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STATE OF WASHINGTON
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No. 200,606-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: S. RICHARD HICKS, AN ATTORNEY AT LAW (#6612),

APPELLANT
S. RICHARD HICKS
OPENING BRIEF

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WSBA Lawyer Discipline Manual

Including Rule Changes Through January 3, 2006

Containing:

- Standards For Imposing Lawyer Sanctions
American Bar Association (2005);
approved February 1986; amended February 1992
- Rules of Professional Conduct
- Enforcement of Lawyer Conduct
10/1/2002 – 1/3/2006
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I. STATEMENT OF THE CASE

This appeal involves six claims brought against Appellant as a result of a Washington State Bar Association's audit conducted August 2005 to January 2007, arising out of IOLTA account overdraft notices May and, June 2005.

The formal complaint filed by the Association is composed of six counts.¹ Appellant admitted to and disclosed the facts comprising Counts I-III at an initial meeting with Ms. Trina Doty of the Association August 9, 2005. The Association asserted Counts 4-6 at the conclusion of its 15 month investigation of Petitioner's records and client files.

The Disciplinary Hearing was on August 22-23, 2007. The Hearing Officer filed Amended Recommendations November 28, 2007.

¹ Count 1. By failing to maintain adequate records regarding client funds in possession, Respondent violated RPC 1.14(b)(3);

Count 2. By Failing to deposit and maintain all client funds in trust: by failing to deposit advance fee or cost deposits and by having a shortage in the account, Respondent violated RPC 1.14(a);

Count 3. By depositing lawyer funds into his pooled IOLTA trust account, Respondent violated RPC 1.14(a).

Count 4. By telling a client that normally a lawyer deducts the lawyer's whole fee at the beginning of a series of payments, when such is prohibited by RPC 1.5, Respondent violated RPC 8.4(c).

Count 5. By taking more fees than he was entitled, Respondent violated RPC 1.5

Count 6. By making a false statement to the Association in the January 28, 2005 letter, Respondent violated RPC 8.4(c) and/or ELC 5.3(e)(1).

The Hearing Officer found that Appellant negligently violated Counts 1-3 as stipulated; assessing a penalty of reprimand.

The Hearing Officer found that Appellant negligently violated RPC 8.4(c), Count 4, but she assessed no penalty. Solely for this reason, Appellant does not specifically challenge this finding, which for reasons set out in section IV.A, should also be overturned. The Hearing Officer found that Appellant did not violate RPC 1.5(c) (2), Count 5.

The Hearing Officer found that Appellant violated RPC 8.4(c) and ELC 5.3(e) of Count 6 by not making a “complete and accurate” statement to the Association in a January 28, 2005 response to a January 2005 overdraft notice. The Hearing Officer recommended a reprimand for the violation of RPC 8.4(c) and a 24 month suspension for violation of ELC 5.3(e).

The Disciplinary Board adopted the Hearing Officer’s Amended Findings, Conclusions and Recommendations without comment in its automatic review, by order of April 15, 2008.

Appellant appeals the finding of a violation of Count 6, (RPC 8.4(c) and ELC 5.3) and the assessment of the 24 month suspension.

II. ISSUES PRESENTED

- A. Whether holding that Appellant violated ELC 5.3 and RPC 8.4(c) in Count 6 is should be overturned.
- B. Whether imposition of a 24 month suspension sanction for a single violation of ELC 5.3 should be reduced or eliminated.

III. SUMMARY OF ARGUMENT

The Count 6 Violation Should Be Overturned

The allegation of Count 6 is that Appellant submitted a false statement to the Association on January 28, 2005 and, therefore, violated RPC 8.4(c) and ELC 5.3(3).² The Hearing Officer found that Appellant's statement to the Association was not false. The Hearing Officer found, however, that Appellant violated both RPC 8.4 (c) and ELC 5.3 of Count 6 because his statement was 'incomplete and inaccurate' because it did not disclose that he had commingled personal and business funds in his IOLTA account and that the obligation he paid to client SB that resulted in the overdraft to his IOLTA account was for a personal obligation owed the client, rather than a legal obligation.

Count 6 cannot be established by a clear preponderance of the evidence because the statement was not false as alleged in the complaint. Further, liability under ELC 5.3(e) cannot flow from a failure to disclose facts that are not encompassed in the Association's inquiry; and which, under the Rules of Professional Conduct RPC 8.3, Appellant is not required to disclose. By similar analysis, a violation based upon RPC 8.4(c) cannot be established.

Accordingly, Count 6 should be dismissed.

² Count 6. By making a false statement to the Association in the January 28, 2005 letter, Respondent violated RPC 8.4(c) and/or ELC 5.3(e)(1). [cp]

Imposition of A Two Year Suspension Is Error

The Hearing Officer and the Board sanctioned Appellant with a two year suspension for violating ELC 5.3(e) in Count 6.

Neither the Hearing Officer nor the Board performed any analysis as to why this length of suspension was warranted rather than the minimum presumptive six month suspension or some other time frame. While the decision specifies that the presumptive sanction was suspension and lists four aggravating factors and five mitigating factors, it goes no further. The two-year suspension imposed is disproportionate to sanctions assessed in similar cases for violations of ELC 5.3(e) and in other cases of similar seriousness. The analysis below argues for a suspension in the six month range or less. By any measure, however, a sanction of far less than two years is warranted if suspension is required at all.

IV. ARGUMENT

A. Count 6 (Violation of ELC 5.3(e) And RPC 8.4(c)) Should Be Dismissed

Count 6 alleges: “that by making a false statement to the Association, Appellant violated ELC 5.3 and/or RPC 8.4(c).” CP 73 The finding should be overturned because the Hearing Officer found that the statement Appellant made to the Association was not false. CP 229 As a

matter of law, therefore, the charge cannot be shown to have been proven by a preponderance of the evidence.

The Hearing Officer concluded that Appellant's statements to the Association were not false. She further questioned whether Appellant had not fully answered the inquiry, as a colloquy on the second day of the hearing suggests and supporting that this finding was a reasoned conclusion by the Hearing Officer. CP 488-490

In her findings, the Hearing Officer further concluded that Appellant did not disclose that he had commingled personal and business funds in his IOLTA account and did not disclose that the obligation paid to client SB from his IOLTA account resulting in the overdraft was for a personal obligation, rather than a legal matter. CP 229

She found that this failure to disclose this information made the January statement 'inaccurate and incomplete and therefore violated RPC 8.4(c) and ELC 5.3 (e). CP 229

The Disciplinary Board on review adopted her findings of fact, conclusions of law and recommendations without comment. CP 46-47

ELC 5.3(e) Duty To Furnish Prompt Response

Both the Board and the Hearing Officer incorrectly concluded, however, that the response violated ELC 5.3(e) or was "inaccurate and incomplete;" but the stated omitted disclosures had no relevance to the

Association's inquiry in the first instance (the Hearing Officer concluded the reason for the overdraft was Appellant's failure to record a check paid to client SB). CP 225 As such Appellant cannot be said to have failed to have provided "a full and complete response to inquiries and questions." as is required under ELC 5.3(e).³

Whether Appellant was using his IOLTA account funds as his personal account, however egregious, was not inquired of by the Association in its 2005 inquiry. The text of the Association's January 25, 2005 letter follows: CP-501

Enclosed is a copy of a Trust Account Overdraft Notice received by the Association. This matter has been assigned to me for investigation. Pursuant to Rule 15.4(d) of the Rules for Enforcement of Lawyer Conduct (ELC), please provide a complete explanation of the overdraft. A copy of ELC 15.4 is enclosed for your information. Please provide supporting documentation with your explanation.

The text of Appellant's January 28, 2005 letter response follows: CP 503

This is in response to your Trust Account Overdraft notification of January 25, 2005 for account No. 1-535-0007-2936 U.S. Bank.

The overdraft occurred as a result of an oversight, in failing to record into the computer, a check drawn against the account and thereafter making a separate check payment to a client which caused the overdraft of the account. The bank honored the check and assessed a \$30 fee. At the time of the overdraft, the only funds in the account belonged to the one client and all payments were to or for the benefit of that client. I subsequently made a deposit to the account to cover the overdraft and the charges and have reviewed the account to make sure that there were no other oversights.

³ ELC 5.3(e) Duty To Furnish Prompt Response. Any lawyer must promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation. Upon inquiry or request, any lawyer must: (1) furnish in writing, or orally if requested, a full and complete response to inquiries or questions;....

The Association left it to Appellant to ascertain what the Association meant in its letter by “a complete explanation of the overdraft.” In fact the Association admitted that Appellant did provide the information. Their complaint was that the surplusage was false. CP 493
But see the testimony of Appellant in two regards. CP 381-383, 482-484.

See Justice Sanders’ dissent in In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671, 690; 161 P.3d 333 (2007), with which Justices Johnson and Chambers concurred, provides insight. Bronston v. United States, 409 U.S. 352, 362, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), cited by the dissent, teaches that literally true statements, even if misleading or unresponsive, cannot support a perjury conviction because there is no falsity. State v. Olson, 92 Wash.2d 134, 137, 594 P.2d 1337 (1979), adopted Bronston's holding: “The burden is on the questioner to pin the witness down to the specific object of his inquiry. Precise questioning ... is imperative as a predicate for perjury.” *Id.* at 139 and Olson at 139-140: “We must look at the context of the question to isolate its meaning, and if it's unclear, then we cannot say with sufficient certainty the answer is false.” *Id.* at 139-40 (quoting In re Rosoto, 10 Cal.3d 939, 949-50, 519 P.2d 1065, 112 Cal.Rptr. 641 (1974)).

Nonetheless, whether a “full and complete response” to the Association’s January 2005 inquiry under ELC 5.3 (e) would encompass

disclosure of commingling requires an interpretation of the question on the part of the Appellant that is not evident from the inquiry made. A plain reading of the inquiry would not so indicate.

As to ELC 5.3, Count 6 should be dismissed. Alternatively, ABA standard 7.3 should be utilized to evaluate the conduct as to ELC 5.3 because clearly Appellant attempted to completely answer the question put to him by the Association, as set out above.

RPC 8.4(c) Misconduct

The essence of RPC 8.4(c)⁴ is to engage in conduct involving dishonesty, fraud and deceit and misrepresentation -- intentional conduct. "Simply put, the question is whether the attorney lied. No ethical duty could be plainer." In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77; 960 P.2d 416 (1998).

The Hearing Officer's findings in this matter were that the response to the Association was "incomplete and inaccurate" because Appellant failed to disclose professional misconduct of commingling in his IOLTA account; not that it was false. CP 229

It cannot amount to an 8.4(c) violation either because the stated violating omission was irrelevant to the specific Association inquiry. One should not find a violation of RPC 8.4(c) by omission in this instance.

⁴ **RPC 8.4 MISCONDUCT** It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation....

That the stated violation deceived the Association into closing its January 2005 inquiry about Appellant's overdraft is false logic, however it is phrased. CP 226 This conclusion implies that the real question asked by the Association was whether Appellant had committed any professional impropriety in the use of his IOLTA account, which was not the question asked., and probably could not be under RPC 8.3. This is a question to which a response is not required.

The Association's argument that had it known of the commingling, obviously they would not have closed the investigation is similarly misleading. CP 226 Obviously they would not have closed the investigation if they had known by whatever means of any professional misconduct. That does not speak to Appellant's obligation to himself self-report under RPC 8.3.

This, however, is not the standard under which to analyze whether Appellant violated Count 6. The proper measure is that the RPC 8.4(c) claim relies on finding that the failure to disclose violated the rule because the failure to so disclose rendered the reason for the overdraft deceitful, dishonest, fraudulent or a misrepresentation. The reason for the overdraft was not rendered misleading for the nondisclosure.

Under RPC 8.3, the Appellant was not required to admit professional misconduct. While RPC 8.3 indicates an attorney should

report misconduct, he is not obligated to do so. Therefore, it is not conduct for which he should be sanctioned.

Appellant in his response attempted to thread the needle of the literally true answer and the disclosure of his misconduct he is not required to divulge, but this should not be said to be an intentional act to deceive for purposes of RPC 8.4(C).

While Count 6 calls this question to a judgment, Appellant believes that this conduct does not rise to the level of deceit, fraud or misrepresentation anticipated under RPC 8.4(c) when viewed under the lens described. And so it should be dismissed.

**B. It Was Error to Impose
A 24 Month Suspension Sanction**

The Hearing Officer concluded that the presumptive sanction under ABA Std. 7.2 was suspension; but her analysis stopped there. Assuming the Hearing Officer correctly found that Association proved Count 6 as to ELC 5.3, she erred in imposing a sanction of a 24 month suspension:

First the presumptive sanction for suspension is six months rather than two years as may be intimated by the Hearing Officer's blanket recommendation. CP 231 In re Disciplinary Proceeding Against Cohen, 149 Wn.2d 323, 339; 67 P.3d 1086 (2003)(Cohen I); In

re Disciplinary Proceeding Against DeRuiz, 152 Wn.2d 558, 582; 99 P.3d 881 (2004) (citing Cohen I).

It is possible the Hearing Officer's conclusion #76 CP 229 referencing In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 72 P.3d 173 (2003) cited by Association skewed the analysis. Discussing this case where the presumptive sanction is suspension in the light of another where it is disbarment throws off the analysis when weighing mitigating factors.

Second, the length of the sanction in this case is disproportionate to sanctions imposed in other similar cases and to other cases of similar seriousness:

Proportionate sanctions are those which are " 'roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.' "Anschell, 141 Wn.2d at 615, 9 P.3d 193 (quoting In re Disciplinary Proceeding Against Gillingham, 126 Wn.2d 454, 469, 896 P.2d 656 (1995)).

In re Disciplinary Proceeding Against Dynan 152 Wn.2d 601, 98 P.3d 444 (2004)

1. Six Months Is The Correct Presumptive Sanction For The Suspension Under ELC 5.3.

Neither the Hearing Officer, nor the Board specified any reason for a deviation from the 6 month presumptive minimum suspension. CP 231; CP 46-47. The Board provided no explanation at all, other than to adopt the Hearing Officers recommendations. In assessing and

confirming Both deviated from the presumptive sanction without announcing any justification for the departure. Having failed in this regard, it is the Court's responsibility to perform the analysis.

The sanction imposed by the Board is not warranted here where there is virtual balance in the mitigating and aggravating factors.

While a sanction above the minimum sanction may be appropriate where aggravating factors exceed mitigating factors, such is not the case here. Cohen I *supra* at 339.

A presumptive sanction of less than six months may even be appropriate in certain cases, as stated in In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 497, 998 P.2d 833 (2000) where the court noted, "...there are exceptions to this general rule [*sic* of a six month minimum presumptive suspension], allowing a "minimal suspension" "where the mitigating factors clearly outweigh any aggravating factors."

Even where aggravating factors have far exceeded mitigating factors the Court has seen fit to impose the minimum presumptive suspension sanction. See Cohen I at 339, and DeRuiz at 582.

Moreover, the sanction imposed by the Board is at the high end of the disciplinary scale. This Court has recognized that a 2 year suspension is a comparatively long suspension not warranted without some additional justification.

Even so, a **comparatively long suspension** is warranted by the multiple violations and the fact that aggravating factors far outweigh mitigating ones.” In re Disciplinary Proceeding Against Haley, 157 Wash.2d 398, 411-12, 138 P.3d 1044 (2006); Longacre, 155 Wash.2d at 746-47, 122 P.3d 710; Cohen II, 150 Wash.2d at 764, 82 P.3d In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 157 P.3d 859 (2007) [emphasis added]

The balance of mitigating and aggravating factors in this case do not warrant going beyond the minimum sanction. A maximum of a six month sanction should be the presumptive sanction for starting the analysis in this matter.

Extent of the Harm

“The presumptive sanction is determined by considering: (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct.” In re Disciplinary Proceeding Against Anschell, 141 Wn.2d 593, 608; 9 P.3d 193 (2000). In this matter, as concerns ELC 5.3(e), Appellant does not oppose the findings herein of the duty violated and the conclusion at to lawyer's mental state.

Appellant believes, however, that in assessing the proper presumptive sanction, the fact of the actual harm caused herein by the misconduct for which suspension was imposed was at best minimal. Although the Hearing Officer found “there is damage to the profession

by any violation of ELC 5.3”, the finding is a simply a recitation of the ABA standards and no specific harm was found but image. CP 226

In this case, there was no client complaint. CP 201-203, 228

One can compare this set of circumstances to the harm in cases where lesser penalties were imposed and in which there was actual financial damage to clients. *See, Cohen I, Dann, DeRuiz, and Marshall.*

Attempt To Rectify Conduct

Furthermore, the Appellant negated or attempted to negate any harm that may have been caused by conduct set out in Count 6, by coming forward several months later and disclosing what was not disclosed in the January statement to the Association.

The Hearing Officer and Board recognized Appellant’s timely good faith effort to make restitution or rectify consequences of his misconduct. CP 227 At the outset of the Association’s inquiry in June 2005, he came forward requesting a personal meeting with the Association, at which disclosed the essentials of Counts 1-3 of the complaint which was not the Association’s inquiry at the time. [CP] Appellant also cooperated fully with the Association’s investigation, providing all requested documents, provided a substantial number of case

files and submitting to his deposition. CP 309-312 He stipulated to the conduct except to counts 4, 5 and 6.^{5 6} CP 219; 87-90

To Whom the Duty Violated Was Owed

ABA Standards discussion establishes that the seriousness of the duty violated varies by whether the duty is to the client, the court and legal system or to the legal profession. Of them, those owed to the profession are deemed to be the least serious. The violation in Count 6 was of a duty owed to the profession. This does not defend any misconduct found, but is another factor to consider in setting out the presumptive sanction and in performing the valuable analysis of proportionality, as set out below.

Mitigating and Aggravating Factor Analysis

The Hearing Officer's Recommendations set out no discussion of mitigating and aggravating factors, although some can be expanded by the record as indicated below. The Hearing Officer set out the following factors in this matter. CP231

Mitigating Factors:

- (a) absence of a prior disciplinary record;
- (b) personal or emotional problems; CP 227;
- (c) timely good faith effort to make restitution or rectify consequences of misconduct;

⁵ (The Hearing Officer found no penalty for Count 4 and denied Count 5).

⁶ This perhaps more aptly compares to ABA standard 6.11, where the degree of penalty levied is offset by the Attorney recanting or correcting misleading conduct to the court.

- (d) character or reputation; CP 443-444, 447
- (e) imposition of other penalties or sanctions.

Aggravating Factors:

- (a) dishonest or selfish motive;
- (b) a pattern of misconduct with regard to the trust account recordkeeping and commingling of funds;
- (c) multiple offenses;
- (d) substantial experience in the practice of law (33 years).⁷

Of the mitigating factors set out by the Hearing Officer, Appellant contends that the issue of 'personal or emotional problems' figures quite prominently in the history of this case and the cause of the misconduct.

As described at the hearing, Appellant had come out of an all-consuming two-year litigation in which he prevailed substantially, but the client recanted a substantial settlement in the matter. Through no fault of Appellant, he was left without resources and in poor physical and emotion health. Through the course of the case he was hospitalized twice, but continued on for the client. After he was forced to withdraw rather than take up the appeal, Appellant was forced to relinquish his condominium and his car. It was during this period that he resorted to using his IOLTA account as a personal account when his other accounts were closed. CP 371-374; CP 445-446; 449-451

Impact Of The Sanction On The Attorney

Finally, in reviewing the decision of the Board, the Court in addition to reviewing the proportionality of the sanction is obligated also

⁷ Aggravating factors were listed: (b),(c),(d),(g), respectively in the Amended Findings and Recommendations

to recognize and evaluate the effect that any sanction will have on the attorney being sanctioned. In re Disciplinary Proceeding Against Johnson 114 Wn.2d 737, 752; 790 P.2d 1227 (1990)

While any suspension would have a dramatic impact upon any practicing attorney, a two year suspension because of Appellant's age will virtually end his legal career and amount to a disbarment: A suspension on an attorney sole practitioner in his sixties will have a far greater impact than it otherwise might because it will mean loss of his business, less time to prepare financially for the time when he cannot work and less chance of alternative employment. See In re Disciplinary Proceeding of Malone, 107 Wn.2d 263, 268, 270; 728 P.2d 1029 (1985) (Age, years of service and sole practice considered).

In In re Disciplinary Proceeding of Noble, 100 Wn.2d 88, 97-99; 667 P.2d 608 (1983) the court recognized the serious impact of even a 90 day suspension upon an attorney. They reduced a longer suspension in part as a result of the fact that the longer suspension would destroy the legal practice of respondent.

The sanction recommended, therefore, reflects the serious nature of respondent's misconduct. It also recognizes, however, that respondent's transgression stemmed from a disease, rather than a deliberate and evil intent. A longer suspension (of 2 years, for example) would effectively destroy any reasonable chance for respondent to readily salvage his law practice or maintain his clientele. The Board's recommendation, therefore, appears appropriate. Noble at 97.

In In re Disciplinary Proceeding Against Burtch, 112 Wn.2d 19, 20, 770 P.2d 174 (1989), the Court suspended Mr. Burtch for 45 days, plus a 2 year probation for numerous violations. Of consideration were respondent's emotional problems. See Burtch *infra* in section V. B.2.

2. **A 24 Month Suspension is a Disproportionate Sanction**

The twenty-four month suspension sanction imposed by the Board in this matter is disproportionate to violations in similar cases and to sanctions imposed for similar levels of seriousness in other cases. Dynan, *supra*. The court will modify the Board's recommended sanction if the sanction is not proportionate to other cases. In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 277-278; 66 P.3d 1069 (2003).

ELC 5.3 Cases Imposing A Lesser Sanction

A 24 month suspension imposed here is disproportionately greater than sanctions assessed in other cases of ELC 5.3 violations:

In DeRuiz, *supra* the Court imposed a 6 month suspension for violations of former DR 2.8 (now embodied in ELC 5.3(e)) in each of two matters. The Court noted that six months was the accepted minimum under Cohen I and Halverson and imposed that sanction even though:

...aggravating factors overwhelmingly outweigh the single mitigating factor of the absence of a disciplinary record prior to DeRuiz I. Although this could justify a period of suspension

above the minimum term for each matter, we affirm the recommended sanctions.

DeRuiz at 582.

In re Disciplinary Proceeding Against Clark, 99 Wn.2d 702, 663 P.2d 1339 (1983), the court imposed a 60 day suspension for violation of former DRA 2.6, now embodied in ELC 5.3. It was the only violation in that underlying malpractice misconduct was dismissed,

In re Disciplinary Proceeding Against Burtch, 112 Wn.2d 19, 770 P.2d 174 (1989), The Court reduced the Board's recommendation of a 90 day suspension and 2 years probation to a 45 day suspension and 2 year probation for *inter alia* a violation of RLD 2.8 (now embodied in ELC 5.3) and numerous other violations:

The findings and conclusions establish: (1) three violations of RPC 1.5(b) (failure to communicate fees); (2) six violations of RPC 1.3 and 3.2 (lack of diligence and failure to expedite litigation); (3) two violations of RPC 1.4 (failure to keep client fully informed); (4) two violations of RPC 1.15(d) (failure to return client documents and unearned fees); (5) one violation of RLD 13.3 (failure to timely file trust account declaration); and (6) one violation of RLD 2.8 (failure to cooperate with disciplinary investigation). Burtch at 20.

Cases Imposing Lesser Sanctions

There are examples of cases of similar seriousness in which lesser sanctions have been imposed. These include cases arguably more serious in that the violations are those that have a financial impact on the client; rather than, as here, minimal or potential injury. Similarly, there are cases

of apparent greater seriousness in which the same sanctions were imposed as in the instant case. Accordingly, the sanction imposed in this case is clearly disproportionate and should be reduced.

In In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 98 P.3d 444 (2004) the respondent committed a number of violations of submission of multiple false declarations to Court, alteration of bills and prejudicing the administration of justice. *Id.* The presumptive sanction in of disbarment in the case was modified from the Board sanction of a 9 month suspension to a 6 month suspension based on proportionality and factor analysis (Aggravating factors slightly outnumbered mitigating factors). The dissent in Dynan by Justice Hunt in which Justices Madsen and Sanders concurred, argues for a reprimand based also on an excellent discussion of proportionality and factor analysis. Cases of equal or greater seriousness in which lesser sanctions than those imposed on Dynan were compared. Justice Hunt focused on In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 48 P.3d 311 (2002)) in which the Court imposed a 60 day suspension for the following conduct:

Carmick made false statements to the trial court to facilitate an *ex parte* order releasing to his client court-held interest due on past child support without prior notice to the opposing party, who was legally entitled to the money. 146 Wn.2d at 596, 48 P.3d 311. He blatantly misled the trial court by representing that he had informed both the opposing party and her attorney that he would be presenting the order for the court to sign and that they had approved the order....

He communicated with the opposing party (his client's ex-wife) directly, without the knowledge or consent of her counsel; (2) he falsely told the opposing party that her attorneys were not available for her to consult because they were either in trial or on vacation; and (3) he persuaded her to settle for only \$5000 of the \$12,000 his client owed her, without telling her that \$11,000 was already on deposit with the court and available to her. Instead, he implied that if she did not settle, she would likely recover even a smaller amount. *Id.* at 589-90, 598, 48 P.3d 311.

Holding that Carmick had knowingly made misrepresentations to the trial court that affected the administration of justice, (fn9) *id.* at 603, 48 P.3d 311, this court nonetheless imposed only a 60-day suspension. *Id.* at 607, 48 P.3d 311.

Dynan *supra*.

The conduct in this case is less serious than either Dynan or Carmick because there was no actual harm, the misconduct was not to the Court and it was one instance of conduct for which the suspension was imposed. Furthermore, in both Dynan and Carmick, aggravating factors outnumbered mitigating factors.

In In re Discipline of Malone, 107 Wn.2d 263, 728 P.2d 1029 (1986), Malone was given a 60-day suspension for misappropriating over \$10,000 of client trust funds over a period of eight years. Factors in mitigation were cooperation with the bar audit, ultimately no shortfall to any client. A major factor appeared to be the impact of the sanction upon the attorney who had practiced without discipline for 29 years. *Id.* at 270, 271. Here, there was no misappropriation of client funds; the misconduct

warranting suspension occurred in one letter to the Association. Appellant is of similar age and practice circumstance to respondent in Malone.

In re Discipline of Dann, 136 Wn.2d 67, 960 P.2d 416, Dann was charged with making misrepresentations on billing statements, lying to clients and charging them a higher partner rate for work an associate performed. A two-year suspension recommendation was mitigated to a one-year suspension because of prosecutorial delay. The extent of the harm in this matter, for instance, is far less than in Dann, where the court noted the importance of giving "particularly great weight" to the question of the extent of injury involved due to the attorney's misconduct. *Id.* at 79.

When the conduct involves neither the client, the public, nor the Court system, but the profession; and where it does not involve the loss of client funds or falsification of documents; presentation of false evidence to the court; the sanction for similarly serious conduct should not be greater but lesser.

Cases of Two Year Suspensions

Most cases in which a two-year suspension is imposed seem to be normally cases in which the presumptive sanction is disbarment and the court has reduced the sanction for various reasons. *See, In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557; 9 P.3d 822

(2000) (misappropriation of client funds; commingling; applying to his fee \$7,000 in bond proceeds due the parents of a client without their permission, misrepresentations to the court); In re Disciplinary Proceeding Against Haskell, 136 Wn.2d 300, 962 P.2d 813 (1998) (overbilled clients and included personal expenditures and travel expenses never taken, stealing from clients over a period of time); In re Disciplinary Proceeding Against Heard, 136 Wn.2d 405, 963 P.2d 818 (1998) (suspended two years for negotiating a settlement agreement with worthless interests, advising his client to sign it, and then keeping all cash proceeds of some \$50,000 of the settlement); In re Discipline of McLendon, 120 Wn.2d 761, 845 P.2d 1006 (1993)(stole nearly \$100,000 in client funds never restored. He was suspended for two years because of bipolar disorder, though he brought it under control with medication.) In re Disciplinary Proceeding Against Salveson, 94Wn.2d 73, 614 P.2d 1264 (1980) (Taking client funds from trust account and only repaying after a client complained).

V. CONCLUSION

With the exception of the violation of ELC 5.3(e) in Count 6, the Hearing Officer found all conduct of Appellant in this case to be negligence, imposing a reprimand.⁸

⁸ The Hearing Officer and Board assessed no penalty for Count 4.

Even with ELC 5.3(e) in Count 6, the statements made to the Association were not determined to be false, as charged in the complaint. This misconduct occurred in one letter written to the Association and Appellant later voluntarily admitted the conduct.

This Court should adopt the reasoning advanced in this brief and resolve this case accordingly. In the instance that it does not dismiss the ELC 5.3(e) violation of Count 6, or Count 6 entirely, it should reduce the sanction for this matter to below six months.

DATED this 14th day of August, 2008.

s/ S. Richard Hicks

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CERTIFICATE OF SERVICE

Transmitted for filing by e-mail; signed original retained by S. Richard Hicks, who under penalty of perjury declares by his signature above that on this date he caused to be delivered a copy of this Brief of Appellant to:

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