Kenneth Evans vacated the order *nunc pro tunc*. BF 46, ¶ 2.31. Ms. McIntosh later told Owens that she had done nothing as bad as what other attorneys in the Skagit County Bar community have done. BF 46, ¶ 2.32.

At the time that this incident occurred, Ms. McIntosh was under investigation in a separate disciplinary action. BF 46, ¶ 4.8. In that case, Ms. McIntosh falsely attested in a notarial statement that a witness had appeared before her to sign a document, when in fact she had not. Ex. 5; Ex. 10. In that matter, however, it was conceded that Ms. McIntosh had called the individual to confirm that she was agreeing to the terms represented in the document, and that she had signed the document (though not in Ms. McIntosh's presence).

Ms. McIntosh's conduct was found to have violated RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice). Ms. McIntosh was admonished for this conduct in July, 2005. Ex. 5; Ex. 10.

**IV. ARGUMENT REGARDING DISPROPORTIONATE
SANCTIONS**

It is well established that this Court will adopt the Board's recommended sanction *unless* the sanction is not proportionate. Proportionate sanctions are those which are roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability. *See, e.g., In re Disciplinary Proceedings Against Dynan*, 152 Wn.2d 601, 623, 98 P.3d 444 (2004); *In re Disciplinary Proceedings Against Anshell*, 141 Wn.2d 593, 615, 9 P.3d 193 (2000); *In re Disciplinary Proceedings Against Gillingham*, 126 Wn.2d 454, 469, 896 P.2d 656 (1995).

Moreover, this Court has often stressed its "commitment to consistency in attorney discipline cases." *See, e.g., Gillingham, supra*, 126 Wn.2d at 469; *In re Discipline of Johnson*, 118 Wn.2d 693, 704, 826 P.2d 186 (1992).

A. EXAMPLES OF SANCTIONS IMPOSED ON OTHER LAWYERS IN CASES SIMILAR TO, OR ANALOGOUS TO, THE INSTANT MATTER.

1. *Stephen T. Carmick Received a Sixty Day Suspension*

In this Court's decision in *In re Disciplinary Proceedings Against Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002), this Court upheld a sixty day suspension imposed upon Mr. Carmick, for a violation that is similar to that in the instant case, but in many ways, far more egregious.

In *Carmick*, which arose in the context of negotiations regarding the settlement of a dispute over back child support and the interest that had accrued, Mr. Carmick entered the case, did not immediately notify the lawyers in the Lewis County Prosecutor's Office who were representing the State's interests, negotiated directly with the adverse party (knowing that the State was involved), and then presented an *ex parte* order to the court that, in addition to misrepresenting facts and omitting material facts, actually took advantage of the adverse party's ignorance, to her very real financial detriment.

Moreover, the findings ultimately adopted by this Court suggest that Mr. Carmick was dishonest with the trial court when he represented to the trial court that the parties were aware of the order he was presenting and that opposing counsel "okayed [his] dealing directly" with the opposing party.

This Court concluded that the *ex parte* order would not have been granted but for Mr. Carmick's misrepresentations to the trial court. *Id.* at 595-97. The Court also concluded:

In conclusion, we hold Carmick violated RPC 3.3(f) and RPC 3.5(c) in his *ex parte* conduct before a tribunal by misrepresenting to the trial judge that all parties were aware of the requested *ex parte* order and had approved it.

Id. at 600.

In addition, after reviewing the aggravating and mitigating factors, this Court concluded:

In summary, we hold the aggravating factors are not as severe or as numerous as found by the Disciplinary Board. We also find one mitigating factor, but consider its value slight. We find the three aggravating factors are (1) Carmick's prior disciplinary offense, (2) his multiple violations of different RPCs in this case, and (3) his substantial experience in the practice of law. The only mitigating factor is a delay in the disciplinary proceedings.

Although we do not find the aggravating factors to be as extensive as the Disciplinary Board did, we view Carmick's misrepresentations to the superior court during the *ex parte* proceeding with the greatest disfavor. In simplest terms, Carmick misled the court when his duty of honesty was at its highest. Based on this misconduct, we find a 60-day suspension is consistent with the sanctions imposed on other attorneys for similar conduct and is not clearly excessive.

Id. at 606-07.

2. *Barbara E. Varon Received a Reprimand*

Lawyer Barbara E. Varon (WSBA No. 17041, admitted 1987), was ordered to receive a reprimand, effective August 4, 2005, following a hearing. This discipline was based on her conduct involving failure to advise a tribunal of all relevant facts in an *ex parte* proceeding and conduct prejudicial to the administration of justice.

As indicated in the Discipline Notice found on the Association's web site and published in the November, 2006 issue of the *Washington State Bar News*, in May 2000, Ms. Varon was hired to represent a client in a child custody and visitation rights matter involving the client's son, who resided in Snohomish County with the client's ex-wife, pursuant to a parenting plan filed six years earlier in a King County dissolution action.

The client advised Ms. Varon that the son was undergoing psychiatric treatment at a hospital in King County. Shortly after Ms. Varon was hired, the client's ex-wife, acting *pro se*, obtained a temporary order for protection from the Snohomish County Superior Court (the "Snohomish County TRO"). The Snohomish County TRO provided, *inter alia*, that the King County parenting plan was temporarily suspended, and that the client was restrained from having contact with his ex-wife and his two children except as authorized by the son's psychiatrist.

The client's ex-wife then hired a lawyer, who notified Ms. Varon that he would be representing the ex-wife. The lawyer's letter to Ms. Varon stated that "[t]he purpose of this letter is hopefully to ensure that there is no disruption to the treatment plan devised for [the son] by the doctors and social workers"

After receiving the letter, Ms. Varon told her client that she would not contact opposing counsel until after she had obtained a restraining order against the client's ex-wife. Ms. Varon then filed a petition seeking modification of the parenting plan in King County Superior Court. Among other things, the petition sought to name Ms. Varon's client as the primary residential parent for his son.

Two days later, without notifying opposing counsel or the ex-wife of the hearing, Ms. Varon sought an *ex parte* temporary order to restrain the ex-wife from contacting her son. Ms. Varon believed that irreparable injury could result if the ex-wife was given notice of the proceeding. Ms. Varon also believed that the ex-wife was evading service.

In support of the request, Ms. Varon submitted 84 pages of documents to the court, which included a copy of the Snohomish County TRO and opposing counsel's letter announcing his representation. Due to the exigencies of the *ex parte* calendar, however, the Commissioner only skimmed through the exhibits, relying (pursuant to his established

practice) on counsel to advise him orally of all relevant facts to permit him to render an informed decision.

Ms. Varon did not orally inform the Commissioner of the existence of the prior Snohomish County TRO, nor did she inform the Commissioner that the opposing party was represented by counsel. Had she done so, the Commissioner would have followed his usual practice and contacted the issuing court and the opposing counsel for a response prior to making his ruling. The Commissioner issued the order (King County TRO) as requested by Ms. Varon, giving her client custody of his son and prohibiting the ex-wife from interfering with that custody or entering the client's home or workplace, or his son's daycare or school.

Soon thereafter, to resolve the two conflicting orders, Ms. Varon and the ex-wife's lawyer appeared before a King County Commissioner at an emergency hearing, after which the King County TRO order was vacated. The lawyers also appeared before a Snohomish County Commissioner at hearings in May and June. As a result, the Snohomish County TRO was vacated and the cause of action dismissed. The client's King County petition for modification of the parenting plan was ultimately granted in the client's favor.

Following the hearing, it was determined that Ms. Varon's conduct violated RPC 3.3(f), requiring a lawyer in an *ex parte* proceeding to

inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.³

3. *Gerald G. Burke Received an Admonition*

Lawyer Gerald G. Burke (WSBA No. 17773, admitted 1988) was ordered to receive an admonition on September 7, 2007, by order of a Review Committee. This discipline was based on conduct involving lack of candor toward a tribunal.

As indicated in the Discipline Notice found on the Association's web site and published in the April, 2008 issue of the *Washington State Bar News*, in March 2001, Mr. Burke agreed to represent his daughter in a marriage dissolution action. In June 2002, the opposing party in the action appeared in front of Commissioner A in the morning for a return hearing on an *ex parte* temporary restraining order. Commissioner A vacated the restraining order because Mr. Burke did not appear.

In the afternoon of that same day, Mr. Burke appeared in front of Commissioner B for the same return hearing on the same *ex parte* temporary restraining order. Commissioner B indicated that Commissioner

³ The text of Ms. Varon's Discipline Notice has been reproduced verbatim, and is annexed hereto as Appendix 1.

A would have to deal with this order, and that either party could re-note this matter for hearing on a date agreeable to the parties.

The next day, Mr. Burke filed a motion and declaration for an *ex parte* stay of Commissioner A's order, alleging the vacation order was improperly obtained. Mr. Burke's motion did not mention the order entered by Commissioner B. Mr. Burke presented his motion to Commissioner C, who reinstated the restraining order.

The Review Committee found that Mr. Burke's conduct violated RPC 3.3(f), requiring a lawyer in an *ex parte* proceeding to inform the tribunal of all material facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.⁴

B. COMPARING THE RESULTS IN *CARMICK*, *VARON*, AND *BURKE* WITH THE INSTANT MATTER, IT IS CLEAR THAT THE SIX MONTH SUSPENSION RECOMMENDED BY THE BOARD IS DISPROPORTIONATE.

In *Carmick* and *Varon*, in particular, the lawyers in those cases were not only lacking in honesty and candor to the tribunal, but were seeking affirmative relief for their clients.

In *Carmick*, the relief sought was to minimize the amount of money the client would have to pay to settle the dispute over accrued

interest. Thus, it was found that Mr. Carmick tried to sneak past the opposing party that there were funds already tendered to the registry of the court, tried to sneak past the State's representatives by not telling them he was communicating with the opposing party and that he was seeking a court order, and tried to sneak past the trial court all of these germane facts.

In Ms. Varon's case, it was found that she was acting to deprive the opposing party of contact with that party's child, and that to accomplish that goal, she hid facts that would have been crucial to a Court Commissioner.

In Ms. McIntosh's case, because release of the sensitive McMillan audit records to DiNardo would have resulted in irreparable injury to the McMillans, all that Ms. McIntosh was trying to accomplish was to maintain the *status quo* until she and her clients returned from their respective vacations.

This is not intended to re-litigate the issues already before the Hearing Officer and the Board, but to suggest to this Court that when assessing proportionality, and, particularly, whether conduct in other cases in which discipline was imposed was analogous and should be approached

⁴ As with Ms. Varon, the Discipline Notice pertaining to Mr. Burke has been reproduced verbatim and is annexed hereto as Appendix 2.

with consistency, it is crucial to examine what was at stake in each case and what motivated the lawyer.

Ms. McIntosh suggests to this Court that her conduct was probably closest to Mr. Burke's, and was less egregious than Mr. Carmick's or Ms. Varon's.

Thus, it appears clear that under these circumstances, taking into account the aggravating and mitigating factors, and seeking consistency and proportionality, the appropriate sanction for Mary McIntosh is a Reprimand.

In the alternative, so as not to exceed the sanction imposed on Stephen Carmick for conduct that was more egregious, if the Court is inclined to impose a suspension, it should not exceed 60 days.

C. THE IMPACT OF A LENGTHY SUSPENSION

In this Court's decision in *In the Matter of the Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 97-98, 667 P.2d 608 (1983), this Court took great pains to examine and acknowledge the enormous impact a lengthy suspension can have on a lawyer, her livelihood, the survival of her practice, and even the psychological effect.

In *Noble*, this Court was considering the consequences resulting from a three month suspension, when it noted:

These consequences are not trivial. For 3 months he may not accept any new retainer or act as an attorney in any case

or legal matter of any kind [citation to rule omitted]. He must notify all clients he is representing in pending matters that he has been suspended and is unable to act as an attorney for 3 months. He must notify attorneys representing adverse parties in any pending litigation or administrative proceedings that he has been suspended for 3 months [citation to rule omitted]. A notice proclaiming his suspension will be published in the Washington State Bar News and a newspaper of general circulation in the county in which he practices [citation to rule omitted]. A copy of the notice of suspension will be sent to the presiding judge of the superior court in the county in which he practices [citation to rule omitted].

These provisions make clear that the order of suspension does more than require respondent to take a 3-month vacation from practice from which he can return as if nothing had happened. To be sure, respondent will be denied the income from his practice for 3 months, and this may represent a significant pecuniary loss to him. However, there are more serious costs imposed by suspension. Respondent's relationships with his clients, staff, and other members of the profession will be impaired by the disciplinary procedures. Those clients whom he is representing in pending matters will be notified of the suspension. Their confidence and trust in respondent will doubtless be shaken, and some clients may seek legal representation elsewhere. Respondent's staff may well be unwilling to accept 3 months without work and may seek employment elsewhere. Other lawyers with whom respondent must work every day, including judges before whom he may appear, will be notified of his breach of ethics.

Effective practice demands the trust and respect of one's fellow practitioners, and loss of that trust and respect is a heavy burden to shoulder. Respondent's working relationships with other lawyers will therefore be strained by the tarnishing of his professional reputation. Moreover, a lawyer's good reputation among his clients and colleagues and in the world of trade and commerce is the source of much new business, and the loss of that

reputation will be felt beyond the 90 days' suspension. That suspension represents, therefore, considerably more than a "slap on the wrist" for respondent. It is a serious measure with serious consequences, which are well known to all lawyers who are engaged in the active practice of law.

In Ms. McIntosh's case, the recommended sanction was a suspension for six months, not three. Moreover, as a solo practitioner, the consequences are particularly devastating, especially when compared to a lawyer who practices as a part of larger firm, or an organization, or a governmental entity.

It is entirely appropriate, when contemplating the appropriate sanction, and the issue of proportionality, for this Court to consider, as it did in *Noble*, the actual effect or impact of the sanction ultimately imposed, because, as this Court also noted in *Noble*:

Because we are committed to the proposition that discipline is not imposed as punishment for the misconduct, then our primary concern is with protecting the public and deterring other lawyers from similar misconduct. The severity of the sanction should be calculated to achieve these ends.

Noble, supra, 100 Wn.2d at 95.

V. CONCLUSION

This Court has stressed for decades that the goal of lawyer discipline is not punishment, *per se*, and that if protection of the public and deterrence of lawyer misconduct is to have any meaning, sanctions

must be meted out in proportion to the misconduct, and with as much consistency as can be achieved in a non-scientific milieu.

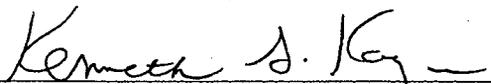
With proportionality and consistent application of sanctions as meaningful goals, Mary McIntosh's sanction must be reduced from a six month suspension to a Reprimand.

In the alternative, if the Court determines that a suspension is required to address proportionality and consistency, that suspension should not exceed sixty days.

DATED this 5th day of May, 2008.

CARNEY BADLEY SPELLMAN, P.S.

By


Kenneth S. Kagan, WSBA No. 12983
Of Attorneys for Mary H. McIntosh

**FILED AS ATTACHMENT
TO E-MAIL**

APPENDIX 1

Discipline Notice

WSBA Bar No.: 17041
Member Name: Barbara E. Varon
Action: Reprimand
Effective Date: 8/4/2005
RPC 3.3 - Candor Toward the Tribunal
8.4 (d) - Conduct Prejudicial to the Administration of Justice

Barbara E. Varon (WSBA No. 17041, admitted 1987), of Bellevue, was ordered to receive a reprimand, effective August 4, 2005, following a hearing. This discipline was based on her conduct involving failure to advise a tribunal of all relevant facts in an ex parte proceeding and conduct prejudicial to the administration of justice.

In May 2000, Ms. Varon was hired to represent a client in a child-custody and visitation-rights matter involving the client's son, who resided in Snohomish County with the client's ex-wife pursuant to a parenting plan filed six years earlier in a King County dissolution action. The client advised Ms. Varon that the son was undergoing psychiatric treatment at a hospital in King County. Shortly after Ms. Varon was hired, the client's ex-wife, acting pro se, obtained a temporary order for protection from the Snohomish County Superior Court (Snohomish County TRO). The Snohomish County TRO provided, inter alia, that the King County parenting plan was temporarily suspended, and that the client was restrained from having contact with his ex-wife and his two children except as authorized by the son's psychiatrist.

The client's ex-wife then hired a lawyer, who notified Ms. Varon that he would be representing the ex-wife. The lawyer's letter to Ms. Varon stated that "[t]he purpose of this letter is hopefully to ensure that there is no disruption to the treatment plan devised for [the son] by the doctors and social workers" After receiving the letter, Ms. Varon told her client that she would not contact opposing counsel until after she had obtained a restraining order against the client's ex-wife. Ms. Varon then filed a petition seeking modification of the parenting plan in King County Superior Court. Among other things, the petition sought to name Ms. Varon's client as the primary residential parent for his son. Two days later, without notifying opposing counsel or the ex-wife of the hearing, Ms. Varon sought an ex parte temporary order to restrain the ex-wife from contacting her son. Ms. Varon believed that irreparable injury could result if the ex-wife was given notice of the proceeding. Ms. Varon also believed that the ex-wife was evading service.

In support of the request, Ms. Varon submitted 84 pages of documents to the court, which included a copy of the Snohomish County TRO and opposing counsel's letter announcing his representation. However, due to the exigencies of the ex parte calendar, the commissioner only skimmed through the exhibits, relying (pursuant to his established practice) on counsel to advise him orally of all relevant facts to permit him to render an informed decision. Ms. Varon did not orally inform the commissioner of the existence of the prior Snohomish County TRO, nor did she inform the commissioner that the opposing party was represented by counsel. Had she done so, the commissioner would have

followed his usual practice and contacted the issuing court and the opposing counsel for a response prior to making his ruling. The commissioner issued the order (King County TRO) as requested by Ms. Varon, giving her client custody of his son and prohibiting the ex-wife from interfering with that custody or entering the client's home or workplace, or his son's daycare or school.

Soon thereafter, to resolve the two conflicting orders, Ms. Varon and the ex-wife's lawyer appeared before a King County commissioner at an emergency hearing, after which the King County TRO order was vacated. The lawyers also appeared before a Snohomish County commissioner at hearings in May and June. As a result, the Snohomish County TRO was vacated and the cause of action dismissed. The client's King County petition for modification of the parenting plan was ultimately granted in the client's favor.

Ms. Varon's conduct violated RPC 3.3(f), requiring a lawyer in an ex parte proceeding to inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Natalea Skvir represented the Bar Association. Steven R. Loitz represented Ms. Varon. Craig C. Beles was the hearing officer.

APPENDIX 2

Discipline Notice

WSBA Bar No.: 17773
Member Name: Gerald Gerome Burke
Action: Admonition
Effective Date: 9/7/2007

RPC 3.3 - Candor Toward the Tribunal

Gerald G. Burke (WSBA No. 17773, admitted 1988), of Tacoma, was ordered to receive an admonition on September 7, 2007, by order of a Review Committee. This discipline was based on conduct involving lack of candor toward a tribunal. Gerald G. Burke is to be distinguished from Jerry L. Burk of Yakima.

In March 2001, Mr. Burke agreed to represent his daughter in a marriage dissolution action. In June 2002, the opposing party in the action appeared in front of Commissioner A in the morning for a return hearing on an *ex parte* temporary restraining order. Commissioner A vacated the restraining order because Mr. Burke did not appear.

In the afternoon of that same day, Mr. Burke appeared in front of Commissioner B for the same return hearing on the same *ex parte* temporary restraining order. Commissioner B indicated that Commissioner A would have to deal with this order and that either party could re-note this matter for hearing on a date agreeable to the parties. The next day, Mr. Burke filed a motion and declaration for an *ex parte* stay of Commissioner A's order, alleging the vacation order was improperly obtained. Mr. Burke's motion did not mention the order entered by Commissioner B. Mr. Burke presented his motion to Commissioner C, who reinstated the restraining order.

Mr. Burke's conduct violated RPC 3.3(f), requiring a lawyer in an *ex parte* proceeding to inform the tribunal of all material facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Randy Beitel represented the Bar Association. Mr. Burke represented himself.

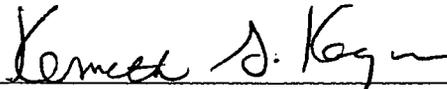
Attorney for the Washington State Bar Association

Ms. Francesca D'Angelo
Washington State Bar Association
1325 Fourth Avenue, #600
Seattle, WA 98101

Via Electronic Mail & First Class Mail

Clerk of the Disciplinary Board

Ms. Becky Crowley
Washington State Bar Association
1325 Fourth Avenue, #600
Seattle, WA 98101



Kenneth S. Kagan, WSBA No. 12983

**FILED AS ATTACHMENT
TO E-MAIL**

OFFICE RECEPTIONIST, CLERK

To: Kagan, Kenneth S.
Cc: francescad@wsba.org; Becky Crowley
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Rec. 5-5-08

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

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Sent: Monday, May 05, 2008 3:27 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: francescad@wsba.org; Becky Crowley
Subject: Mary McIntosh - Brief of Appellant - No. 200,586-1

<<McIntosh - Brief of Appellant.pdf>> Dear Clerk's Office:

Attached please find, in .pdf format:

1. Opening Brief of Appellant Mary H. McIntosh, Attorney at Law (with Appendix 1 and Appendix 2 attached); and
2. Certificate of Service, reflecting service by e-mail and U.S. Mail on the Association and the Clerk to the Board.

Please acknowledge receipt.

Thank you.

Kenneth S. Kagan
Carney Badley Spellman, P.S.
701 Fifth Avenue, #3600
Seattle, WA 98104
(206) 622-8020