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Supreme Court No. 200,625-6

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SUPREME COURT  
STATE OF WASHINGTON

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IN RE:

LARRY A. BOTIMER

Lawyer (Bar No. 23805)

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REPLY BRIEF OF APPELLANT LARRY A. BOTIMER

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ORIGINAL

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## **I. INTRODUCTION**

The Association characterizes this proceeding as a case about a lawyer who violated the Rules of Professional Conduct (RPC): Count 1 – RPC 1.7(b) “by representing multiple family members in joint business ventures without obtaining conflict waivers;” Count 2 – RPC 1.6/RPC 1.9(b) “by disclosing client secrets to the lawyers for the clients who was suing her;” and Count 3 – RPC 1.6/RPC 1.9(b) “by reporting alleged tax violations by the client to the Internal Revenue Service (IRS), disclosing client confidences and secrets.” Association’s Brief, Page 3. These characterizations are inaccurate and there were no violations of the Rules of Professional Conduct.

In order to prevail in this proceeding the Association must prove that there was representation of family members in joint business ventures, that there were confidences and secrets, and for Count III, that reporting tax violations was a violation of the Rules of Professional Conduct. The Association has failed to carry its burden of proof with respect to each of these elements.

In many respects, this case is unprecedented and may have far-reaching effects on the legal profession and the Association.

## **II. STATEMENT OF THE CASE**

### **A. Procedural History.**

Mr. Botimer agrees with the Association's summary of the procedural facts of this matter as stated at Pages 2 through 5 of the Association's brief.

### **B. Statement of Facts.**

The Association argues that the Appellant's Statement of the Case should be disregarded because it does not always refer specifically to the record. Several comments need to be made here.

There is no dispute between the Appellant and the Association about much of the evidence. A large percentage of the evidence in this case comes from a King County Superior Court proceeding that encompassed two years of litigation, approximately ten motions and a five day jury trial. The extremely detailed Findings of Fact and Conclusions of Law, the rulings of the court on motions and evidentiary matters and the jury verdict all have preclusive effect on this proceeding pursuant to the well-settled principles of res judicata and collateral estoppel. Many of the disputed matters in this Disciplinary Proceeding are nothing more than completely unsubstantiated innuendo, unsupported conclusions or, in some instances, outright misstatements. The Appellant was forced to disprove these allegations that are completely unsupported in the record. In many instances, the only way to do this is to cite the entire testimony of a witness to

show that there was no such supporting evidence.

The following matters are absolutely uncontroverted. The Grievant, Ruth Reinking, was not harmed in any way by any of the conduct of Larry Botimer and no allegation is even made that she was. There were no actual conflicts found by the Hearing Officer; only "potential conflicts". Conclusions of Law 74, 75, 76, 77 and 78. None of these "potential conflicts" ever became actual conflicts. Appellant never drafted a will for Ruth Reinking or any other estate planning document. The estate planning advice given to Ruth Reinking was de minimis, at best. No showing was made that Ruth Reinking ever changed her position or acted in any way upon the estate planning advice which was given by Appellant to her. A mere possibility of subsequent harm does not itself require a disclosure and consent. RPC 1.7, comment 8. The Association and the Hearing Officer failed to address this principle.

At all times in the King County Superior Court litigation, Ruth Reinking was represented by independent counsel. We submit that an attorney should not be subject to discipline for testifying in a Superior Court proceeding pursuant to subpoena, court order and the motion and evidentiary rulings of the court. The Hearing Officer cannot second guess the rulings of a King County Superior Court Judge. Ruth Reinking's attorney objected to Mr. Botimer's three declarations with exhibits and his testimony but his objections were overruled after an

evidentiary hearing and extensive briefing on the subject of waiver of attorney-client privilege. The three declarations were used in the Superior Court proceeding. Ruth Reinking's attorney failed to appeal the rulings of the Court. These rulings now have res judicata and collateral estoppel effect in this Disciplinary Proceeding.

### **III. ARGUMENT**

#### **A. Argument that Appellant's Statement of the Case Should Be Disregarded.**

Much of the Appellant's argument in this case has been that there has not been evidence to support the Hearing Officer's Findings of Fact and Conclusions of Law. For this reason, it is impossible to make specific citations to the record except to cite the entire testimony of one or more witnesses. We also have a situation where much of the evidence in this case comes from a lengthy King County Superior Court trial and the Association failed to provide a verbatim transcript of the trial. What took place during the trial has preclusive effect upon this Disciplinary Proceeding pursuant to the well-settled doctrines of res judicata and collateral estoppel. We therefore have the unique situation where what occurred during the trial is controlling in this Disciplinary Proceeding, but we do not have the evidence in the form of a verbatim transcript of what occurred during this trial. The Appellant has been forced to disprove allegations that are

completely unsupported in the record.

**B. Argument that the Hearing Officer's Findings of Fact are Supported by Substantial Evidence.**

**C. Argument that the Conclusions of Law Are Supported by the Findings of Fact.**

**1. THERE WAS NO REPRESENTATION OF MULTIPLE REINKING FAMILY MEMBERS IN "JOINT BUSINESS VENTURES".**

**Count 1: By representing Ruth, Jan and Janet in Magnolia tax and business matters, without obtaining an informed consent as to the joint representation, Appellant violated former RPC 1.7(b).**

The Association accuses the Appellant of representing "multiple (Reinking) family members in joint business ventures without getting conflict waivers". Association's Brief, Page 3. The Appellant did no such thing. An examination of the record shows that Mr. Botimer's work consisted almost entirely of preparing the tax returns for Ruth Reinking. It is uncontroverted that you do not even need to be an attorney to prepare a tax return. The tax returns prepared by Mr. Botimer were based on information supplied to him by Ruth Reinking. The remaining legal work performed by Mr. Botimer consisted solely of answering an occasional business or tax question.

Count 1 does not allege that the Appellant violated RPC 1.7(b) by providing estate planning advice to Ruth Reinking. However, somehow this topic has made

its way into the Hearing Officer's conclusion that RPC 1.7(b) was violated.

The Association is apparently advocating an interpretation of RPC 1.7(b) that whenever an attorney meets with two or more people he needs to obtain an informed consent and conflict waivers. This would be an impossible standard. Attorneys just do not practice law this way.

If this is not what the Association is advocating, we invite the Association to describe what set of circumstances need to exist before the requirements of RPC 1.7(b) are activated. The comment to RPC 1.7 (former) is controlling:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with a lawyer's independent professional judgment in considering alternatives or forecloses courses of action that reasonably should be pursued on behalf of the client. ... ABA Annotated Model Rules of Professional Conduct, r.1.7, comment 4, page 92 (4<sup>th</sup> Edition 1999).

Here, there was no reasonable expectation that a conflict would occur. No conflict, in fact, did occur.

In our case, it is important to consider the entire record when we judge Larry Botimer. Ruth Reinking and her son, Jan Reinking, had been in business together for over twenty years. There were no conflicts between Ruth Reinking and Jan Reinking at any time Mr. Botimer did any work for Ruth. There was no showing, or even an allegation, that any of the legal work performed by Mr. Botimer that the Association characterizes as being some kind of potential

conflict of interest ever became an actual conflict of interest. No harm was caused to Ruth Reinking, or even alleged, by Mr. Botimer's alleged joint representation.

The Association points out that Mr. Botimer answered questions about becoming a sub-chapter S corporation, possible restructuring of Ruth's business relationship with her other son, Jim, amendment of Ruth's taxes in order to benefit her and that he photocopied a statute on historic preservation of the Magnolia Health Care building. No showing was made that any of these matters ever caused any problems later on for Ruth Reinking. The Association and the Hearing Officer also point out that Ruth Reinking and her son, Jan Reinking, were in a lessor/lessee relationship, that Ruth Reinking was named as one of the initial directors of the corporation and that Appellant Botimer was listed as the person to contact about the corporation filing. Mr. Botimer did not draft the lease between the parties. Mr. Botimer was never involved in answering any questions about the lease or resolving any conflicts about the lease. There were never, in fact, any conflicts between Ruth and Jan Reinking about the lease during the time that Mr. Botimer did any work for Ruth Reinking. Mr. Botimer did not incorporate the corporation and was not involved in naming Ruth Reinking as an initial director of the corporation. No showing was ever made of why any of these matters have any bearing on the proceeding.

Most importantly, there were no conflicts of any kind between Ruth Reinking and Jan Reinking during any time that Mr. Botimer did any work for Ruth Reinking. Of course, Jan Reinking and Ruth Reinking did become embroiled in litigation, but that was not until two years after Mr. Botimer ceased doing any work for Ruth Reinking. During the time he performed work for Ruth Reinking, there was never any hint of impending litigation or any conflict between the two of them.

Mr. Botimer occasionally answered estate planning questions for Ruth Reinking. However, Mr. Botimer never prepared a will for Ruth Reinking or any other estate planning document. There was no evidence that he advised her to favor one of her children over the others as potential beneficiary of Ruth's estate. There was never any showing, or even an allegation, that Ruth Reinking followed any of Mr. Botimer's advice about estate planning, if he did, in fact, give her advice on estate planning.

The amount of legal advice Mr. Botimer gave Ruth Reinking was far less than the advice that is given by the Washington State Bar Association to members of the public in the various pamphlets that it publishes on a dozen or so legal topics. Many attorneys purchase these pamphlets and hand them out in their offices. Many attorneys also have websites in which they offer legal advice on various topics and, obviously, they encourage their clients to read this

information.

## 2. THERE WERE NO CONFIDENCES OR SECRETS

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

The Association concedes that Mr. Botimer acted properly when he testified in the King County Superior Court proceeding pursuant to subpoena and court order. The Association, however, still contends that Mr. Botimer violated former RPC 1.6 and/or former RPC 1.9(b)(currently RPC 1.9(c)(1)) by providing three declarations in the case prior to his testimony. Submitting these three declarations was not improper.

There is absolutely no requirement that an attorney obtain a court ruling on whether attorney-client privilege has been waived. In fact, we submit that it is a very unusual situation where an attorney would have the benefit of such a ruling. Of course, if an attorney determines on his own that attorney-client privilege has been waived on a particular subject, he does so at his peril. He may be wrong. In this case, however, the Appellant correctly determined on his own, that attorney-client had been waived when he submitted these three declarations.

At all times during the King County Superior Court litigation, Ruth Reinking was represented by independent counsel. This attorney was, of course,

free to object to the declarations that were submitted from Mr. Botimer. In fact, he did just that. He objected to these declarations and moved to exclude them. While no formal, written ruling was made by Judge Barnett that these three declarations were admissible, it was obvious that this was the intent of the court. The three declarations were filed in the proceeding and were admitted into evidence. Mr. Botimer was allowed to testify, without limitation or restriction, after an evidentiary hearing on the subject of attorney-client privilege with live testimony. Mr. Botimer, in fact, testified about all the topics contained in his three declarations. A verbatim transcript of the Superior Court trial would have shown this. The attorney for Ruth Reinking was free to object to his testimony and did object, but all of his objections were overruled. Unfortunately, the Association failed to produce the verbatim transcript for the trial so we are left with the unfair situation where Mr. Botimer is being suspended from the practice of law based on evidence which we do not have. It should be the policy of this Association that a verbatim transcript of a court proceeding should be obtained and filed in a Disciplinary Proceeding whenever it is alleged that a lawyer committed misconduct in that court proceeding.

All of the topics contained in the three declarations of Mr. Botimer were, quite obviously, topics that were involved in the Superior Court litigation. Ruth Reinking herself "opened up the door" by alleging five separate counterclaims

against Jan Reinking. As shown in Appellant's opening brief, the attorney-client privilege in this case was waived in any number of ways. The Hearing Officer, however, completely failed to address the subject of waiver of attorney-client privilege at all.

There were no "confidences" or "secrets" disclosed by Mr. Botimer. Ruth Reinking's son, Jan Reinking, knew everything about his mother's financial and personal affairs. He obtained this information completely independently of Larry Botimer. Ruth Reinking and Jan Reinking, prior to their lawsuit, had about as close a relationship as any two people could have. They were mother and son. They had been in business together for over 20 years. Jan Reinking ran Ruth Reinking's business. Jan Reinking was, in essence, Ruth Reinking's bookkeeper. Jan Reinking provided the financial information to Larry Botimer so he could prepare Ruth Reinking's taxes. Ruth Reinking shared her tax returns with her son. Jan Reinking and his wife, Janet Reinking, lived with Ruth Reinking when the business was being closed. Ruth Reinking gave Jan Reinking access to her financial documentation.

A discovery order was entered in the case which required Ruth Reinking to produce the same documents which were attached to Mr. Botimer's declarations, including her tax returns.

Mr. Botimer testified in a Superior Court proceeding pursuant to subpoena, court order and the motion and evidentiary rulings of Judge Suzanne Barnett. Ruth Reinking's attorney had every opportunity to appeal the rulings, but chose not to do so. These rulings now have res judicata and collateral estoppel effect in this Disciplinary Proceeding. The Hearing Officer completely ignored these well-settled legal principles in his decision.

The Association suggests that Mr. Botimer should have restricted his participation in the Superior Court litigation, but fails to provide a reason for this argument.

**3. REPORTING TAX VIOLATIONS IN A RETURN YOU  
HAVE PREPARED AND SWORN TO BE ACCURATE IS  
REQUIRED**

**Count 3: By contacting the IRS reporting alleged inaccuracies in Ruth's filed tax returns and alleged avoidance of gift tax, without her consent, Appellant violated RPC 16 and/or former RPC 1.9(b) (currently RPC 1.9(c)(1)).**

Appellant was Ruth Reinking's tax return preparer. Ruth Reinking gave Mr. Botimer explicit authority to file her taxes and, as part of that relationship, the authority to file her taxes accurately. While Ruth Reinking did not give her consent for the Appellant to contact the IRS about inaccuracies in her tax returns, she also did not direct Mr. Botimer to not contact the IRS to correct her returns.

Here, Appellant signed declarations, certifying under penalty of perjury that

the tax returns he prepared and filed on behalf of Ruth Reinking were true and accurate. The Association contends that Mr. Botimer not only had no duty to correct inaccurate returns, but that he was prohibited by the Rules of Professional Conduct from doing so. While no case has been found that is directly on point, Appellant submits that an inaccurate declaration filed with a court, government agency or another tribunal must be corrected.

Certainly, at the very least, the complete lack of any precedent or Ethics Opinion on this topic should be a mitigating factor in the punishment Mr. Botimer receives. Mr. Botimer's conduct cannot be intentional, or even negligent, when there is no known standard against which he can gauge his conduct.

#### **IV. SANCTION**

##### **A. Argument Concerning Presumptive Sanction.**

The Hearing Officer's Conclusions of Law and sanction recommendation are reviewed de novo. ELC 11.12(b).

Appellant's conduct at most amounted to negligence and the presumptive sanction is a reprimand under ABA Standards Section 4.33. As clearly shown in the record (or, more appropriately, lack of record), the "business advice" and "representation of multiple clients" was de minimis. The conflicts of interest, if there were any, were not readily apparent.

Any alleged violations of Count 2 and Count 3 were also the result of negligence, and not intentional conduct. The Appellant was required to testify in the Superior Court litigation pursuant to court order. The three declarations he provided were allowed as evidence by the court. There is no legal precedent or ethics opinion that could have guided the Appellant in making his decision about whether or not to report an inaccurate tax return to the Internal Revenue Service.

Finally, Leland Ripley, the former Senior Disciplinary Counsel for the Washington State Bar Association, determined that the Appellant had not committed any ethical violations.

If a sanction is appropriate, that sanction should be a reprimand.

#### **B. Aggravating and Mitigating Factors**

The Appellant has no prior disciplinary record. No actual harm came to Ruth Reinking as a result of any of the conduct of the Appellant. Ruth Reinking was an astute businesswoman and was not a “vulnerable victim”. Appellant’s conduct in reporting Ruth to the IRS was not motivated by “disappointment at not getting his fees paid”. In no way can this be said to be retribution. Mr. Botimer’s fees were minor. If the Internal Revenue Service had action upon Mr. Botimer’s letter, Ruth Reinking would have greatly benefited.

**C. Argument that Appellant Should be Suspended for a period of Six Months**

The issue of harm to the client is an important factor when determining an attorney sanction. *In re Discipline of Carpenter*, 160 Wn.2d 16, 155 P.3<sup>rd</sup> 937 (2007). In *Carpenter, supra*, a suspension of only two months was found to be the appropriate sanction even though the attorney went so far as to represent one of two co-defendant clients against the other in a lawsuit and after he became aware of the conflicts. ABA Standard 4.33 states that:

Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially effected by the lawyer's own interests, or whether the representation will adversely effect another client, and causes injury or potential injury to a client.

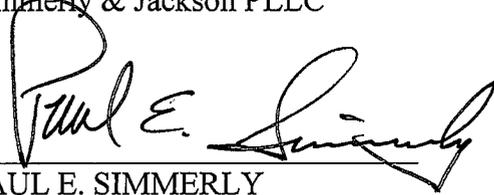
If Mr. Botimer is guilty of a violation, his conduct was at most negligent, justifying only a reprimand. The imposition of sanctions against Appellant is not warranted when the nature of the relationship between attorney and client is relatively undefined, the attorney acts in good faith, and with honest intent, and there is no evidence that the client has been harmed. *In re McGlothlen*, 99 Wn.2d 515,526, 663 P.2d 1330 (1983). When the unethical nature of an action has not been previously decided, no discipline is appropriate. *In re Smith*, 42 Wn.2d 188,197, 254 P.2d 464 (1953). The Hearing Officer failed to take these principles into consideration.

**V. CONCLUSION**

The findings and recommendation of the Hearing Officer should be reversed in all respects and this matter dismissed. In the alternative, this Board should reverse the sanction and order only a reprimand for Appellant.

Respectfully submitted this 30<sup>TH</sup> day of OCTOBER 2008.

Herman, Recor, Araki, Kaufman,  
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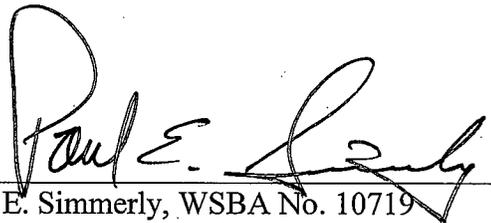
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**DECLARATION OF  
SERVICE**

I certify that on the 30th day of October, 2008, I caused a true and correct copy of the Reply Brief of Appellant Larry A. Botimer to be served on the following by personal service:

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