
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

LARRY A. BOTIMER,

Lawyer (Bar No. 23805).

ANSWERING BRIEF OF THE
WASHINGTON STATE BAR ASSOCIATION

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I. COUNTERSTATEMENT OF THE ISSUES

1. Botimer failed to advise multiple clients as to the advantages and disadvantages of joint representation and failed to obtain informed written consent. The clients ultimately ended up in litigation against each other. The hearing officer rejected Botimer's defense that he did not need to obtain informed written consent because of the mere possibility of conflict, finding instead that the potential for conflict was strong. A unanimous Board affirmed. Should the Court retry the facts?

2. Botimer disclosed his former client's secrets to the opposing party in litigation, without his former client's permission, and without an order from a court directing him to do so. The hearing officer rejected Botimer's defenses that the secrets already had been made public by the former client and that a subsequent order in the litigation absolved Botimer's earlier release of his former client's secrets. A unanimous Board affirmed. Should the Court retry the facts?

3. Botimer disclosed client secrets without his client's consent by writing a letter to the Internal Revenue Service (IRS) reporting that tax returns he had prepared for the client had misreported her income and losses. The hearing officer rejected Botimer's defenses that he was required by Federal tax law to make such a report, that he was authorized to report the discrepancy to prevent a continuing crime, and that the letter did

not harm the client because the IRS did not pursue an audit of the client. Should the Court hold that lawyers are permitted to report client secrets to the IRS?

4. The hearing officer and Disciplinary Board found that Botimer knowingly failed to obtain written informed consent to a conflict of interest and knowingly revealed client secrets. A unanimous Board agreed with the hearing officer that the presumptive sanction was suspension and recommended that Botimer be suspended for six months. Should the Court affirm the Board's unanimous recommendation?

5. Botimer moved to re-open the hearing record to include evidence he acquired after the hearing was concluded. A unanimous Disciplinary Board denied the motion, found the request was late, and expressed concerns about the methods used to obtain the evidence and doubt as to the relevance of the evidence. Did the Board properly exercise its discretion?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

The Washington State Bar Association (Association) filed an amended formal complaint charging Larry Botimer with three counts related to his representation of Ruth Reinking (Ruth) in her tax, business, and estate planning matters. Clerk's Papers (CP) 80-84. On January 8,

2008, following a four-day hearing, the hearing officer filed his Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (FFCL).¹ Decision Papers (DP) 1-21. The hearing officer determined that Botimer had violated the following Rules of Professional Conduct (RPC):

- Count 1: RPC 1.7(b),² by representing multiple family members in joint business ventures without obtaining conflict waivers;
- Count 2: RPC 1.6 and RPC 1.9(b) by disclosing Ruth's client secrets to the lawyer for Ruth's son, Jan Reinking (Jan), who was suing her; and
- Count 3: RPC 1.6 and RPC 1.9(b) by reporting alleged tax violations by Ruth to the Internal Review Service (IRS), disclosing client confidences and secrets.

FFCL ¶¶ 74-78, 79-83, 84-87. The hearing officer found that Botimer acted knowingly with respect to Counts 2 and 3 and negligently with respect to Count 1. FFCL ¶¶ 89, 92, 93.

For Counts 2 and 3, the hearing officer determined that the presumptive sanction under the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) was suspension, applying ABA Standard 4.22.³ FFCL ¶¶ 92-95. For Count 1, the hearing officer found that the presumptive sanction was reprimand, applying ABA Standard 4.33. FFCL ¶¶ 89-91. The hearing offi-

¹ The FFCL is attached as Appendix A.

² The relevant RPC are attached as Appendix B. All citations are to the RPC in effect at the time of the misconduct, all of which was prior to the September 1, 2006 amendments.

³ The pertinent provisions of the ABA Standards are attached as Appendix C.

cer found that, under Washington law, when multiple violations are found, the ultimate sanction should at least be consistent with the most serious instance of misconduct, and that a period of six months is generally the accepted minimum term of suspension. FFCL ¶¶ 96-98. The hearing officer found three aggravating factors (multiple offenses, refusal to acknowledge wrongful nature of conduct, and vulnerability of victim) and two mitigating factors (absence of prior discipline and absence of dishonest or selfish motive as to Counts 2 and 3). FFCL ¶¶ 99, 100. Finding that the aggravating and mitigating factors offset and did not warrant deviation from the presumptive sanction, the hearing officer recommended a six-month suspension. FFCL ¶ 101.

Botimer appealed to the Disciplinary Board, challenging all of the violations found by the hearing officer and seeking dismissal of all the charges. CP 191-222; 273-88. A unanimous Board approved the findings of fact with certain changes. DP 22-25.⁴ There were only two modifications of substance: a change in the mental state finding from negligent to knowing conduct as to the failure to obtain written client consent to multiple-client representation alleged in Count 1, and a change in the presumptive sanction for Count 1 from a reprimand to a suspension under ABA

⁴ The Disciplinary Board order is attached as Appendix D.

Standard 4.32. Appendix D at 3; DP 24. The Board unanimously affirmed the recommended six-month suspension. Id.

Shortly before oral argument, Botimer asked the Board to reopen the record to accept new evidence consisting of an order Botimer's counsel obtained from a superior court judge and a letter dismissing a grievance against another lawyer. CP 287-303; RB Appendix A. The Association argued that the materials Botimer sought to add to the record were neither newly discovered nor relevant. CP 304-28. A unanimous Board denied Botimer's motion to reopen the record. Appendix C at 1-2; DP 22-23.

On appeal, Botimer assigns error to the Board's decision not to reopen the record and argues, as he did below, that all charges should be dismissed. RB at 35, 24, 27-28.

B. SUBSTANTIVE FACTS

Botimer met Jan in high school in the late 1960s and later roomed with him during college. TR 55, 383. He has known Jan's mother, Ruth, since that time. TR 56. He received his law degree in 1976, and from 1989 to 1995 he was an employee of the IRS. TR 56-57; EX A-28. He was admitted to the Association in 1994. TR 54.

In 1991, prior to becoming a lawyer, Botimer discussed with Jan the proposed transfer of Ruth's Magnolia nursing home business, Magno-

lia Health Care Center Inc. (Magnolia), to Jan and his wife, Janet, including potential gift tax issues. TR 74-75; EX A-28; FFCL ¶ 7. In 1992, Ruth retired from the business, and although she continued to own the Magnolia real property, Jan and Janet operated the nursing home business under a lease. FFCL ¶¶ 4, 8, 9; EX A-6. Botimer advised Jan and Janet as to the incorporation of Magnolia as a Subchapter S corporation⁵ and advised Ruth as to forming a consulting business to handle some of the tax aspects of the lease payments. FFCL ¶¶ 17, 18; TR 67-69; EX A-28 at 2.

Botimer prepared federal tax returns for Ruth, as well as for Jan and Janet, for the years 1995 through 2001. FFCL ¶¶ 11, 15; TR 70-71. He also prepared corporate tax returns for Magnolia. TR 71, EX A-28 at 2. Because of incomplete written documentation as to the business relationship between Ruth and Jan and Magnolia, Botimer allocated business income and expenses between the tax returns for Ruth, Jan, and Magnolia based on what they told him and on his understanding of the agreements between them. FFCL ¶ 20. Botimer also advised Ruth regarding her estate planning. FFCL ¶ 34; EX A-28 ¶ 3.

⁵ Subchapter S corporations for federal tax purposes permit the income and expenses of a closely-held corporation to flow through to the tax returns of the stockholders, allocated on their ownership interest, as though they were in a partnership. FFCL ¶ 31.

Beginning in 1997 or 1998, Ruth and her other son, James Reinking (Jim), were involved in a separate nursing home business in Spokane, Alternative Care Corporation (ACC), also a Subchapter S corporation. FFCL ¶ 21. Despite having guaranteed very substantial loans for ACC, secured by her Magnolia real property, Ruth had not been issued stock in ACC. FFCL ¶¶ 22, 33. Botimer advised Ruth and Jan about possible restructuring of Ruth's business relationship with Jim so that Jan could be involved in the management of ACC and so that Ruth's taxes could be amended to reflect ACC losses. FFCL ¶ 33; EX A-8; EX A-9; EX A-10; EX A-16; EX A-17. Jim was uncooperative about recognizing that Ruth and/or Jan had an actual or potential ownership interest in ACC. There was a continuing controversy about ACC stock ownership between the brothers Jan and Jim, which was upsetting to their mother, Ruth. FFCL ¶ 38. Botimer represented Ruth and Jan in attempting to negotiate a solution with Jim. EX A-9.

Although Botimer was representing multiple clients involved in the Magnolia business relationship and the dispute as to ACC stock ownership, as well as representing Ruth in tax work and estate planning issues, he did not use a written client engagement agreement, obtain a written consent to any conflict, or explain to the clients the implications of the common representation or the advantages and risks involved. FFCL ¶ 42.

In August 2000, Jan, Janet and Ruth decided to close the Magnolia business and sell the property. FFCL ¶ 46. Jan and Janet understood that they would receive half of the net proceeds from the sale of the Magnolia real property. FFCL ¶ 54; EX A-12. Botimer also had asked that his fees be paid out of those proceeds. EX A-9. But, when the sale was closed in June 2002, Ruth used the proceeds to pay off the debt she had personally guaranteed for ACC. FFCL ¶ 56. None of the Magnolia proceeds were paid to Jan and Janet or used to pay Botimer's fees. FFCL ¶ 57.

On October 28, 2002, Botimer sent Ruth a letter stating that he would no longer provide her with tax or legal services because of her failure to cooperate with him, refusal to follow his advice to amend her tax returns to show an ownership interest in ACC, and failure to pay for his legal services. The letter told her that he was sending a notification letter to the IRS stating that her tax returns did not contain a true record of her taxable income and that she had failed to report gifts to her son. EX A-42;⁶ TR 98-101, 118-21. The next week Botimer sent his letter to the IRS stating that he had prepared Ruth Reinking's tax returns and had discovered that she did not correctly state her share of income and loss from ACC and that she had failed to pay gift tax on gifts made to Jim. TR 121;

⁶ Attached as Appendix E

EX A-23.⁷ Botimer's letter to the IRS also alleged that Ruth had participated in an unlawful investment in ACC of funds from her grandchildren's trusts. EX A-23. Botimer neither sought nor obtained Ruth's consent to reveal any of this information to the IRS. TR 145-46; FFCL ¶ 59.

In 2004, Jan and Janet brought suit in King County Superior Court against Ruth, Jim, and ACC, alleging conversion, fraudulent misrepresentation, breach of contract, and other claims. (Reinking litigation). They sought damages of \$530,951.30, one-half of the net sale proceeds from the Magnolia property. FFCL ¶ 60; EX R-1. Jan and Janet were represented by Paul Simmerly. Botimer cooperated with Simmerly and provided three separate declarations to him for use in pretrial motions and hearings. FFCL ¶ 61. Specifically, Botimer provided a declaration dated July 22, 2005, and filed August 1, 2005, which described the business relationships regarding the Magnolia nursing home, as well as estate planning discussions he had with Ruth. EX A-28. This declaration included as Exhibit B copies of Ruth's personal tax returns for the years 1998 and 1999. Also attached to Botimer's declaration was a copy of his 2002 letter reporting Ruth to the IRS. EX A-23. Botimer supplied two additional declarations for the Reinking litigation, both dated and filed January 17, 2006. One declaration described his role in tax preparation for the Reinking family

⁷ Attached as Appendix F.

and discussions he had with Ruth about estate planning issues. EX A-30. Included as attachments were three memos from Ruth to Botimer about tax, gift, and estate planning issues. The second declaration described Ruth's lease transaction with Jan and Janet, and her business transactions with Jim, as being gift tax avoidance devices. EX A-29. Botimer neither sought nor obtained Ruth's consent, nor obtained a court order directing him to reveal client information before providing the information and documents to Simmerly. TR 153; FFCL ¶¶ 67, 68.

On April 17, 2006, Judge Suzanne Barnett, to whom the matter had been assigned for trial, heard oral argument on a number of pre-trial motions, including a motion in limine brought by Ruth to exclude testimony or evidence regarding exchanges between herself and Botimer. EX R-12, pp. 9-27. Although Judge Barnett denied Ruth's motion and allowed Botimer to testify at trial as to his exchanges with Ruth, Judge Barnett did not address whether Botimer's prior actions in providing documents and declarations to Jan's lawyer were proper under either the statutory attorney-client privilege or the RPC. FFCL ¶ 71. Judge Barnett did grant another of Ruth's pre-trial motions, ordering that no direct or indirect facts or issues should be raised to the jury regarding the grandchildren's trusts, whose funds had also been invested in ACC by Ruth. EX R-12 at 2-7; EX A-33. One of the declarations that Botimer already had provided to Jan's

lawyer, and that previously had been made public upon filing in the court file, alleged that Ruth had participated in unlawful investment in ACC of funds from the grandchildren's trust. EX A-28 at Ex. D. Although this information was kept from the jury, Botimer's filed declaration making his allegations public was not sealed or otherwise protected. EX A-33.

In her Findings and Conclusions, Judge Barnett implemented a jury award of \$530,091.30 in favor of Jan and Janet against Ruth, Jim, and ACC by ordering that shares of ACC be held in a constructive trust by Jim for the benefit of Jan, Janet, and Ruth. EX A-35. The jury verdict found that Ruth had not made intentional or negligent misrepresentations to Jan and Janet. There was no finding of fraud by Ruth. EX A-34.

III. ARGUMENT

A. STANDARD OF REVIEW

Unchallenged findings of fact are verities on appeal. In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 461, 120 P.3d 550 (2005). The Court upholds challenged factual findings if they are supported by substantial evidence. In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58-59, 93 P.3d 166 (2004). "Substantial evidence exists if a rational, fair-minded person would be convinced by it. Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. And circumstantial evi-

dence is as good as direct evidence.” Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C., 152 Wn.2d 387, 391, 97 P.3d 745 (2004) (citations omitted); In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 191-92, 117 P.3d 1134 (2005). The substantial evidence standard requires the reviewing body to view the evidence and the reasonable inferences “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).

In reviewing the factual findings, the Court does not retry the facts. See In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003). The Court gives particular weight to the credibility determinations of the hearing officer, who has had direct contact with the witnesses and is best able to make such judgments. Id. Thus, “even if this court were of the opinion that the hearing officer should have resolved the factual finding otherwise, it would be inappropriate for it to substitute its judgment for that of the hearing officer or the Board.” In re Disciplinary Proceeding Against Bonet, 144 Wn.2d 502, 512, 29 P.3d 1242 (2001). Parties challenging factual findings must not simply reargue their version of the facts but, instead, must present argument as to why the findings are unsupported by the record. In re Disciplinary Proceeding Against Mar-

shall, 160 Wn.2d 317, 331, 157 P.3d 859 (2007). The Court “will not overturn findings based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer or Board.” Id.

The Court reviews conclusions of law de novo, upholding them if supported by the findings of fact. Guarnero, 152 Wn.2d at 59. It also reviews sanction recommendations de novo, but generally affirms the Board’s sanction recommendation unless it “can articulate a specific reason to reject” it. Id. (quotations omitted). The Court hesitates to reject the Board’s recommendation when, as here, it is unanimous. Id.

B. THE COURT SHOULD DISREGARD BOTIMER’S STATEMENT OF THE CASE.

Rule 10.3(a)(5) of the Rules of Appellate Procedure (RAP) requires that “[r]eference to the record must be included for each factual statement.” RAP 10.4(f) requires that “[a] reference to the record should designate the page and part of the record.” Here, Botimer’s Statement of the Case is substantially unsupported by any meaningful citation to the record. Respondent’s Brief (RB) at 1-12. Several paragraphs describing various portions of Botimer’s conduct have only a citation to “TR 53-222,” which is the entire 169-page testimony of Botimer.⁸ In a similar manner, he cites to “TR 371-517,” which is the entire 146-page testimony

⁸ These include several whole paragraphs at pp. 2, 3, 4 and 8 of Respondent’s Brief.

of Jan Reinking.⁹ Such “mega cites” are meaningless, do not meet the requirement to “specifically refer to the record,” and allow for misrepresentations as to the record.¹⁰

“The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on [the] court.” Lawson v. Boeing Co., 58 Wn. App. 261, 271, 792 P.2d 545 (1990); see also Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider arguments unsupported by reference to the record). The Court should disregard Botimer’s Statement of the Case.

C. THE DISCIPLINARY BOARD PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO REOPEN THE RECORD.

Rule 11.5(d) of the Rules for Enforcement of Lawyer Conduct (ELC) provides that when a matter is being reviewed by the Disciplinary Board, “[e]vidence not presented to the hearing officer or panel must not be presented to the Board.” Not satisfied with the evidence he had presented to the hearing officer, Botimer had his counsel create additional evidence while this matter was awaiting argument before the Disciplinary Board. Specifically, Botimer’s counsel obtained an order from the Supe-

⁹ These are found at pp. 9 and 12.

¹⁰ For example, at page 9 of his brief, Botimer supports his statement about a mediation with a citation to the “TR 371-517” mega cite of the entire testimony of Jan, but Jan never testified about a mediation. Similarly, at pages 11-12 of his brief, although Jan never testified about any bankruptcy proceedings, Botimer supports a passage describing bankruptcy proceedings with the same mega cite.

rior Court judge who presided over the Reinking litigation and then sought to re-open the record by submitting the order to the Board. CP 289-303. Also, during the same time frame, disciplinary counsel dismissed a grievance that had been filed by Jan against the lawyer for the opposing party in that litigation. Although that grievance involved some of the same individuals as this matter, it did not involve all of the same issues, had no direct relationship to this matter, and was not filed until the week after the hearing in this matter concluded. CP 299. Nonetheless, Botimer sought to re-open the record to add the dismissal letter. CP 294-95.

The Disciplinary Board considered this motion under ELC 11.11, which gives the Board discretion to remand the matter to the hearing to take additional evidence.¹¹ Under this rule, the issue before this Court is whether the Disciplinary Board abused its discretion in denying the motion. In re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 249, 66 P.3d 1057 (2003); In re Disciplinary Proceeding Against Brothers, 149 Wn.2d 575, 583, 70 P.3d 940 (2003). “An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly un-

¹¹ ELC 11.11 provides “In any brief permitted in rules 11.8 or 11.9, either party may request that an additional hearing be held before the hearing officer or panel to take additional evidence based on newly discovered evidence. A request for an additional hearing must be supported by affidavit describing in detail the additional evidence sought to be admitted and any reasons why it was not presented at the previous hearing. The Board may grant or deny the request **in its discretion.**” (emphasis added)

reasonable, based on untenable grounds, or based on untenable reasons.”
Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

Here, Botimer obliquely raises the motion to reopen in the heading of a section of his brief but makes no argument whatever as to why the Board abused its discretion in denying his motion. RB at 24, 27-28. This Court has declined to consider insufficiently briefed challenges, and should decline to review the Board’s decision denying Botimer’s motion to reopen the record. Whitney, 155 Wn.2d at 467; In re Disciplinary Proceeding Against Haskell, 136 Wn.2d 300, 310-11, 962 P.2d 813 (1998).

In the event the Court decides to review the Board’s decision refusing to reopen the record, it should reject it. “To justify remand, a moving party must show, inter alia, that the evidence could not have been discovered before the original hearing by the exercise of due diligence and that the new evidence will likely change the result.” Brothers, 149 Wn.2d at 583. The unanimous Disciplinary Board denied Botimer’s motion to reopen the disciplinary hearing, because the request was late, the order had questionable relevance, and “the Board [had] concerns about the methods used to obtain this order” DP 22-23.¹² As to relevance, the hearing officer concluded “[t]he ruling by Judge Barnett did not address Botimer’s

¹² The Board’s concern about the methods used to obtain the order was that the order was obtained by Botimer’s counsel without notice to the opposing party. Board TR 6-7; CP 308 (n.1), 312-328.

obligations under the Rules of Professional Conduct.” FFCL ¶ 82 As such, a further explanation by Judge Barnett of her ruling would have no effect on the conclusion under Count 2 that Mr. Botimer violated RPC 1.6 and RPC 1.9 by revealing his client’s secrets. Furthermore, even if one considered Judge Barnett’s reasons as relevant, those reasons were not newly discovered evidence. No showing was made as to why Botimer could not have called Judge Barnett to testify at the hearing. Indeed, Botimer subpoenaed Judge Barnett to testify at the hearing, but then did not call the judge. CP 315-16, TR 17. The Board was well within its discretion to deny the motion to reopen the record to admit Judge Barnett’s April 21, 2008 order.

As to the dismissal letter, the Board properly exercised its discretion to conclude that a dismissal letter from a grievance that is, at best, tangentially related to this matter would not likely change the result with respect to Botimer’s misconduct in this case. If it is offered as an argument for proportionality, it is misguided. As a concept, proportionality addresses a comparison of cases that have proceeded through the disciplinary process to a public sanction. See In re Disciplinary Proceeding Against Noble, 100 Wn.2d 88, 95, 667 P.2d 608 (1983) (“Comparison of the [sanction recommendation of the Disciplinary Board] with **sanctions** imposed in similar cases may sometimes be of assistance.”) (emphasis added). Pro-

portionality does not encompass grievances dismissed by disciplinary counsel. To conclude otherwise would allow the internal decisions of the Office of Disciplinary Counsel, in situations not reviewed by the Disciplinary Board or this Court, to impact the proper determination of a disciplinary sanction for a rule violation. In considering a claim of selective prosecution, citing this Court's decision in State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984), the Court of Appeals has noted that:

The decision to prosecute includes consideration of the public interest involved, the strength of the State's case, deterrence value, the State's priorities, and the case's relationship to the State's general enforcement plan. (citations omitted).

State v. Terrovonia, 64 Wn. App. 417, 421-22, 824 P.2d 537 (1992), review denied, 119 Wn.2d 1015, 833 P.2d 1389 (1992). Similar factors effect decisions of whether to prosecute disciplinary matters. The Court should not disturb the Board's exercise of discretion in this matter.

D. THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In challenging the evidence, Botimer reargues his version of the facts and disagrees with the hearing officer's credibility determinations. A respondent lawyer challenging factual findings must do more than "argu[e] his version of the facts while ignoring testimony by other witnesses that supports each finding." Kagele, 149 Wn.2d at 814. "The hearing officer's findings are entitled to considerable weight especially when

the credibility of witnesses is at issue.” In re Disciplinary Proceeding Against Juarez, 143 Wn.2d 840, 869-70, 24 P.3d 1040 (2001).¹³

1. Findings of Fact No. 5, No. 18 and No. 19

Botimer challenges Findings 5, 18 and 19, which found that on Botimer’s recommendation, Ruth Reinking had a consulting business that reported consulting income from the Magnolia nursing home on her tax returns. The record is replete with evidence that supports these findings.¹⁴ Without citing to any contrary evidence in the record, Botimer now argues that he never recommended that Ruth form a consulting business and that the income she reported as consulting income was not in fact consulting income. RB at 13. The hearing officer was entitled to credit the testimony of Ruth and the exhibits. Indeed, at the hearing, Botimer never refuted Ruth’s testimony regarding consulting income. TR 153-61. Botimer argues that what was reported on the tax returns as consulting income was actually Ruth’s property taxes on the Magnolia real property being paid for her by the nursing home business. RB at 13-14. He argues the amount

¹³ The only Findings modified by the Board were Findings 10 and 37. Both of these modifications addressed minor factual errors by the hearing officer and neither involved credibility determinations. DP 23.

¹⁴ Ruth’s 1998 and 1999 tax returns showed net profit from “Ruth Reinking Consulting.” EX A-28 at 000166 and 000175.

Ruth testified that she did consulting and was paid by Magnolia for it. TR 247.

Ruth testified that “Larry Botimer recommended that I set up a consulting.” TR 248.

of the consulting income exactly matches her deduction for those taxes. RB at 13. But this claim is not borne out by the tax returns.¹⁵ It is apparent that the hearing officer credited the testimony of Ruth on this point. Botimer's challenge should be rejected.

2. Finding of Fact No. 10

The discrepancy of which Botimer complains as to when he began preparing Ruth's tax returns was corrected by the Disciplinary Board. DP 23. It is, however, inconsequential to the issues in this matter.

3. Finding of Fact No. 27

The hearing officer found that Botimer introduced Jan to Simmerly in 1996 for the purpose of probating the estate of Jan's father for the benefit of Jan's children and others. Although Botimer lists FFCL ¶ 27 as being challenged, his actual discussion on this point does not contradict the finding in any manner. See RB at 15. Instead, Botimer seeks to supplement the finding by embellishing on the purpose of his role in the lawsuit challenging the will of John Reinking, who was Ruth's former husband and Jan's father. The information provided in Botimer's brief is largely outside the record and should be disregarded. ELC 11.5(d). Moreover, as Botimer himself notes, "These . . . facts . . . are completely irrelevant to

¹⁵ Compare EX A-28 at 167 (reflecting \$9,645 of taxes on her commercial property for 1998) with EX A-28 at 166 (reflecting consulting income in 1998 of \$9,861). Similarly, the 1999 return (EX A-28 at 175-76) reflects \$18,961 of consulting income, but taxes on the commercial property of \$12,214.

this action.” RB at 15.

4. Findings of Fact No. 34, No. 35, No. 36 and No. 37

The hearing officer found that at various points between 1999 and 2002, Botimer provided estate planning advice to Ruth. Botimer asserts that all of the advice he provided Ruth was related to the tax consequences of her actions. RB at 16. There is ample support for the hearing officer’s findings that Botimer provided Ruth with estate planning advice. First, Botimer’s own declaration indicated:

. . . Ruth Reinking began discussing a family estate plan for herself and her children and grandchildren with me. She would, on occasion, call me at my office and ask me about questions about particular types of estate plans or ways to avoid gift and estate tax. She talked to me about real estate investment trusts, revocable family trusts, irrevocable trusts and Limited Liability companies as pertained to her family situation.

EX A-30 ¶ 12; see FFCL ¶ 36. Second, the hearing officer obviously credited the testimony of Ruth as to the estate planning advice she received, specifically this exchange about a May 14, 1999 note to Botimer (EX A-51):

Q. At the time that you wrote this letter did you consider that Mr. Botimer was your attorney?

A. Yes, I was seeking information on estate planning, and attorneys do that, as far as I knew.

TR 263. Botimer’s challenges must be rejected. See Kagele, 149 Wn.2d

at 814.¹⁶

5. Finding of Fact No. 40

This finding is merely the hearing officer's stated paraphrasing of Botimer's January 19, 2001 letter advising Ruth as to the conflicting positions being taken by Jan and Jim. EX A-8. Botimer complains that Ruth did not testify as to her understanding of the letter (RB at 17), but that is irrelevant because the letter speaks for itself as to what Botimer told her. Moreover, his statement "I told Jan he must get his own attorney if he insists on pursuing his agenda of forcing everyone to accept his demands," serves as an admission that there was a conflict. EX A-8. The hearing officer is entitled to draw reasonable inferences from the documents and testimony. See, e.g., In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 82, 101 P.3d 88 (2004).

6. Finding of Fact No. 43

The finding that Ruth did not have a continuing relationship with any attorney other than Botimer is based on Ruth's testimony that during this time frame she had met only "briefly" and as "a one-time deal" with other lawyers. TR 317. Botimer challenges this, noting that a letter from the Zeno firm to Jan indicated they were representing Ruth (EX A-53).

¹⁶ Although Botimer complains about the hearing officer's error in FFCL ¶ 37 as to the identity of the executor that Ruth had chosen (RB at 16), that error has already been corrected by the Board. DP 23. Furthermore, that discrepancy was of no significance to the issues charged in this matter.

But there is no evidence in the record to suggest that Ruth met more than once with any lawyer from the Zeno firm. Indeed, Ruth testified that Mr. Zeno told her he could not represent her. TR 316-17. The hearing officer obviously credited Ruth's testimony, as he was entitled to do. See In re Disciplinary Proceeding Against Selden, 107 Wn.2d 246, 251, 728 P.2d 1036 (1986).

7. Finding of Fact No. 44

The hearing officer found that Botimer jointly represented Jan and Ruth Reinking. Botimer does not directly challenge the finding, but argues that the joint representation was "extremely limited" and only related to the correct tax reporting of the Magnolia sale. RB at 18. But Botimer's own testimony supports the finding. For example, when asked "was that work for Jan or for Ruth or for both?" Botimer answered "For both." TR 88. When asked "So who was the client during the spring of 2002?" Botimer answered "Both of them," referencing both Jan and Ruth. TR 111. Regarding a letter he wrote concerning ownership of ACC (EX A-8), Botimer was asked "so in this case you're representing both Ruth and Jan?" Botimer answered "[y]es, ma'am." TR 105-06. The record contains substantial evidence that Botimer considered his representation of Jan and Ruth to be joint.

8. Finding of Fact No. 49

The hearing officer found that Botimer researched historic preservation statutes for Jan. Botimer disputes this, claiming he merely gave copies of those statutes to Jan. RB at 18. This is a matter of semantics and is immaterial to the issues of this disciplinary proceeding.

9. Finding of Fact No. 58

The hearing officer drew an inference from Botimer's October 28, 2002 letter to Ruth (EX A-42) that Ruth's failure to pay his fees out of the proceeds of the Magnolia sale motivated him to withdraw from her representation and report her to the IRS. Botimer objects to that inference. RB at 18-19. Botimer had written to Ruth in November 2001 requesting "[w]ould you pay some of the bill, if and when you sell Magnolia?" EX A-9. Botimer testified that when his fees were not paid out of the sale proceeds, he felt that "[s]he failed to honor her agreement to compensate me for my time." TR 86; EX A-30 ¶ 17. The hearing officer was entitled to draw the reasonable inferences from this evidence. See, e.g., VanDerbeek, 153 Wn.2d at 82.

10. Finding of Fact No. 62

In this finding the hearing officer summarized the declarations Botimer provided to Jan's lawyer. It does not appear that Botimer is challenging that summarization. RB at 19-20. In any event, the documents

speak for themselves. EX A-28, EX A-29, EX A-30. Instead, Botimer challenges whether Ruth considered these matters to be confidences and secrets personal to her. But Ruth was clear in her testimony that she considered her communications to Botimer regarding her estate planning to be confidential. TR 266. She testified that she expected Botimer to keep her estate planning confidential from Jan. TR 268. She testified that she expected Botimer to keep confidential her January 13, 2002 letter to Botimer (EX A-11) indicating that she did not want either of her sons to be named as executor of her will. TR 272. And she testified that she considered her tax returns to be confidential, and that this included being confidential from Jan. TR 314, 327, 328, 329. Nevertheless, Botimer attached Ruth's tax returns and the January 13, 2002 letter to his declaration that he provided to Jan's attorney to be filed in the Reinking litigation. EX A-28 at 000162-000178; EX A-30 Exhibit C. The hearing officer was fully justified in crediting Ruth's testimony and finding that she considered her tax returns, financial, business and estate planning information to be confidential. The Board appropriately did not disturb these findings. As this Court noted in In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 406, 98 P.3d 477 (2004), "The mere presence of conflicting evidence in the record is not enough to overturn a hearing officer's findings and we ordinarily will not disturb unanimously approved findings of fact made

upon conflicting evidence.”

11. Findings of Fact No. 65 and No. 66

Botimer also challenges Findings of Fact 65 and 66, which found not credible Jan’s testimony that Ruth freely shared her tax returns with him, and that it was he, rather than Botimer, who provided the tax returns to his lawyer for attachment to Botimer’s declaration for filing in the Re-inking litigation. Ruth was quite clear on this point, testifying that “I never let him [Jan] see my income tax reports. . . . I assumed that he was not – I assumed, honestly, that Larry [Botimer] did not share my income tax with Jan.” TR 314. The hearing officer’s findings regarding credibility are entitled to considerable weight and should not be disturbed. Juarez, 143 Wn.2d at 869-70.

12. Findings of Fact No. 67 and No. 68

The hearing officer found that Botimer did not have Ruth’s consent to release her secrets to Jan’s lawyer, and that he released the information before the Superior Court’s ruling allowing him to testify. Although Botimer claims to challenge Findings of Fact 67 and 68 in a heading of his brief, he presents no argument to challenge these findings. RB at 24. Absent such argument, this Court ordinarily declines to review such challenges. Marshall, 160 Wn.2d at 331. Furthermore, the facts as to Finding of Fact 67 are established by the nonconflicting testimony of both Ruth

and Botimer. TR 282; TR 153. The facts as to Finding of Fact 68 are unchallenged and established by the exhibits. See EX A-28, EX A-29, EX A-33.

E. THE FINDINGS FULLY SUPPORT THE CONCLUSION THAT BOTIMER VIOLATED RPC 1.7 BY FAILING TO ADVISE OF THE RISKS AND ADVANTAGES OF JOINT REPRESENTATION AND BY FAILING TO OBTAIN WRITTEN CONSENT.

The Disciplinary Board unanimously approved the hearing officer's conclusion as to Count 1 that Botimer violated RPC 1.7(b) by failing to advise his clients as to potential conflicts of interest and the risks of joint representation in three respects:

- There was potential conflict between Ruth and Jan during the time when they maintained a relationship as lessor/lessee and/or as implied partners. FFCL ¶ 74.
- There was a potential conflict between Ruth as a testator and Jan as a potential beneficiary of Ruth's estate. FFCL ¶ 75.
- There was a potential conflict between Ruth and Jan regarding tax and corporate matters involved in a possible restructuring of ACC ownership and management, in light of conflicting demands made by Jan and Jim on Ruth. FFCL ¶ 76.

1. The Hearing Officer Correctly Rejected Botimer's Claim That He Was Not Practicing Law.

At hearing, Botimer claimed that he was not practicing law, but was only engaged in a tax practice for Ruth and Jan. The hearing officer rejected this contention as not supported by the evidence. FFCL ¶ 77. The only support Botimer provides for his claim is a citation to the entire

93-page transcript of Ruth's testimony. RB at 22.

Rule 24 of the General Rules (GR) defines the practice of law to include "[g]iving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration," and "[n]egotiation of legal rights or responsibilities on behalf of another entity or person(s)." GR 24(a)(1) and (4). The record is replete with Botimer's admissions that he gave advice to Ruth and Jan as to their legal rights and responsibilities and negotiated on their behalf.¹⁷ This work clearly constitutes the practice of law.

¹⁷ For example:

(1) In Botimer's September 24, 2000 letter to Ruth he states "the failure to adequately secure your grandchildren's monies . . . continues to leave open the possibility of an action for fraud and breach of fiduciary duty . . . against yourself." EX A-7.

(2) In Botimer's July 22, 2005 declaration he states "Mrs. Reinking . . . would occasionally ask me questions about tax law and estate planning and review her potential estate plan with me." EX A-28 at 3.

(3) In Botimer's July 22, 2005 declaration he states "Mr. Jan and Mrs. Janet and myself discussed with her [Ruth] such things as Family Limited partnerships, a standard method of handling rental real estate, and Family corporations." EX A-28 at 4.

(4) In Botimer's December 15, 2001 letter to Ruth, he states "I made the agreement with you . . . about working on a settlement with Jim to set up a compromise and an employment contract and supervisory power of attorney for you and Jan, as well as agreement with Jim on "preferred stock" and several other items." EX A-10.

2. Multiple Representations Require Consultation and Consent In Writing When There Is a Potential Conflict of Interest.

Botimer claims that because the hearing officer found only potential conflicts as a result of Botimer's joint representation of Ruth and Jan, his failure to consult and obtain a consent in writing is not a violation of RPC 1.7(b). RB at 23. He misconstrues the law. Former RPC 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client **may** be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(Emphasis added). Botimer cites a sentence from Comment 8 of Rule 1.7 of the ABA Model Rules of Professional Conduct (2002 ed.) that says "The mere possibility of subsequent harm does not itself require disclosure and consent." But, when read in its full context, this comment does not support Botimer's failure to provide consultation and obtain a written con-

sent.¹⁸ The sentence immediately following the one cited by Botimer indicates that “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” (Emphasis added.) The Comment clearly directs the lawyer to obtain conflict waivers based on the potentiality of future conflicts. Ruth and her son Jan had the differing interests of lessor and lessee, and testator and potential beneficiary (FFCL ¶¶ 74-75). Further, Ruth was faced with the conflicting demands of her two sons, Jan and Jim, as to the use of the Magnolia sales proceeds, whereas Jan had only his own interests. FFCL ¶ 76. The hearing officer concluded that “Because the interlocking business affairs of these parties were informal and not fully spelled out in writing, the potential for conflict was strong.” FFCL ¶ 89.¹⁹ These differing interests presented a high likelihood of dispute and the clear foreseeability that the lawyer’s professional judgment would be impaired.

In Marshall, 160 Wn.2d at 336, this Court considered the RPC 1.7(b) duties of a lawyer representing multiple clients, finding that “[t]he rule assumes that multiple representation will necessarily require consultation and consent in writing, reasonably so since the rule imposes these re-

¹⁸ The full text of the American Bar Association’s Model Rule of Professional Conduct 1.7(b) (2002 ed.), together with Comment 8 is attached as Appendix G.

¹⁹ Botimer has not challenged FFCL ¶ 89.

quirements anytime there is *potential* conflict.” (Emphasis in original.) This court further noted that “we have recognized that former RPC 1.7(b) applies even absent a direct conflict.” *Id.* at 337 (citing *Egger*, 152 Wn.2d at 412). Botimer does not challenge the hearing officer’s finding that there was no consultation or consent as to the multiple representation. FFCL ¶ 42. The hearing officer’s conclusion of a violation of RPC 1.7(b) is fully supported.

F. THE FINDINGS FULLY SUPPORT THE CONCLUSION THAT BOTIMER VIOLATED RPC 1.6 AND RPC 1.9 BY REVEALING RUTH REINKING’S CONFIDENCES AND SECRETS FOR USE IN ADVERSE LITIGATION WITHOUT HER CONSENT.

The hearing officer concluded that Botimer betrayed his former client’s secrets by providing information to Jan’s lawyer and by signing declarations that were filed with the court in the Reinking litigation that contained Ruth’s personal information. FFCL ¶¶ 80, 81. This was a violation of former RPC 1.6 and former RPC 1.9(b).

Botimer admits he neither sought nor obtained Ruth’s consent before providing information and documents to Jan’s attorney. TR 153. Botimer contends this was not necessary because Ruth had waived her attorney-client privilege by sharing information such as her tax returns with Jan and by interjecting her communications with Botimer into her counterclaims in the Reinking litigation. RB at 28-29. This defense for his

conduct fails to differentiate between two similar, but distinct, concepts in our rule: namely, client “confidences,” which is information protected by the statutory attorney-client privilege, and client “secrets,” which is other information the lawyer has gained in the professional relationship, the disclosure of which has the potential to embarrass the client or be detrimental to the client. See RPC, Terminology. A “confidence” can be waived by the client’s own conduct (see, e.g. Ramsey v. Mading, 36 Wn.2d 303, 312, 217 P.2d 1041 (1950) (making the communication in the presence of a third party waives the attorney-client privilege)), whereas the protection afforded a client “secret” under the RPC cannot be waived by client conduct. Rather, disclosure of a secret can only be authorized by client consent, as set forth in RPC 1.6(a), and must be held confidential even if the secret is in the public domain. See, e.g., In re Anonymous, 654 N.E.2d 1128, 1129 (Ind. 1995) (lawyer violated RPC 1.6 by disclosing information relating to representation of client, even though information was readily available from public sources); Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850, 861 (W. Va. 1995) (duty of confidentiality is not nullified by fact that information is part of public record or that others have access to it); Washington State Bar Association Formal Opinion 188 (regarding lawyer’s duty not to disclose client’s criminal history) (attached as Appendix H).

Botimer argues that the statutory attorney-client privilege did not prohibit his disclosure. To support this argument, Botimer contends that the privilege had been waived by having been communicated to a third party, by Ruth having selectively interjected some of the privileged matters into the litigation, by the communications having related to a joint enterprise, by Ruth having allegedly acted in bad faith,²⁰ and by waiver under the “crime-fraud” exception.²¹ RB at 28-30. However, none of these arguments is on point because the hearing officer did not find that Botimer disclosed client “confidences.” As such, Botimer’s assertions and arguments that the evidentiary attorney-client privilege had been waived are irrelevant, as the issue here is the separate and distinct ethical obligation to maintain the secrets of one’s client under the RPC.

The ABA commentary to the Model Rules of Professional Conduct addresses the difference between the statutory protection for attorney-client privileged material, RCW 5.60.060 in this state, and ethical rule requirements:

²⁰ The jury in the Reinking litigation found that Ruth did not make intentional misrepresentations to Jan and Janet. EX A-34, Special Verdict Form ¶ 13 at 3.

²¹ In In re Disciplinary Proceeding Against Schafer, 149 Wn.2d 148, 166, 66 P.3d 1036 (2003), the Court held that “the crime-fraud exception, as it has been used in Washington, has traditionally been applied to the evidentiary privilege available in a court proceeding, not the ethical privilege covered under the RPCs.”

The evidentiary attorney-client privilege is closely related to the ethical duty of confidentiality....But the two are entirely separate concepts, applicable under different sets of circumstances.... [A] court's determination that particular information is not covered by the attorney-client privilege is not the same as a determination that the lawyer has no ethical obligation to protect the information from disclosure in other contexts.

ABA Annotated Rules of Professional Conduct 87-88 (5th ed. 2003) (citing Ex parte Taylor Coal Co. Inc., 401 So. 2d 1 (Ala. 1981)).²²

The hearing officer found that Botimer disclosed client secrets, not confidences. FFCL ¶¶ 80-81. Botimer disclosed Ruth's secrets in three declarations provided to Jan's counsel in the lawsuit Jan brought against Ruth, all of which were filed with the court, with no protective order being sought.

First, Botimer's July 22, 2005 declaration, which was used in opposition to Ruth's motion for summary judgment (EX A-28) disclosed:

- Ruth's 1998 & 1999 tax returns (pp. 000162-000178); and
- Botimer's 2002 letter to the IRS accusing Ruth of avoiding gift tax and investing her grandchildren's funds without maintaining an accounting (pp. 000183-00184).

²² Prior to the 2006 amendments that adopted comments to Washington's RPC, this Court frequently observed that the comments to the ABA Model Rules were helpful in understanding the underlying policy behind the rules. See, e.g., In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 864, 64 P.3d 1226 (2003).

Second, Botimer's January 17, 2006 declaration, which was used in opposition to Ruth's second motion for summary judgment (EX A-29), disclosed:

- Botimer's legal analysis of Ruth's lease transaction with Jan as being a tax avoidance device constituting a de facto partnership and describing her statements to him about giving the Magnolia business to Jan (§§ 2-4);
- Description of conversations with Ruth about her 1998 & 1999 tax returns, treatment of deductions and expenses relating to investment and/or gifts to Jim, and her failure to file state B&O tax returns (§ 5); and
- Botimer's analysis of Ruth's investment/gift relationship with Jim as being a tax avoidance device constituting a de facto partnership (§ 7).

Third, a second January 17, 2006 declaration by Botimer, which was used in opposition to Ruth's motion to exclude Botimer's testimony (EX A-30), disclosed:

- Descriptions of Botimer's negotiations with Jim and Jim's accountant regarding stock issuance to Ruth and Botimer's advice to Ruth (§§ 9-11);
- Descriptions of Botimer's advice to Ruth regarding estate planning issues including allegations of misuse of her grandchildren's funds (§§ 12-15); and
- Copies of three 2002 memos from Ruth to Botimer regarding issuance of stock in ACC to her and to Jan, issues for preparation of her 2001 tax return, and choice of an executor for her will (Exhibits A, B and C).

Ruth considered her communications with Botimer to be confidential. TR 266, 268, 270, 271-72. The declaration testimony and documents Botimer provided to Jan's attorney were embarrassing and detrimental to

Ruth and constituted disclosures of secrets in violation of RPC 1.6. See, e.g. TR 271-72 referencing her letter to Botimer indicating she did not want any of her children to serve as her executor, which was attached to one of Botimer's two January 17, 2006 declarations (EX A-30, Exhibit C). Botimer went far beyond simply providing documents and information relating to his joint representation of Ruth and Jan. Rather than remaining neutral in the litigation between two former clients, he provided assistance to Jan's lawyer. The information Botimer provided to Jan's attorney was to the disadvantage of his former client and a violation of RPC 1.9(b).

Botimer claims that "the Association seeks to have [Botimer] suspended from practicing law for obeying the order of a Superior Court Judge." RB at 27. Not so. As the hearing officer made clear, "none of the counts raised have anything to do with the fact that pursuant to Judge Barnett's order Mr. Botimer testified. It had to do with **the declarations that he prepared and submitted** to you [Jan's attorney] **prior** to the Judge's order." TR 441 (emphasis added). Botimer's three declarations, were publicly filed well before Judge Barnett's April 17, 2006 ruling directing that Botimer testify at the trial. EX R-12.

In concluding that Botimer violated RPC 1.6 and RPC 1.9(b), the hearing officer noted that

Respondent failed to obtain Ruth's consent to disclose her

secrets and confidences, he did not invoke attorney-client privilege when he supplied the information or wait for a court determination regarding the extent of possible evidentiary waiver, and he did not act to limit or protect the information that he supplied.

FFCL ¶ 82. Botimer does not challenge these facts. RB at 25. The hearing officer concluded that Judge Barnett's April 17, 2006 ruling

[d]id not address Respondent's obligations under the Rules of Professional Conduct. At most it was a prospective ruling that he was not barred from testifying based on attorney-client privilege in the proceeding. It did not address his prior disclosures of information and documents nor did it retroactively condone them.

FFCL ¶ 82. The hearing officer concluded that "[t]here is no issue preclusion with respect to Judge Barnett's ruling." FFCL ¶ 82.²³

Botimer failed to follow the protective rules regarding his former client's secrets. His reliance on an after-the-fact court order and on claimed waiver under evidentiary rules as justification for his violation of the RPC is misplaced. The hearing officer's conclusion that Botimer violated RPC 1.6 and RPC 1.9 in Count 2 is fully supported by the facts.

²³ Even if Judge Barnett's ruling had purported to ratify or retroactively condone Botimer's conduct in providing information and documents to Jan's attorney for the declarations, the doctrine of collateral estoppel would not have precluded the hearing officer from coming to a contrary conclusion. In Whitney, 155 Wn.2d at 464, the Court declined to apply a factual finding made in a superior court matter because the issue of whether the lawyer violated the RPC was not an issue before the superior court. A review of the jury's special verdict and the judge's findings of fact and conclusions of law in the Reinking litigation, EX A-34, A-35, reveals that the superior court did not rule on whether Botimer's conduct in providing the information and documents to Jan's lawyer to prepare the declarations was a violation of the RPC.

G. THE FINDINGS FULLY SUPPORT THE CONCLUSION THAT BOTIMER VIOLATED RPC 1.6 AND RPC 1.9 BY REPORTING RUTH REINKING TO THE IRS FOR ALLEGED INACCURACIES IN HER RETURNS.

The hearing officer found that Botimer breached his duty to his client Ruth, and violated former RPC 1.6 and RPC 1.9(b), when, without seeking or obtaining his client's consent, he wrote to the IRS reporting that his client's prior tax returns had discrepancies. EX A-23. The lack of consent is admitted. TR 145-46; FFCL ¶ 59. Botimer challenges the hearing officer's conclusion that "Federal law, tax procedure, guidelines and regulations did not require that Botimer write his 2002 letter to the IRS about a later discovery that Ruth's income tax returns that he had prepared were not correct." FFCL ¶ 85. The hearing officer's conclusion on this point was based on the clear and unambiguous testimony of Professor John Price, former Dean of the University of Washington Law School, who was qualified as an expert on tax law and procedure. TR 337; EX A-27. Professor Price testified that a lawyer had no duty under Federal tax law to report to the IRS the discovery that a tax return the lawyer had thought was accurate when he prepared it in fact had false information in it. TR 342-43. Botimer argues otherwise. RB 32-33. However, the hearing officer is not required to believe the testimony of a respondent lawyer. In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 722, 72 P.3d

173 (2003). Professor Price's testimony fully supports the hearing officer's findings.

Botimer references the tax regulations in Title 31, Part 10, of the Code of Federal Regulations.²⁴ Attached as Appendix I are the two sections of Part 10 that have any relevance to this matter, 31 C.F.R. § 10.21 and 31 C.F.R. § 10.51. Consistent with Professor Price's testimony, under these regulations, when Botimer came to the conclusion that Ruth's tax returns were inaccurate, he had a duty to advise Ruth that he thought she had made errors. TR 340. This Botimer did on more than one occasion. EX A-7, EX A-9, EX A-42. There was no showing of a legal duty to do more. Botimer claims he could have been disbarred by the IRS if he did not report Ruth to the IRS, citing 31 CFR § 10.51. RB at 32. But 31 CFR § 10.51, only authorizes discipline if a tax practitioner knowingly provided false information.

This Court's decision in Schafer is instructive. In reporting the wrongdoing of a Judge, Schafer revealed potentially criminal conduct by his client, clearly a confidence and secret of his client. In ordering a six-month suspension, the Court noted that:

[T]he benefit of revealing a past harm that can no longer be prevented does not outweigh the injury to attorney-client re-

²⁴ Referenced in the testimony of Professor Price as Treasury Circular 230. TR 345.

relationships that would result by disclosure. *See United States v. Zolin*, 491 U.S. 554, 562-63, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) ("The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection -- the centrality of open client and attorney communication to the proper functioning of our adversary system of justice -- 'ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*.'")

Schafer, 149 Wn.2d at 166 (additional citations omitted).

Botimer seeks to justify his reporting of his former client to the IRS by claiming that if he failed to disclose to the IRS his conclusion that the returns he had prepared and signed contained false information "he would be subjecting himself and Ruth to possible charges of conspiracy for failure to report the ongoing crime of defrauding the government." RB at 32. Botimer argues that he was authorized under former RPC 1.6(b)(1) to reveal Ruth's confidences and secrets to prevent her from committing that crime. Botimer offered lawyer Leland G. Ripley as an expert on this issue. Mr. Ripley was, however, rejected by the hearing officer as an expert on tax procedure or duties of taxpayers. TR 537-38.²⁵

To be a continuing crime there must be an initial crime that contin-

²⁵ Mr. Ripley was allowed to make an offer of proof in which he identified three statutes which he believed required a lawyer who had prepared a tax return, but later learned that it was fraudulent, to report the information to the IRS: 18 U.S.C. § 1001; 26 U.S.C. § 7203; and 26 U.S.C. § 7206. TR 538-39. A review of these statutes, copies of which are attached as Appendix J, reveals these statutes do not criminalize the failure of a taxpayer (much less a tax preparer) to amend a tax return upon discovering inaccuracies and have no relevance to the matter at hand.

ues, as opposed to a single event, such as an assault. Under Botimer's logic, if a taxpayer discovers that he or she failed to claim certain income or deductions then, until the tax return is amended, the taxpayer is guilty of a continuing crime and the statute of limitations will never expire. This is contrary to reason, logic and federal law. See United States v. Gray, 876 F.2d 1411, 1418 (9th Cir. 1989) (doctrine of continuing crime is disfavored and only applied when the substantive criminal statute clearly intends to extend the statute of limitations); see also United States v. Kirkman, 755 F. Supp. 304, 306 (D. Idaho 1991) (tax evasion is not a continuing offense). Botimer has cited no criminal statute that establishes a continuing crime for failure to correct a tax return. Furthermore, Professor John Price testified that federal tax procedure, guidelines, regulations and rules did not require that Botimer, as a tax preparer, write his letter to the Internal Revenue Service. TR 347.

Botimer also claims that he reported Ruth to the IRS because he had signed the returns under the penalty of perjury and might subject himself to criminal charges for a conspiracy to not report the ongoing crime. However, the signature line on the tax return states:

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. **Declaration of preparer (other than taxpayer) is based on all information of which pre-**

parer has any knowledge.

EX A-28 at 000163, 000173 (emphasis added). As the tax preparer, Botimer's declaration under the penalty of perjury was limited to information of which he had actual knowledge. Botimer testified that he believed the returns were accurate when he prepared them. TR 71. Therefore, he had no legitimate perjury or conspiracy concerns.

In sum, Botimer's excuses regarding his disclosure of client secrets to the IRS are meritless. The hearing officer properly concluded that the failure of Ruth to file amended returns reflecting an ownership interest in ACC or to file gift tax returns was not a continuing crime. FFCL ¶ 86. The hearing officer properly concluded that Botimer violated RPC 1.6 and RPC 1.9(b) by sending his letter to the IRS.

H. THE COURT SHOULD ADOPT THE BOARD'S UNANIMOUS RECOMMENDATION OF A SIX-MONTH SUSPENSION.

Botimer argues that the charges should be dismissed, but does not challenge the Disciplinary Board's sanction analysis. For the reasons set forth, the Board's unanimous recommendation should be affirmed.

1. The Board Properly Found the Presumptive Sanction of Suspension For All Three Counts.

Count One. The Disciplinary Board correctly modified the hearing officer's conclusion regarding Botimer's state of mind in failing to obtain written informed consent. Citing Botimer's January 19, 2001 letter to

Ruth,²⁶ a unanimous Board concluded that the conduct was knowing, noting that despite having recognized that he had a conflict of interest, Botimer continued to represent both Ruth and Jan. DP 24.

The Board's action is consistent with the ABA Standards definition of "knowledge" as "the conscious awareness of the nature or the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards at 17; In re Disciplinary Proceeding Against Boelter, 139 Wn.2d 81, 100, 985 P.2d 328 (1999). "Knowledge" under the ABA Standards does not require that the lawyer know that his conduct violates the RPC. Egger, 152 Wn.2d at 416. Botimer knew that he was representing the Reinking clients and knew that he had not obtained informed consent to the representation as the conflicting interests became increasingly apparent. In In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 340 n. 11, 126 P.3d 1262 (2006), a respondent lawyer claimed that he was only negligent where he knew of a conflict but failed to obtain written client consent. The Court

²⁶ Discussing Ruth's dilemma of being caught in the middle between her two sons, Jan and Jim, who were fighting over the use of the Magnolia proceeds to satisfy the ACC debt, Botimer wrote: "The resentment that has built up with the three of you has gotten to the point where it is impossible for me to do my job as a proper professional. I told Jan that he must get his own attorney if he insists on pursuing his agenda of forcing everyone to accept his demands." EX A-8.

rejected this argument, noting: “There is no intent element related to obtaining informed written consent, which either exists or does not.” Id.

The Hearing officer found that “Ruth Reinking was potentially harmed by Botimer’s failure to identify the conflict to her and describe the possible risks.” FFCL ¶90. Nevertheless, Botimer argues that he should not be sanctioned because, in his view, Ruth was not actually harmed. RB 33. However,

Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes **injury or potential injury** to a client.

ABA Standard 4.32 (emphasis added). In re Disciplinary Proceeding Against Carpenter, 160 Wn.2d 16, 31, 155 P.3d 937 (2007) (“a disciplinary proceeding does not require a showing of actual harm The rationale is the need for protection of the public and the integrity of the profession.”). Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict and obtain informed consent, and causes injury or potential injury to a client. ABA Standard 4.32 (See Appendix C). The Board properly concluded that the presumptive sanction for Count 1 is suspension.

Counts Two and Three. The hearing officer correctly concluded that a suspension under ABA Standard 4.22 is the presumptive sanction

for Botimer's failing to protect Ruth's secrets in violation of RPC 1.6 and RPC 1.9(b). The Disciplinary Board adopted this recommendation, including the hearing officer's conclusion that the Botimer's conduct as to Count 2 was intentional and that his conduct as to Count 3 was knowing. FFCL ¶¶ 92, 93.

As to Count 2, Botimer argues he should not be disciplined, either for testifying at the Reinking litigation pursuant to Judge Barnett's order, or for providing declarations covering matters about which he was later ordered to testify. RB at 34. As the hearing officer pointed out, Botimer was not charged with misconduct for testifying at the Reinking v. Reinking trial pursuant to Judge Barnett's order. TR 441. Further, the hearing officer found that Judge Barnett's order was "[a]t most . . . a prospective ruling that he [Botimer] was not barred from testifying based on attorney-client privilege in the proceeding. It did not address his prior disclosures of information and documents nor did it retroactively condone them." FFCL ¶ 82.

The hearing officer correctly concluded that filing Ruth's tax returns and other confidential information in the litigation through the declarations provided by Botimer was harmful to Ruth. The hearing officer noted that clients have an expectation of privacy regarding information supplied to their lawyer and filing Ruth's documents in public court files

was harmful. FFCL ¶ 94. Likewise, the hearing officer concluded that cooperation with an opposing party and lawyer through the wholesale provision of confidential information was harmful to Ruth. FFCL ¶ 94. The superior court eventually allowed Botimer to testify in the Reinking litigation, but ruled out any testimony regarding the grandchildren's trusts. EX R-12 at 2-7. Unfortunately, harmful information accusing Ruth of misusing her grandchildren's trust money had already been disclosed by Botimer in his pretrial declarations. See EX A-28 at 000183.

As to Count 3, the hearing officer concluded that although there appeared to be no actual harm (the IRS did not audit her and did not assess any additional tax, interest or penalties) there was a clear potential for such harm. FFCL ¶ 92.

The hearing officer and a unanimous Board both correctly concluded that the presumptive sanction for Counts 2 is a suspension and the presumptive sanction for Count 3 is a suspension.

2. The Board Properly Weighed the Aggravating and Mitigating Factors.

The Board properly adopted the hearing officer's finding that the mitigating factor of an absence of a prior disciplinary record applied under ABA Standard 9.32 (a). FFCL ¶ 99.

The Board properly adopted the hearing officer's application of the aggravating factors of multiple offenses [ABA Standard 9.22(d)], refusal to acknowledge wrongful nature of conduct [ABA Standard 9.22(g)], and vulnerability of victim [ABA Standard 9.22(h)]. FFCL ¶ 100. Botimer does not challenge them. The Court should affirm.

3. Botimer Should Be Suspended For Six Months.

In In re Disciplinary Proceeding Against Cohen, 149 Wn.2d 323, 339, 67 P.3d 1086 (2003), the Court noted that when a suspension is appropriate,

A period of six months is generally the accepted minimum term of suspension. In re Disciplinary Proceeding Against Halverson, 140 Wash.2d 475, 495, 998 P.2d 833 (2000). The minimum suspension is appropriate in cases where there are both no aggravating factors and at least some mitigating factors, or when the mitigating factors clearly outweigh the aggravating factors. Halverson, 140 Wash.2d at 497, 998 P.2d 833. Therefore, the Board should deviate from the presumptive sanction only if the aggravating and mitigating factors are sufficiently compelling to justify a departure.

Here, the aggravating factors are substantial, particularly the multiple instances of misconduct. In light of these aggravating factors, nothing less than the generally accepted minimum of a six-month suspension is appropriate.

Botimer claims that the imposition of sanctions is not warranted "when the nature of the relationship between attorney and client is rela-

tively undefined.” RB at 33. Botimer cites two cases where the Court declined to impose discipline. In In re Disciplinary Proceeding Against McGlothlen, 99 Wn.2d 515, 663 P.2d 1330 (1983), the respondent engaged in a business transaction with a person who was tangentially, and temporarily, a client. In that matter the Court extended the purview of the rule restricting business transactions with a client to include a former client if the attorney’s influence over the former client continues. Id. at 523. Because the Court found a violation under circumstances where it previously had been unclear whether there was a violation, the Court declined to impose discipline for what they described as a “borderline” case. Id. at 526.

Botimer also cites In re Disciplinary Proceeding Against Smith, 42 Wn.2d 188, 197, 254 P.2d 464 (1953), a case involving a lawyer who charged a contingent fee in a divorce case. At the time, this State had the Canons of Professional Ethics, which did not specifically prohibit contingent fees in divorce cases,²⁷ and there had not been any ethical opinions or disciplinary cases construing whether Canon 13, which just required that contingency fee contracts be reasonable, prohibited the practice. Id. Since

²⁷ A specific prohibition of contingent fees in dissolution cases was not added to our ethical rules until the adoption of the RPC in 1985. Prior to the RPC, this principle was established by In re Smith, and WSBA Formal Opinion 4 (1951), WSBA Formal Opinion 28 (1954), and WSBA Formal Opinion 75 (1960).

the Smith discipline case was a case of first impression, the Court did not impose a sanction, making its ruling prospective only. Id.

Botimer's conduct does not, however, present a case of first impression. His failure to advise multiple clients about the risks of common representation and his failure to obtain written consent is hardly new or novel. See, e.g., Marshall, 160 Wn.2d at 336; Egger, 152 Wn.2d at 412. Nor is there anything new or novel about a lawyer who discloses client confidences and secrets for his own purposes. See, e.g., Boelter, 139 Wn.2d at 94; Schafer, 149 Wn.2d at 170. While Botimer may not have been aware that his conduct was violating the RPC, that is not a defense in a lawyer discipline proceeding. See, e.g., Egger, 152 Wn.2d at 416.

IV. CONCLUSION

The conclusions that Botimer violated RPC 1.7(b), RPC 1.6, and RPC 1.9 are fully supported by the findings, which are supported by substantial evidence. The Court should adopt the Disciplinary Board's unanimous recommendation of a six-month suspension.

RESPECTFULLY SUBMITTED this 9th day of October 2008.

WASHINGTON STATE BAR ASSOCIATION



Randy Beitel, Bar No. 7177
Senior Disciplinary Counsel

Appendix A

Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation

FILED

JUN 26 2007

DISCIPLINARY BOARD

BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

Larry A. Botimer,
Lawyer (Bar No. 23805).

Public No. 07#00003

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND HEARING OFFICER'S
RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), a hearing was held before the undersigned Hearing Officer on October 23 through October 25, and on December 3, 2007. Respondent Larry A. Botimer appeared at the hearing, represented by Paul Simmerly. Disciplinary Counsel Nancy Bickford Miller and Senior Disciplinary Counsel Randy Beitel appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The First Amended Formal Complaint filed by Disciplinary Counsel charged Mr. Botimer with the following counts of misconduct:

Count 1 – By representing Ruth, Jan and Janet (Reinking) in Magnolia tax and business matters, without obtaining an informed written consent as

1 to the joint representation, Respondent violated former RPC 1.7(b).

2 Count 2 – By providing information and declarations to Jan’s attorney,
3 including Ruth’s personal tax returns and descriptions of conversations with
4 her about estate planning, without Ruth’s consent, Respondent violated
5 former RPC 1.6 and/or former RPC 1.9(b) (currently RPC 1.9(c)(1)).

6 Count 3 – By contacting the IRS and reporting alleged inaccuracies in
7 Ruth’s filed tax returns and alleged avoidance of gift tax, without her
8 consent, Respondent violated former RPC 1.6 and/or former RPC 1.9(b)
9 (currently RPC 1.9(c)(1)).

10 Based on the pleadings in the case, the testimony and exhibits at the
11 hearing, the Hearing Officer makes the following:
12

13 FINDINGS OF FACT

14 1. Respondent was admitted to the practice of law in the State of
15 Washington on June 21, 1994.

16 2. Respondent first met Jan Reinking (Jan) in high school in 1967 or
17 1968 and later roomed with Jan during college. He has known Reinking
18 family members, including Ruth Reinking, since that time.

19 3. Ruth Reinking (Ruth) and her husband owned a nursing home
20 called Magnolia Health Care (Magnolia). Her son, Jan and daughter-in-law
21 (Janet) were employed by the business as nursing home administrator and
22 registered nurse, respectively, commencing in about 1979. In about 1986
23 Ruth and her husband separated and later divorced. She kept and operated
24

1 Magnolia.

2 4. In about 1992 Ruth retired from the business and Jan leased the
3 business from her for \$5,000 per month.

4 5. Thereafter Ruth would continue to work at the business doing
5 landscaping, laundry and occasionally as a nurse. She also did some
6 "consulting" to the business. While she did not receive additional income
7 from landscaping, laundry or working as a nurse, she did receive consulting
8 fees from Magnolia, reported as such on her tax returns.

9 6. Respondent is a former employee of the Internal Revenue Service
10 (IRS).

11 7. While Respondent worked for the IRS, he provided some informal
12 tax advice to Jan regarding the operation of Magnolia and possible gift tax
13 implications if Ruth gave Magnolia to Jan.

14 8. In 1993 the business arrangement was documented as a lease by
15 Ruth of the Magnolia real property to Jan and Janet.

16 9. Respondent did not prepare the lease.

17 10. Respondent began preparing Ruth's income tax returns around
18 1988.

19 11. After Respondent was admitted to practice in 1994, left the IRS
20 and entered private practice in 1995, Respondent prepared individual
21 income tax returns for Ruth for the years 1995-2001.

22 12. After preparing the returns for these years, based on
23
24

1 information provided to him by Ruth and Jan, he signed the income tax
2 return forms as preparer and sent them to Ruth for signature and filing.

3 13. When Respondent signed Ruth's income tax returns he believed
4 that the information in them was correct.

5 14. When Ruth received the return forms from Respondent, she
6 signed them and mailed them to the Internal Revenue Service. She
7 retained a copy of the return form signed by Respondent for her records.

8 15. Respondent prepared the business and personal income tax
9 returns for Jan and Janet for the years 1995-2001.

10 16. Respondent allocated income, expenses, deductions and other
11 tax reporting items so as to legally minimize the tax liability of Jan, Janet
12 and Ruth, based on the information he was provided by them.

13 17. In 1997 Respondent recommended that Jan establish a
14 Subchapter S corporation to operate Magnolia and Magnolia Health Care
15 Center, Inc. was formed that year.

16 18. In 1998 or earlier, Respondent recommended to Ruth Reinking
17 that she form a "consulting business" so that she could claim expense
18 deductions to offset "consulting" income paid to her by Jan regarding
19 Magnolia.
20

21 19. Ruth's tax returns for 1998 and 1999 include income and
22 expenses related to this "consulting business."

23 20. Respondent allocated the Magnolia business income and
24

1 expenses between Ruth's income tax return, Janet and Jan's income tax
2 return and the Magnolia corporate tax return, based on the information
3 provided to him and his personal understanding of the agreements between
4 Ruth and Jan as to the real property lease and Magnolia ownership. This
5 was done because of the lack of complete written documentation regarding
6 the business arrangement between Ruth and Jan.

7 21. Beginning in 1997 or 1998, Ruth and her son James Reinking
8 (Jim) were involved in a form of business partnership regarding Alternative
9 Care Corporation (ACC), a Subchapter S corporation, and a nursing home
10 operator in Spokane, Washington.

11 22. Ruth advanced significant sums of money to ACC and/or James
12 Reinking in connection with the purchase and operation of ACC property,
13 and co-signed purchase obligations regarding ACC.

14 23. Many of the agreements between Ruth and her two sons, Jim
15 and Jan, were oral.

16 24. Respondent never represented ACC. In March 1999, G. Michael
17 Zeno, an attorney for ACC, wrote to Jan Reinking stating that he
18 represented Ruth and asked for cost report information prepared for the
19 State of Washington regarding Magnolia operations to obtain a loan for an
20 important project. The letter stated that Ruth was entitled to receive this
21 information under the Magnolia lease and failure to provide it was grounds
22 for lease termination.
23
24

1 25. At Jan's request Respondent responded to the letter and agreed
2 that the requested financial records would be supplied.

3 26. Jan Reinking had previously denied access to Magnolia cost
4 report information to his mother.

5 27. A probate for Jan Reinking's father, John Reinking, was
6 established on or about 1996. Respondent introduced Jan to attorney Paul
7 Simmerly for the purpose of suing the estate and obtaining funds to be set
8 aside for Jan's children and the children of his siblings, Jim Reinking and
9 Bonnie Blehm.

10 28. Respondent served in a legal liaison role between Jan Reinking
11 and Paul Simmerly. After a successful conclusion to the litigation,
12 Respondent was paid a lump sum fee for his services.

13 29. Money received from the John Reinking Estate was placed in
14 trusts for the grandchildren of John and Ruth Reinking. Bonnie Blehm was
15 appointed trustee for these trusts.
16

17 30. Some the children's trust money was invested in ACC and Ruth
18 had some involvement in making these investments.

19 31. Both Magnolia and ACC operated as Subchapter S corporations,
20 a provision by which the income and expenses of a closely-held corporation
21 flow through to the tax returns of the stock holders, allocated on their
22 ownership interest, as though they were in a partnership.

23 32. Ruth's personal tax return did not include business deductions
24

1 and income that were related to ACC, notwithstanding Ruth's financial
2 interest in ACC.

3 33. Beginning in 1999 Respondent had discussions with Ruth and
4 Jan about possible restructuring of ACC so that stock would be issued to
5 them and Jan might be involved in ACC management after the Magnolia
6 property was sold.

7 34. Beginning in 1999 or earlier Respondent had discussions with
8 Ruth about possible estate planning alternatives.

9 35. Respondent stated in a January 17, 2006 declaration provided
10 to Jan's counsel:

11 (Mrs. Reinking) would occasionally ask me questions about tax
12 law and estate planning and review her potential estate plan
13 with me. She repeatedly advised me that she would want me to
14 prepare her estate plan as soon as her deceased former
husband's estate was settled.

15 36. Respondent stated in a July 22, 2005 declaration provided to
16 Jan's counsel:

17 After the successful conclusion of the controversy over John
18 Reinking's estate, Ruth Reinking began discussing a family
19 estate plan for herself and her children and grandchildren with
20 me. She would, on occasion, call me at my office and ask me
about questions about particular types of estate plans or ways to
avoid gift and estate tax.

21 37. Ruth sent several notes, memos or letters to Respondent about
22 estate planning issues, including a January 13, 2002 memo that identified a
23 bank as her chosen executor rather than naming one of her sons. She
24 considered Respondent to be her lawyer regarding these consultations and

1 considered this information to be confidential.

2 38. Jim Reinking was uncooperative about recognizing that Ruth
3 and/or Jan had an actual or potential ownership interest in ACC because of
4 Ruth's advance of funds to or for ACC property acquisition and operation
5 and there was a continuing controversy about ACC stock ownership
6 between Jan and Jim Reinking, which was upsetting to Ruth.

7 39. Respondent recommended that Jim's, ACC's and Ruth's tax
8 returns be amended to show an ownership interest by Ruth that would allow
9 her to offset ACC losses against other income, such as the gain from sale of
10 the Magnolia real property.

11 40. In a letter to Ruth Reinking dated January 19, 2001,
12 Respondent stated that Jan had become as unreasonable and unrealistic as
13 Jim and that he had told Jan that he must get his own attorney if he
14 insisted on pursuing his agenda of forcing everyone to accept his demands.

15 41. Respondent researched corporate statutes and provided copies
16 to Jan regarding a possible ACC restructuring.

17 42. At no time during Respondent's representation of Jan and Ruth
18 Reinking regarding tax and business matters was there a written client
19 engagement agreement, a written consent to any conflict, an explanation
20 about sharing information between Reinking family member clients or an
21 explanation regarding what would happen in the event of a client dispute.

22 43. Ruth Reinking did not have a continuing relationship with any
23
24

1 attorney other than Respondent for the period from 1996-2001, although
2 she met on a one-time basis with two other attorneys.

3 44. Respondent regarded the representation of Jan and Ruth
4 Reinking as being joint and maintained one Reinking family file.

5 45. Respondent never explained to Ruth Reinking that he
6 considered all work that he did for her to be a joint representation with Jan
7 and that therefore none of the information that she supplied to him was
8 confidential as to Jan because of the joint client representation.

9 46. The Magnolia facility was closed in August of 2000 and the real
10 property was sold for use other than as a nursing home.

11 47. Jan and Janet Reinking lived with Ruth Reinking from
12 approximately August 2000 to August 2001.

13 48. Closing of the sale was delayed because of issues including the
14 government declaration of the Magnolia property as historic.

15 49. Respondent researched historic preservation statutes and gave
16 copies to Jan Reinking.

17 50. Respondent sent a letter to Ruth on November 25, 2001, stating
18 that she owed him \$3,150 for legal work he did in 2000 and asking whether
19 he would be paid from Magnolia sale proceeds.

20 51. Respondent had not submitted a bill for legal services to Ruth.

21 52. A December 15, 2001 letter from Respondent to Ruth Reinking
22 stated that although he had agreed to work for her on a settlement with Jim
23
24

1 Reinking, "Jan insisted on being informed on any potential agreements I
2 proposed for you and Jim."

3 53. Closing of the sale of the Magnolia property occurred in June
4 2002.

5 54. Jan and Janet understood they would receive half the proceeds
6 from the sale of the Magnolia property under a statement signed by Ruth on
7 or about January 15, 2002, while the sale of the property was pending.
8 Respondent did not prepare this agreement.

9 55. Although Jan and Janet had a lengthy business relationship with
10 Ruth in operating Magnolia Health Care and devoted time and monetary
11 resources to the closing process, including the relocation of residents, the
12 Magnolia real property was in Ruth's name alone.

13 56. Ruth used the approximate \$1,000,000 net proceeds from the
14 sale of the Magnolia property to retire debt of ACC, which Ruth had
15 personally guaranteed.
16

17 57. None of the proceeds was paid to Jan Reinking or Respondent.

18 58. After Respondent learned of this, he sent an October 28, 2002
19 letter to Ruth stating that he would no longer provide her with tax or legal
20 services because of her failure to cooperate with him, refusal to follow his
21 advice and failure to pay for legal services, and that he intended to send the
22 enclosed notification letter to the IRS stating that her tax returns did not
23 contain a true record of her taxable income and that she had failed to
24

1 reports gifts to her son.

2 59. A few days later he sent an undated letter to the IRS stating
3 that as "the signed preparer for Mrs. Reinking's returns for the tax years
4 1998, 1999, and 2000" he had discovered that Ruth's tax returns for those
5 years did not correctly state her share of income and loss from ACC, that
6 she had failed to pay gift tax on gifts to Jim and that she had diverted
7 money from her grandchildren's trusts. Respondent neither sought nor
8 obtained Ruth's consent to reveal this information to the IRS.

9 60. In 2004, Jan and Janet filed suit (the Reinking litigation) against
10 Ruth, Jim and ACC alleging conversion, breach of contract, fraudulent
11 misrepresentation and other legal theories, and sought damages of
12 \$530,951.30, one-half of the net proceeds from the sale of the Magnolia
13 property.
14

15 61. Respondent cooperated with Jan's attorney, Paul Simmerly, in
16 the Reinking litigation and provided three separate declarations to Mr.
17 Simmerly, one dated July 22, 2005 responding to a summary judgment
18 motion and two dated January 17, 2006 in connection with a later motion.

19 62. The declarations provided background information about Ruth's
20 business and estate planning affairs, with an attached copy of Respondent's
21 2002 letter to the IRS and attached copies of documents and tax returns
22 relating to the tax advice and tax preparation work he had done for Ruth
23 and Jan, which Ruth considered confidences and secrets personal to her.
24

1 63. The declarations were filed with the court in the Reinking
2 litigation.

3 64. The copies of income tax returns attached to one of the
4 declarations were unsigned.

5 65. The testimony of Jan Reinking that his mother Ruth Reinking
6 kept a stack of her personal tax returns on her desk and freely shared them
7 with him, and that it was he rather than Respondent who provided copies of
8 Ruth's tax returns to Mr. Simmerly was not credible or in the alternative Jan
9 was not the source of the copies of the tax records supplied by Respondent
10 and attached to his declarations filed in the Reinking litigation.

11 66. Jan Reinking's testimony that Ruth gave him copies of
12 correspondence with Respondent while he lived at her home, from August
13 2000 to August 2001, and that after he moved out of her home to a rental
14 residence and later moved to Walla Walla, she mailed him copies of letters
15 was not credible.

16 67. Respondent neither sought nor obtained consent from Ruth
17 before providing information and documents to Jan's attorney.

18 68. Respondent signed his three litigation declarations prior to an
19 April 2006 Court Order that permitted him to testify in the Reinking
20 litigation.

21 69. The trial judge in the matter, The Hon. Suzanne Barnett, ruled
22 on April 17, 2006, immediately prior to the start of the trial, on two motions
23
24

1 in limine brought by Gregory Lockwood, Ruth's defense litigation attorney,
2 granting the motion to rule out any testimony about use of trust moneys
3 held for the grandchildren of John Reinking. She ruled against a motion to
4 exclude Respondent's testimony on the grounds of attorney-client
5 evidentiary privilege.

6 70. In oral argument prior to the judicial ruling, Paul Simmerly
7 argued that there was waiver of the attorney-client privilege for many
8 different reasons. Judge Barnett's oral ruling stated the following rationale
9 for permitting the testimony:

10 If we don't have a written contract, we have certainly enough of
11 the makings of an oral contract. And we can only figure it out by
12 hearing from these people who know what has transpired. And
13 Mr. Botimer happens to be one of them. So he will testify.

14 71. Judge Barnett made no specific finding of a waiver of attorney-
15 client privilege, but the nature of her ruling implied she felt that there was a
16 waiver. Judge Barnett ruling did not address whether Respondent's actions
17 in providing documents and declarations to Jan Reinking's attorney were
18 proper under the statutory attorney-client privilege or under the rules of
19 professional conduct.

20 72. Ruth Reinking filed a grievance against Respondent in January
21 2006, as suggested by Mr. Lockwood, her defense lawyer in the suit against
22 her by her son Jan Reinking.

23 73. Jan Reinking tried to persuade his mother to drop her grievance
24 against Respondent and she signed a statement to that effect due to his

1 | urgings.

2 | CONCLUSIONS OF LAW

3 | Violations Analysis

4 | The Hearing Officer finds that the Association proved the following:

5 | 74. Count 1: There was a potential conflict in Respondent's joint
6 | representation of Ruth and Jan during the time when they maintained a
7 | relationship as lessor/lessee and/or as implied partners.

8 | 75. There was a potential conflict in Respondent's joint
9 | representation of Ruth as a testator and Jan Reinking as one potential
10 | beneficiary of Ruth's estate.

11 | 76. There was a potential conflict in Respondent's joint
12 | representation of Ruth and Jan Reinking regarding tax and corporate
13 | matters involved in a possible restructuring of ACC ownership and
14 | management, deriving from potential and actual use of Magnolia sale
15 | proceeds, since Ruth was faced with conflicting demands by Jan and Jim
16 | Reinking as to such matters.

17 | 77. Respondent's defense claim that he only prepared tax returns
18 | and did no legal work for Jan Reinking and Ruth Reinking is not supported
19 | by the evidence. Some of the work that Respondent did for Jan and Ruth
20 | was joint, e.g. advice about possible ACC restructuring; some of the work
21 | was individual, such as preparation of their personal tax returns or estate
22 | planning advice for Ruth Reinking.
23 |
24 |

1 78. Count 1 is proven by a clear preponderance of the evidence.

2 79. Count 2: Respondent voluntarily provided confidential client
3 information of Ruth to Paul Simmerly, counsel for Jan Reinking in the
4 Reinking litigation, by providing declarations that described Ruth's personal
5 and business affairs, with attached copies of her personal income tax
6 returns and of some of her correspondence directed to him.

7 80. Respondent's January 17, 2006 declaration stated that Ruth
8 Reinking had failed to pay Business and Occupation tax for her "consulting"
9 business. This information was a client secret as defined in the former RPC.

10 81. Respondent's July 22, 2005 declaration included as an
11 attachment his letter to the IRS stating that Ruth had requested her
12 daughter to illegally withdraw funds from grandchildren's custodial accounts
13 and had invested these funds in ACC as if they were her own funds.
14 Respondent's January 17, 2006 declaration stated that the grandchildren's
15 monies had been illegally withdrawn and illegally used by Jim for his own
16 benefit. This information was a client secret as defined in the former RPC.

17 82. Respondent failed to obtain Ruth's consent to disclose her
18 secrets and confidences, he did not invoke attorney-client privilege when he
19 supplied the information or wait for a court determination regarding the
20 extent of possible evidentiary waiver, and he did not act to limit or protect
21 the information that he supplied. The ruling by Judge Barnett did not
22 address Respondent's obligations under the Rules of Professional Conduct.
23
24

1 At most it was a prospective ruling that he not barred from testifying based
2 on attorney-client privilege in the proceeding. It did not address his prior
3 disclosures of information and documents nor did it retroactively condone
4 them. There is no issue preclusion with respect to Judge Barnett's ruling.
5 Respondent's acts and omissions violated former RPC 1.6 and former RPC
6 1.9(b).

7 83. Count 2 is proven by a clear preponderance of the evidence.

8 84. Count 3: Respondent sent a letter to the IRS. The letter put
9 Ruth Reinking at risk for audit and assessment of underpayments, penalties
10 and interest by the IRS with respect to the possibility that she did not
11 correctly state her share of income and loss from ACC, that she had failed
12 to pay gift tax on gifts to Jim and that she had diverted money from her
13 grandchildren's trusts. The letter did ultimately benefit her by limiting her
14 liability to additional interest and penalties and by serving to start the
15 limitations period for IRS audit. Irrespective of whether the letter harmed
16 or benefited Ruth Reinking, Respondent's action violated former RPC 1.6
17 and former RPC 1.9(b) as it betrayed Ruth Reinking's confidences and
18 secrets without her consent.
19

20 85. Federal law, tax procedure, guidelines and regulations did not
21 require that Respondent write his 2002 letter to the IRS about a later
22 discovery that Ruth's income tax returns that he had prepared were not
23 correct.
24

1 86. Any failure by Ruth Reinking to file amended tax returns
2 reflecting an ownership interest in ACC or gift tax returns was not a
3 continuing crime.

4 87. Count 3 is proven by a clear preponderance of the evidence.

5 Sanction Analysis

6 88. A presumptive sanction must be determined for each ethical
7 violation. In re Anschell, 149 Wn.2d 484, 69 P.2d 844, 852 (2003). The
8 following standards of the American Bar Association's Standards for
9 Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992
10 Supp.) are presumptively applicable in this case:

11 Count 1

12 89. ABA Standards section 4.33 is most applicable to the duty to
13 avoid conflicts of interest in this case. Respondent had a long standing
14 personal relationship with the Reinking family, yet he represented them
15 individually and jointly through his tax work and business advice for
16 Magnolia, Ruth Reinking and Jan and Janet Reinking. Because the
17 interlocking business affairs of these parties were informal and not fully
18 spelled out in writing, the potential for conflict was strong. Respondent's
19 failure to obtain informed written client consents to the multiple-client
20 representation was negligent conduct.
21

22 90. Ruth Reinking was potentially harmed by Respondent's failure to
23 identify the conflict to her and describe the possible risks.
24

1 91. The presumptive sanction for Respondent's conduct as to Count
2 1 is reprimand.

3 **Counts 2 and 3.**

4 92. ABA Standards section 4.22 is most applicable to the duty to
5 protect client secrets and confidences in this case. Respondent wrote a
6 letter to the IRS divulging information about Ruth Reinking's alleged failure
7 to pay gift tax and misreporting of information on her federal tax returns.
8 His knowledge of her affairs was based on the tax and legal work he had
9 done for her. Writing such a letter is "knowing" conduct in that Respondent
10 had conscious awareness of the nature or attendant circumstances of the
11 conduct but without the conscious objective or purpose to accomplish a
12 particular result as contemplated by the ABA Standards for Imposing
13 Lawyer Sanctions III Black Letter Rules - Definitions: "*Knowledge*". There
14 was a clear potential for harm through the possible assessment of tax,
15 interest and penalties. There was also clear potential to benefit her by
16 cutting off additional penalties and interest and to start the limitations
17 period for audit and assessment of additional tax, interest and penalties. In
18 fact, the IRS did not audit her and did not assess further taxes, penalties or
19 interest and thus Ms. Reinking did receive an ultimate benefit from
20 Respondent's disclosure.
21

22 93. Respondent assisted Jan Reinking by providing documents,
23 information and declarations to Jan's attorney for use in the litigation
24

1 against Ruth, including a copy of Respondent's letter to the IRS. This
2 happened prior to any rulingt by the trial judge who permitted Respondent
3 to testify in the litigation. Respondent's conduct was intentional.

4 94. Filing Ruth's tax returns and other confidential information in
5 the litigation through the declarations provided by Respondent caused
6 actual or potential harm to Ruth. Clients have an expectation of privacy
7 regarding information supplied to their lawyer. Filing documents in public
8 court files that contain client information is harmful. Likewise, cooperation
9 with an opposing party and lawyer through the provision of confidential
10 information is harmful to a client or former client. Some of the information
11 contained in Respondent's declarations, such as the allegations of misuse of
12 her grandchildren's trust moneys, was potentially harmful to Ruth's
13 testimony in her defense and was ruled out as a subject for testimony by
14 the trial judge. Ruth Reinking did ultimately benefit from the disclosures by
15 way of a jury award and judgment favorable to her was obtained.
16

17 95. The presumptive sanction for Respondent's conduct as to
18 Counts 2 and 3 is suspension.

19 96. In case of multiple acts of misconduct: When multiple ethical
20 violations are found, the "ultimate sanction imposed should at least be
21 consistent with the sanction for the most serious instance of misconduct
22 among a number of violations." In re Petersen, 120 Wn.2d 833, 854, 846
23 P.2d 1330 (1993).
24

1 97. Based on the Findings of Fact and Conclusions of Law and
2 application of the ABA Standards, the appropriate presumptive sanction is
3 suspension.

4 98. In Washington State lawyer discipline cases, a period of six
5 months is generally the accepted minimum term of suspension. In re
6 Cohen, 149 Wn.2d 323, 67 P.3d 1086, 1094 (2003).

7 99. The following aggravating factors set forth in Section 9.22 of
8 the ABA Standards are applicable in this case:

- 9 (d) multiple offenses;
10 (g) refusal to acknowledge wrongful nature of conduct;
11 (h) vulnerability of victim [Ruth Reinking is an elderly woman
who was trusting and easily manipulated by her family];

12 100. The following mitigating factors set forth in Section 9.32 of the
13 ABA Standards are applicable to this case:

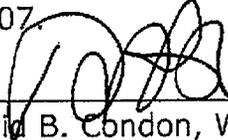
- 14 (a) absence of a prior disciplinary record;
15 (b) with respect to Counts 2 and 3, absence of a dishonest or
16 selfish motive (his motive was to help Ms. Reinking and in
17 fact as it relates to both her IRS and Reinking litigation
matters she was ultimately benefited by Respondent's
disclosures).

18 Recommendation

19 101. The presumptive sanction should be deviated from only if the
20 aggravating and mitigating factors are sufficiently compelling to justify a
21 departure. In this case the aggravating and mitigating factors are
22 offsetting. Therefore, based on the ABA Standards and with due
23 consideration to the applicable aggravating and mitigating factors, the
24

1 Hearing Officer recommends that Respondent Larry A. Botimer be
2 suspended for a term of six months.

3 Dated this 31st day of December, 2007.

4 
5 David B. Condon, WSBA No. 5578
6 Hearing Officer

7
8
9
10 CERTIFICATE OF SERVICE

11 I certify that I caused a copy of the Findings of Fact
12 to be delivered to the Office of Disciplinary Counsel and to be mailed
13 to Paul Simmerly, Respondent/Respondent's Counsel
at 2100 11th Ave. NE by Certified/first class mail,
postage prepaid on the 8 day of January, 2008

14 Robert Cooper
Clerk/Counsel to the Disciplinary Board

Appendix B

Pertinent Rules of Professional Conduct

Excerpts From
Washington
Rules of Professional Conduct
(in effect during time frame of 9/1/95 – 9/1/06)

TERMINOLOGY

....

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

....

"Secret" see "Confidence"

RPC 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

(c) A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

RPC 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

....

RPC 1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or
- (b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

Appendix C

Pertinent ABA Standards for Imposing Lawyer Sanctions

Excerpts From
ABA Standards for Imposing lawyer Sanctions
(1991 ed. & Feb. 1992 Supp.)

Definitions

“Injury” is harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct. The level of injury can range from “serious” injury to “little or no” injury; a reference to “injury” alone indicates any level of injury greater than “little or no” injury.

“Intent” is the conscious objective or purpose to accomplish a particular result.

“Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

“Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.

4.2 Failure to Preserve the Client’s Confidences

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:

- 4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
- 4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
- 4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.
- 4.24 Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

4.3 Failure to Avoid Conflicts of Interest

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
 - (a) engages in representation of a client knowing that the lawyer’s interests are adverse to the client’s with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

- (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
 - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
- 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
- 4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

9.2 Aggravation

- 9.21 *Definition.* Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.
- 9.22 *Factors which may be considered in aggravation.* Aggravating factors include:
- (a) prior disciplinary offenses;
 - (b) dishonest or selfish motive;
 - (c) a pattern of misconduct;
 - (d) multiple offenses;
 - (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
 - (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
 - (g) refusal to acknowledge wrongful nature of conduct;
 - (h) vulnerability of victim;
 - (i) substantial experience in the practice of law;
 - (j) indifference to making restitution.
 - (k) Illegal conduct, including that involving the use of controlled substances.

9.3 Mitigation

- 9.31 *Definition.* Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.
- 9.32 *Factors which may be considered in mitigation.* Mitigating factors include:
- (a) absence of a prior disciplinary record;
 - (b) absence of a dishonest or selfish motive;
 - (c) personal or emotional problems;

- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse when:
 - (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

Appendix D

Disciplinary Board Order

FILED

JUN 24 2008

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

Larry Botimer,
Lawyer (WSBA No. 23805).

Proceeding No. 07#00003

DISCIPLINARY BOARD ORDER
AMENDING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND RECOMMENDATION

This matter came before the Disciplinary Board at its May 30, 2008 meeting on automatic review of the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation. Additionally, the Board considered Respondent's May 22, 2008 Motion and Declaration to Reopen Disciplinary Proceedings to Accept New Evidence. Having reviewed the parties' briefs, documents designated by the parties, the applicable case law and rules, and having heard oral argument;

IT IS HEREBY ORDERED THAT Respondent's Motion to Reopen Disciplinary

1 Proceedings is denied.¹ ELC 11.11 controls the procedure for requesting additional
2 proceedings. Respondent's request was late. Additionally, the Board has concerns about the
3 methods used to obtain this order and the relevancy of this order to the misconduct involved in
4 this proceeding.

5
6 **IT IS FURTHER ORDERED THAT** the Hearing Officer's Findings of Fact,
7 Conclusions of Law and Recommendation are adopted with the following amendments²:

8 **FINDING OF FACT 10³**

9 Respondent began preparing Ruth's income tax returns around 1995.

10 **FINDING OF FACT 37⁴**

11 Ruth sent several notes, memos or letters to Respondent about estate planning issues,
12 including a January 13, 2002 memo that identified the Seventh Day Adventist Conference as her
13 chosen executor rather than naming one of her sons. She considered Respondent to be her
14 lawyer regarding these consultations and considered this information to be confidential.

15
16
17 ¹ The vote on the motion was unanimous. Those voting were: Anderson, Andrews, Carlson, Cena,
18 Coppinger-Carter, Find, Hazelton, Kuznetz, Madden, Meehan, Meyers and Urefia.

19 ² The vote on the amendments to the Hearing Officer's decision was also unanimous. Those voting
20 were: Anderson, Andrews, Carlson, Cena, Coppinger-Carter, Find, Hazelton, Kuznetz, Madden,
21 Meehan, Meyers and Urefia.

22 ³ Original Finding of Fact 10 stated: "Respondent began preparing Ruth's income tax returns around
23 1988." Respondent testified that he began preparing Ruth's income tax returns around 1995. Mr.
24 Botimer did not file Ms. Reinking's 1988 tax return.

⁴ Original Finding of Fact 37 stated: "Ruth sent several notes, memos or letters to Respondent about
estate planning issues, including a January 13, 2002 memo that identified a bank as her chosen executor
rather than naming one of her sons. She considered Respondent to be her lawyer regarding these
consultations and considered this information to be confidential." The parties agree that Ruth Reinking
named the Seventh Day Adventist Conference, not a bank, as her executor.

1 **PARAGRAPH 89⁵**

2 *ABA Standard 4.32* is most applicable to the duty to avoid conflicts of interest in this
3 case. Respondent had a long standing personal relationship with the Reinking family, yet he
4 represented them individually and jointly through his tax work and business advice for
5 Magnolia, Ruth Reinking and Jan and Janet Reinking. Because the interlocking business affairs
6 of these parties were informal and not fully spelled out in writing, the potential for conflict was
7 strong. Respondent recognized his conflict of interest by January 19, 2001, but continued the
8 representation without obtaining written informed consent of all clients. (Exhibit A-8).
9 Respondent's failure to obtain written client consent to the multiple-client representation was
10 knowing conduct.

11
12 **PARAGRAPH 91⁶**

13 The presumptive sanction for Respondent's conduct as to Court 1 is suspension pursuant
14 to *ABA Standard 4.32*.

15
16 The remainder of the Hearing Officer's decision is adopted by the Board. The
17 amendments do not alter the recommended sanction of six-month suspension.

18
19 ⁵ Original paragraph 89 stated: "ABA Standards section 4.33 is most applicable to the duty to avoid
20 conflicts of interest in this case. Respondent had a long standing personal relationship with the Reinking
21 family, yet he represented them individually and jointly through his tax work and business advice for
22 Magnolia, Ruth Reinking and Jan and Janet Reinking. Because the interlocking business affairs of these
23 parties were informal and not fully spelled out in writing, the potential for conflict was strong.
24 Respondent's failure to obtain informed written client consents to the multiple-client representation was
negligent conduct." The Board finds that the record supports knowing conduct rather than negligent. In
particular, the Board noted Mr. Botimer's 2001 letter to Ruth Reinking (Exhibit A-8) discussing the
developing conflict of interest.

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Dated this 24th day of June, 2008.

Lawrence J. Kuznetz
Lawrence J. Kuznetz, Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DBoard Order Amending HO orders ^{recommendation}
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Paul Summerlin, Respondent/Respondent's Counsel
at 2107 116th Ave. NE, Bellevue, by Certified first class mail,
postage prepaid on the 24 day of June, 2008

Becky Coley
Clerk/Counsel to the Disciplinary Board

⁶ Original paragraph 91 stated: "The presumptive sanction for Respondent's conduct as to Count 1 is reprimand. The change from negligent to knowing conduct changes the presumptive sanction for Count 1 from reprimand to suspension."

Appendix E

EX A-42

Law Office of Larry A. Botimer
952 S.W. Campus Dr. #43-A1, Federal Way, WA 98023
Phone 253-835-1086 Fax 253-815-1077

Mrs. Ruth Reinking
3380 Scenic Dr.
Auburn, WA 98002

October 28th, 2002

Ruth,

The October 15th deadline has come and gone and you have not contacted me concerning your taxes and neither have I received copies of amended 1120S's from the Alternative Care Corporation. That being the case, I assume you have turned your tax matters over to someone else, perhaps the accountants you referred to earlier who advised you that you could not write off the losses and debts. I hereby formally advise you that I will no longer provide you with any tax or legal services by reason of your failure to cooperate with me and your refusal to follow the advice I have given you, as well as your failure to pay for the legal services I provided you. Because I signed the your tax returns as preparer for your 1040s for the years 1998, 1999, and 2000 I have written a letter to the Internal Revenue Service informing them that those returns do not contain a true record of your taxable income and that you neglected to report gifts made to your son. I enclose a copy of that letter. I intend to contact them directly to verify that I have been relieved of any liability for the failure to file correct returns on your part.

Additionally, I talked to your granddaughter Stacey last month in Walla Walla and informed her that the release/waiver you had her sign was void because of the failure of informed consent and that I would be happy to consult with any attorney she chooses to retain in the future and to help her with any questions she and Jamie might have. Since I signed hers and Jamie's returns as preparer as well, I can supply the Internal Revenue Service with information about their custodial accounts, if they sign consent forms with the Service. I will certainly do so if the Fraud department of the Examination Division contacts me. I suggest you forward a copy of this letter to whoever you now have handling your tax affairs.

Sincerely,

Larry A. Botimer
Attorney at Law



Appendix F

EX A-23

Law Office of Larry A. Botimer
952 S.W. Campus Dr. #43-A1, Federal Way, WA 98023
Phone 253-835-1086 Fax 253-815-1077

I.R.S.
Attn: Examination Division
Ogden, UT 84201

Re: Mrs. Ruth Reinking TIN 501-12-3534

For your information,

I am writing to notify you that as the signed preparer for Mrs. Reinking's returns for the tax years 1998, 1999, and 2000 that I have discovered that the returns filed for her for those years do not report her share of the income or loss of the Alternative Care Corporation TIN 91-1834658. Mrs. Reinking provided at least two thirds of the capital or equity for that corporation when it was formed with her son, James Reinking, as the pro forma 100% shareholder. She has since paid off debts of the corporation in excess of \$2,000,000.00 which are either gifts to her son or a further increase in her capital investment. I have repeatedly advised Mrs. Reinking that she must file a gift return for amounts used to pay the corporate debts or finance her son's withdrawals from the corporation but she has preferred to accept the advice of her son's real estate attorney that no form 709s need be filed. I have a copy of that attorney's letter to Mrs. Reinking in which he suggests that no return is due despite my forwarding to her copies of various authorities in Tax law on the issue. I worked 10 years for a small tax law firm on Bellevue, Washington and helped in the litigation of gift and estate tax issues for the firm and there is no question in my opinion that Mrs. Reinking and her son are avoiding the gift tax in a classic manner seen numerous times in case law and I.R.S rulings. I have requested that the tax preparer for the Alternative Care Corporation file amended 1120S's and provide K-1s to Mrs. Reinking for the years in question but my request has been ignored.

It has also come to my attention that Mrs. Reinking requested that her daughter, Ms. Bonnie Blehm illegally withdraw funds from several of her grandchildren's custodial account while they were still minors and that she invested these funds in the Alternative Care Corporation as if they were her own funds without maintaining or requiring a separate accounting be made. Thus, the Alternative Care Corporation's 1120S's listing Mr. Jim Reinking (and his wife as community property interest holder) as 100% shareholder also violates the reporting requirements for disclosing all the owners of capital investment interests in the Corporation. There also remain questions as to possible violation of Subchapter S status rules if a constructive trust for a minor holds an equity interest in the alleged Subchapter S corporation. Requests to Ms Blehm to pursue the interests of the Reinking grandchildren to account for those funds which she illegally turned over to her mother, Mrs. Ruth Reinking, have met with a complete refusal to do so and must now be turned over to legal action.

I have provided a copy of this letter to Mrs. Reinking and notified her that I will no longer act as her return preparer or tax adviser. I assume that she will forward a copy of this letter to her son and to the accountant for the Alternative Care Corporation so that they are aware of my action in this matter. I will be happy to provide any assistance required of me to clear up this matter and to clear

EXHIBIT "D"



000183

myself of any liability for the incorrect 1040s filed over my signature for the years 1998, 1999, and 2000. Thank you for your attention to this matter.

Sincerely,

Larry A. Botimer
Attorney at Law

cc: Mrs. Reinking
file

EXHIBIT "D"

000184

Appendix G

ABA Model Rule of Professional Conduct 1.7 with comment

CLIENT-LAWYER RELATIONSHIP

Rule 1.7

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

~~[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.~~

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. 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.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment.

Appendix H

WSBA Formal Opinion 188



Formal Opinion: 188

Year Issued: 1991

Question:

What is the ethical responsibility of an attorney serving as defense counsel in a criminal case, particularly a felony case, to disclose to the court prior to sentencing, information regarding a defendant's criminal history known to the defense counsel solely through defense counsel's independent investigation or through disclosure of such criminal history to the attorney by the client?

Answer:

The answer to this question brings into play two distinct ethical obligations.

Under RPC 1.6(a), a lawyer may not reveal confidences or secrets relating to the representation of a client.

These terms are defined for purposes of the Rules of Professional Conduct, as follows: "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

If criminal history information has been provided to counsel directly by the client, the information contained would be covered by the term "confidence," unless the client has specifically authorized disclosure. If the information was gained independently by counsel, with or without confirmation by the client, given the fact that such information in the circumstances would clearly be detrimental to the client if disclosed, and the client may well request that the information be held inviolate if the matter is broached by the attorney, this criminal history information also would be covered by the term "secret."

If counsel is aware that a prosecuting attorney in offering a plea bargain in a criminal case is, or may be, laboring under a misimpression as to a client's criminal history (where that criminal history would specifically be relevant to plea bargain determinations), defense counsel cannot reveal criminal history information which is a confidence or secret without the client's consent.

In felony cases under the current Sentencing Reform Act, a guilty plea entered pursuant to a plea agreement (RCW 9.94A.100) can be conditioned upon the defendant providing the prosecution, and the court, with the defendant's "understanding of what the defendant's criminal history is." The legality and constitutionality of this provision has been upheld (*State v. Ammons*, 105 Wash.2d 175, 183-184, 713 P.2d 719 (1986)), but such "understanding" is limited to those prior convictions which can be found by a preponderance of the evidence to exist and as to which the Court could be satisfied by a preponderance of the evidence would apply, by proper identification, to this particular defendant.

In this instance, counsel must not make affirmative misrepresentations to either the prosecution or the court regarding relevant criminal history information under such requirements, as to do so would be violative of RPC 8.4(c) and (d), which provide:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

However, unless the client consents, after consultation with counsel as to the client's affirmative duties, and the circumstances under which such duties arise, a lawyer shall not reveal such confidences or secrets.

The circumstances in nonfelony proceedings, guilty pleas at arraignment on a felony, a change of plea on a felony (nonplea bargain) and at sentencing after a guilty verdict at trial, are clearly not governed by any affirmative obligation to disclose criminal history.

Entering a guilty plea with knowledge that the criminal history of the defendant as outlined to the court by the prosecutor is inaccurate does not change the obligation of defense counsel. Under the Criminal Rules, specifically CrR 4.2(g), the written statement of a defendant on entering a plea of guilty contains the following language as described in the rule:

12. I have been informed and fully understand that the standard sentencing range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions or guilty pleas at juvenile court that are felonies and which were committed when I was 15 years of age or older. Juvenile convictions count only if I was less than 23 years of age at the time I committed this present offense. I fully understand that if criminal history in addition to that listed in paragraph 5 is discovered, both the standard sentence range and the Prosecuting Attorney's recommendation may increase. Even so, I fully understand that my plea of guilty to this charge is binding upon me if accepted by the court, and I cannot change my mind if additional criminal history is discovered and the standard range and Prosecuting Attorney's recommendation increases.

As can be seen from examining the language directed by the Supreme Court's criminal rules, the defendant is advised by the court that allowing the court to take a guilty plea with a misimpression of the defendant's criminal history imposes certain risks upon the defendant depending upon whether the misimpression is corrected prior to sentencing. The language of the plea form directed under the criminal rules, however, reinforces the concept that it is not the obligation of the defendant or his counsel to advise the court voluntarily of the criminal history of the defendant; rather, that it is an element to be established 'by the prosecution in seeking a particular sentence range to be established under our current

Sentencing Reform Act.

The answer is no different when a defendant is being sentenced by a court which is clearly laboring under a misimpression as to the accurate criminal history of the defendant; the answer as to the lawyer's ethical obligation is the same. The criminal history would be a confidence or secret relating to representation of the criminal defendant which cannot be revealed by defense counsel.

Under RPC 3.3(a)(1), the lawyer cannot knowingly make a false statement of material fact to a tribunal. This creates the ethical obligation on behalf of criminal defense counsel not to knowingly misstate the criminal history of a defendant when such information is specifically requested of defense counsel by the court at time of a sentencing.

Further, under RPC 3.3(g): "Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule." (See RPC 3.3(a)(1) cited above.)

It would be improper for defense counsel to answer a query from a sentencing court with information which the attorney knows to be false regarding a defendant's criminal history. Defense counsel is obliged to decline to answer any question from the court regarding the defendant's criminal history.

Appendix J

18 U.S.C. § 1001, 26 U.S.C. § 7203, 26 U.S.C. § 7206

18 U.S.C.A. § 1001

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

- (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
- (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

26 U.S.C.A. § 7203

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 U.S.C.A. § 7206

§ 7206. Fraud and false statements

Any person who--

(1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.--Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.--Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.--In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property.--Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.--Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Appendix I

Title 31, Part 10, Code of Federal Regulations (excerpts)

§ 31 CFR 10.21

Code of Federal Regulations

TITLE 31--MONEY AND FINANCE: TREASURY

PART 10--PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

31 CFR 10.21 Knowledge of client's omission.

31 CFR 10.21 Knowledge of client's omission.

Subpart B--Duties and Restrictions Relating to Practice Before the Internal Revenue Service

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

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§ 31 CFR 10.51

Code of Federal Regulations

TITLE 31--MONEY AND FINANCE: TREASURY

PART 10--PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

31 CFR 10.51 Incompetence and disreputable conduct.

31 CFR 10.51 Incompetence and disreputable conduct.

Subpart C--Sanctions for Violation of the Regulations

Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, but is not limited to--

- (a) Conviction of any criminal offense under the revenue laws of the United States;
- (b) Conviction of any criminal offense involving dishonesty or breach of trust;
- (c) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service;
- (d) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, or any other document or statement, written or oral, are included in the term information.
- (e) Solicitation of employment as prohibited under § 10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or officer or employee thereof.
- (f) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.
- (g) Misappropriation of, or failure properly and promptly to remit funds received from a client for the purpose of payment of taxes or other obligations due the United States.
- (h) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor or thing of value.
- (i) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, territory, possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(j) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

(k) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations and statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(l) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (l) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the tax opinion or offering material are false or misleading. For purposes of this paragraph (l), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

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